Article 6 of the Habitats Directive

Rulings of the European Court of Justice

Revised October 2019

This document was researched and prepared by Kerstin Sundseth and Petr Roth, Ecosystems LTD (N2K Group EEIG) under contract 070202/2017/766291/SER/D3

Table of Contents

INTRODUCTION

About the Birds and Habitats Directives

In 2010 the EU Heads of State and Governments set themselves the following target for biodiversity conservation in the EU: "*To halt the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, restore them in so far as feasible, while stepping up the EU contribution to averting global biodiversity loss."* The Commission's EU 2020 Biodiversity Strategy[1], adopted in May 2011, sets out six main targets to ensure this overall objective is achieved by 2020. One of the targets is to fully implement the Birds and Habitats Directives.

The Birds and Habitats Directives, sometimes jointly called "Nature directives", are the cornerstones of the EU's biodiversity policy. They enable all 28 EU Member States to work together, within a common legislative framework, to conserve Europe's most endangered and valuable habitats and species across their entire natural range within the EU, irrespective of political or administrative boundaries.

The overall objective of Directive 2009/147/EC [2] - the so-called "**Birds Directive"** - is to maintain and restore the populations of all naturally occurring wild bird species present in the EU at a level that will ensure their long-term survival. Council Directive 92/43/EEC [3] - known as "**Habitats Directive**" - has similar objectives to the Birds Directive but targets species other than birds as well as certain habitat types in their own right.

The two directives do not cover every species of plant and animal in Europe (i.e. not all of the EU's biodiversity). Instead, they focus on a sub-set of around 2000 animal and plant species (out of the hundreds of thousands present in Europe) - which are in need of protection to either prevent their extinction or enable their long-term survival. Around 230 valuable habitat types are also protected in their own right.

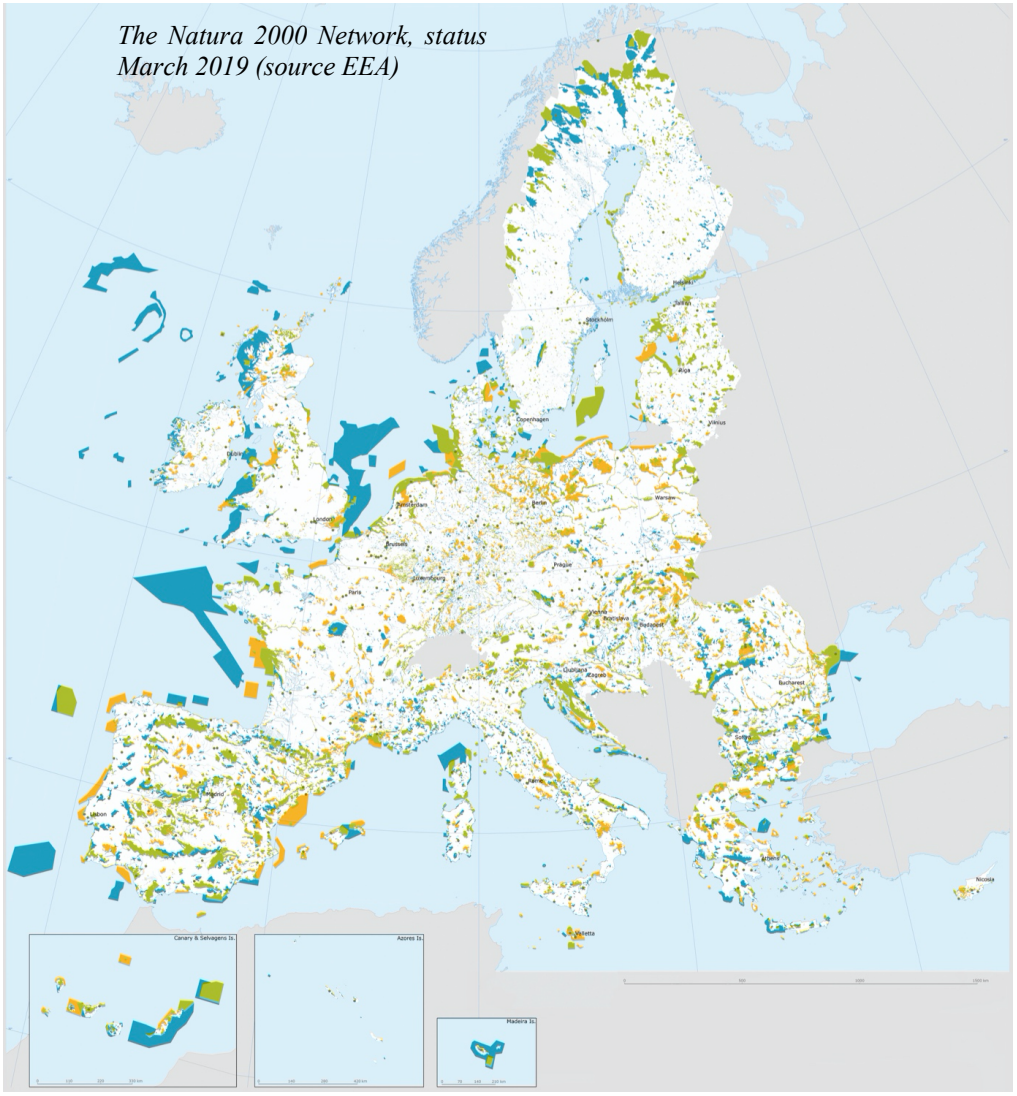
The two directives require that Member States do more than simply prevent the further deterioration of these species and habitat types. They must also undertake positive management measures to ensure their populations are maintained at, or restored to, a favourable conservation status throughout their natural range within the EU. Favourable conservation status can be described as a situation where a habitat type or species is prospering (in both quality and extent/population) and has good prospects to do so in future as well.

[1] Our life insurance, our natural capital: an EU Biodiversity Strategy to 2020 (COM (2011) 244, 3.5.2011
[2] Directive 2009/147/EC[2] (the codified version of Directive 79/409/EEC as amended) of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p 7)
[3] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (as amended OJ L 43, 1.1.2007, p. 1),

To achieve this objective, the directives require two types of provisions:

- *Site designation and protection and management measures*: aimed at conserving core areas for those species listed in Annex I (and regularly occurring migratory species) of the Birds Directive and Annex II of the Habitats Directive as well as habitat types listed in Annex I of the Habitats Directive;
- *Species protection provisions:* to establish a general system of strict protection for all wild bird species in the EU and for other endangered and valuable species listed in Annex IV of the Habitats Directive. These measures apply across the species´ entire natural range and therefore both inside and outside protected sites. Member States must also take measures, where they deem it necessary, to ensure that the taking in the wild of specimens of species listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status.

Sites designated under the two Directives form part of a European network - called the **Natura 2000 Network** - which currently (March 2019) contains over 27,800 sites[4] across 28 EU Member States. Together they cover around 18 % of the land area in the EU-28 as well as significant marine areas.



[4] *The Natura 2000 sites can be viewed on the Natura 2000 viewer* http://natura2000.eea.europa.eu

Article 6 of the Habitats Directive

The sites designated under the Habitats Directive must be managed, conserved and protected in accordance with all the provisions of Article 6 of the said Directive. Paragraphs 6(2), 6(3) and 6(4) also apply to SPAs protected under the Birds Directive (ref. Article 7 of Habitats Directive).

The first two paragraphs of Article 6 require Member States to:

- Establish the **necessary conservation measures** involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites (Article 6(1));
- Take appropriate steps to **avoid the deterioration** of natural habitats and the habitats of species as well as the disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive (Article 6(2)).

Whereas Article 6(1) and 6(2) concern the day-to-day management and conservation of Natura 2000 sites, Articles 6(3) and 6(4) lay down **the permit procedure** to be followed in cases where a plan or project, not directly connected with or necessary to the management of the site, is likely to have a significant effect thereon, either individually or in combination with other plans or projects. Such plans or projects shall be subject to an **appropriate assessment** of its implications for the site in view of the site's conservation objectives.

In light of the conclusions of the assessment the competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned. However, in exceptional circumstances, a plan or project may still be approved in spite of it having an adverse effect on the integrity of one or more Natura 2000 sites provided the procedural safeguards laid down in the Habitats Directive are followed (Article 6.4).

The appropriate assessment carried out under Article 6(3), despite having many similarities, is distinct from the environment impact assessment required under the EIA and SEA Directives. Whilst these assessments are often carried out together, as part of an integrated or coordinated procedure, each assessment has a different purpose and assesses impacts on different aspects of the environment. The outcome of each assessment procedure is also different. In the case of assessments under the EIA or SEA directives, the authorities must take the information on impacts into account in their decision-making. For the appropriate assessment, however, the outcome is decisive for the authorization of the plan or project.

About the Court of Justice of the EU

For the purpose of European construction, the Member States concluded treaties creating first the European Communities and subsequently the European Union (EU), with institutions which adopt laws in specific fields. The EU produces legislation, known as regulations, directives and decisions. To ensure that the law is enforced, understood and uniformly applied in all Member States, a judicial institution is essential. That institution is **the Court of Justice of the European Union** (formerly European Court of Justice)**.**

The Court constitutes the judicial authority of the EU and, in cooperation with the courts and tribunals of the Member States; it ensures the uniform application and interpretation of EU law. The Court of Justice of the European Union, which has its seat in Luxembourg, consists of three courts: the Court of Justice (since 1952), the General Court[5] (created in 1988) and the Civil Service Tribunal[6] (created in 2004).

The Court has jurisdiction on various categories of proceedings[7]. Rulings mentioned in this booklet come from actions for failure of Member States to fulfil obligations or from references for a preliminary ruling.

- **Actions for failure to fulfil obligations** - These actions enable the Court of Justice to determine whether a Member State has fulfilled its obligations under EU law. Before bringing the case before the Court of Justice, the Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice. The action may be brought by the Commission - as, in practice, is usually the case - or by a Member State. If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay. If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed and/or periodic financial penalty. However, if measures transposing a directive are not notified to the Commission, it may propose that the Court impose a pecuniary penalty on the Member State concerned, once the initial judgment establishing a failure to fulfil obligations has been delivered. Where failure to comply with a judgment of the Court is likely to harm the environment, the protection of which is one of the European Union's policy objectives, as is apparent from Article 191 TFEU (Treaty of the Functioning of the European Union), such a breach is of a particularly serious nature[8].
- **References for a preliminary ruling -** The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of EU law. To ensure the effective and uniform application of EU legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law. The Court of Justice's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's judgment likewise binds other national courts before which the same problem is raised. It is thus through references for preliminary rulings that any European citizen can seek clarification of the EU rules which

[5] The General Court has jurisdiction to hear: direct actions brought by natural/legal persons against acts of the institutions, bodies, offices or agencies of the EU (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies; actions brought by the Member States against the Commission; actions brought by the Member States against the Council relating to acts adopted in the field of State aid, 'dumping' and acts by which it exercises implementing powers; actions seeking compensation for damage caused by the institutions of the EU or their staff; actions based on contracts made by the EU which expressly give jurisdiction to the General Court; actions relating to Community trade marks; appeals, limited to points of law, against the decisions of the EU Civil Service Tribunal; actions brought against decisions of the Community Plant Variety Office or of the European Chemicals Agency.

[6] The Civil Service Tribunal resolves disputes between the European institutions and their officials and servants.

[7] The various types of proceedings of the Court of Justice include: references for preliminary rulings; actions for failure of Member States to fulfil obligations under EU law; actions for annulment; actions for failure to act; appeals; reviews.

[8] (see Case C-121/07 *Commission* v *France*, paragraph 77, Case-279/11 *Commission* v *Ireland*, paragraph 72)

affect him. Although such a reference can be made only by a national court, all the parties to the proceedings before that court, the Member States and the institutions of the EU may take part in the proceedings before the Court of Justice. In that way, several important principles of EU law have been laid down by preliminary rulings, sometimes in reply to questions referred by national courts of first instance.

About this booklet

The Court of Justice plays an important role in the implementation and interpretation of the Habitats Directive. This booklet assembles the **most important rulings of the European Court of Justice related to Article 6 of the Habitats Directive**. It also includes reference to a number of rulings on the EIA and SEA Directives where they are relevant for Article 6(3) of the Habitats Directive. [9]

Part I of this booklet summarises statements of the Court of Justice which can be considered as general principles of the Habitats Directive or the EU law as a whole.

Part II contains short explanatory texts and extracts from relevant Court Rulings as regards each of the four paragraphs within Article 6 of the Habitats Directive. Short introductory remarks are put in ***italics*** to distinguish them from the core elements of the judgments. The core elements of each judgment are quoted verbatim from the original Ruling and are therefore put in ***quotation marks.*** In each case a reference is given at the end to both the Court Ruling and the relevant paragraphs within that ruling.

If not otherwise mentioned, the excerpts are taken from the official English versions of the particular judgments. In a few cases, however, official English translations did not exist and the other language versions were used instead for the purposes of this booklet. It should be noted that these are unofficial translations. The original language version remains the only legally correct text. Unofficial translations are always identified as such.

Part III contains short extracts of a number of ECJ rulings on the EIA and SEA Directives that are also relevant to the Habitats Directive

Annex I provides an overview of all the cases mentioned in this booklet, organised according to key the provisions of each paragraph of Article 6. This is designed to provide the reader with a quick and easy reference tool for identifying rulings pertaining to specific aspects of Article 6.

Annex II provides a complete reference list of all ECJ Rulings relating to Article 6 in chronological order, together with their reference codes (e.g., "C-14/08") and dates of publication.

All ECJ Rulings can be downloaded in full from: http://curia.europa.eu.

[9] See also the following relevant documents:

- Environmental Impact Assessment (EIA) of Projects - Rulings of the Court of Justice 2013
- Nature and Biodiversity Cases - Ruling of the European Court of Justice 2006
- Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (update November 2018)

PART I – GENERAL PRINCIPLES

EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so. Each directive specifies the date by which the national laws must be adapted - giving national authorities the room for manoeuvre within the deadlines necessary to take account of differing national situations. Directives are used to bring different national laws into line with each other, and are particularly common in matters that affect the operation of the single market (e.g. product safety standards) or the protection of the environment.

Transposition of a directive

According to the case-law of the Court:

"Under the third paragraph of Article 249 EC, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods for implementing the Directive in question in domestic law. However, in accordance with settled case-law, while the transposition of a directive into domestic law does not necessarily require that the content of the Directive be incorporated formally and verbatim in express, specific legislation and, depending on its content, a general legal context may be adequate for the purpose, that is on condition that that context does indeed **guarantee the full application of the Directive in a sufficiently clear and precise manner"**.

"Second, it is apparent from the 4th and 11th recitals in the preamble to the Habitats Directive that threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Consequently, as the Advocate General has observed in point 11 of her Opinion, **faithful transposition becomes particularly important** in an instance such as the present one, **where management of the common heritage is entrusted to the Member States in their respective territories."**

"It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is **clear and precise**, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by Articles 11, 12(4) and 14(2) of the directive."

(Case C-6/04, *Commission* v *UK,* paragraphs 21, 25, 26)

"… it is important to recall that, according to consistent case-law, the provisions of directives must be implemented with **unquestionable binding force,** and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (see, in particular, Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32). The **principle of legal certainty** requires appropriate publicity for the national measures adopted pursuant to Community rules

in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by Community law …"

(Case C-415/01, *Commission* v *Belgium,* paragraph 21)

"...it would be contrary to the **principle of legal safety** if a Member State could rely on the regional authorities' power to issue regulations in order to justify national legislation which does not comply with the prohibitions laid down in a directive".

(Case C-157/89, *Commission* v *Italy*, paragraph 17)

"According to the settled case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order **to justify a failure to comply** with the obligations and time-limits laid down in a directive .."

(Case C-166/97, *Commission* v *France* - "Seine Estuary", paragraph 13)

"As the Court has already held, the fact, should it be established, that **a practice** is in conformity with the requirements of a directive which concern protection cannot constitute a reason for not transposing that Directive into the domestic law of the Member State concerned. "

(Case C-6/04, *Commission* v *UK,* paragraph 67)

"**Mere administrative practices**, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting fulfillment of the obligations owed by the Member States in the context of transposition of a directive."

(Case C-508/04, *Commission* v *Austria*, paragraph 80).

"The fact that a Member State has conferred on its regions the responsibility for giving effect to directives cannot have any bearing on the application of Article 226 EC [Article 258 TFEU]. A **Member State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations** and time-limits resulting from Community directives. While each Member State may freely allocate internal legislative powers as it sees fit, the fact remains that it alone is responsible towards the Community under Article 226 EC [Article 258 TFEU] for compliance with obligations arising under Community law".

"The fact that proceedings have been brought before a national court to challenge the decision of a national authority which is the subject of an action for failure to fulfil obligations and the decision of that court not to suspend implementation of that decision cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of remedies available through the national courts cannot in any way prejudice the bringing of an action under Article 226 EC [Article 258 TFEU], since the two procedures have different objectives and effects".

(Case C-87/02, *Commission* v *Italy*, paragraphs 38, 39)

The provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. The principle of legal certainty requires **appropriate publicity for the national measures** adopted pursuant to Community rules in such a way as **to enable the persons concerned by such**

measures to ascertain the scope of their rights and obligations in the particular area governed by Community law.

(Case C-415/01, *Commission* v *Belgium*, paragraph 21)

Affected rights of private landowners and municipalities

Several landowners and local municipalities brought a claim before the Court to annul Commission decision 2004/798/EC adopting the list of SCIs for the Continental Region on the ground that site designation restricts their activities. The private individual applicants consider, inter alia, that the system of protection provided for in Article 6(2) to (4) which the contested decision applies to their lots of land, entails direct negative consequences for them, such as the prohibition on deterioration and the duty to evaluate the implications of projects carried out on site. The local authority applicants considered their position as local authorities was compromised because they are subject —arbitrarily and wrongly — to the legal regime of the Habitats Directive, leading to an infringement of their institutional competences.

According to the Court the inclusion of a site in the list of SCI gives no precise indication concerning the measures which are to be taken by the national authorities in accordance with the provisions of the Habitats Directive. Therefore, **natural and legal persons are not directly affected by the inclusion of the site in the list since the provisions of Article 6(2) to (4) leave it to the discretion of the national authorities to determine the measures to be applied**. For a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of that individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it.

Every measure of Community law of general application imposing obligations on Member States may, depending on their institutional structure, mean that various national or local authorities are required to honour those obligations. Therefore, **the fact that a site listed in the Community list falls within the territory of particular municipality does not distinguish that local authority from any other national public law bodies** which are territorially competent in respect of sites designated as SCI; therefore, **such municipalities cannot be considered directly affected by the Commission decision on the Community list of SCIs.**

(Case T-122/05, *Benkö and Others* v *Commission*)

PART II –
ECJ RULINGS ON ARTICLE 6 OF THE HABITATS DIRECTIVE

Article 6(1)

Text of the paragraph *1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.*

1. Necessary conservation measures:

"Regarding the complaint set out by the Commission, both Article 6(1) of the Directive and Paragraph 9(5) of the No NSchG[10] use the words 'if need be'. However, in the provision of domestic law, those words refer generally to all conservation measures, which means that under that provision the implementation of such measures is not mandatory."

"In Article 6(1) of the Directive, on the other hand, the same words relate only to particular cases, that is to say to certain means or technical choices for achieving conservation which are defined as appropriate management plans specifically designed for the sites or integrated into other development plans'".

"Thus, the Directive requires **the adoption of necessary conservation measures, a fact which excludes any discretion in this regard on the part of the Member States** and restricts any latitude of the national authorities when laying down rules or taking decisions to the means to be applied and the technical choices to be made in connection with those measures".

"It should be noted at the outset that, by means of the words used in Article 6(1) of the Directive, the Community legislature sought to impose on the Member States **the obligation to take the necessary conservation measures** that correspond to the ecological requirements of the natural habitat types and species covered by Annex I and Annex II to the Directive respectively".

"It is clear, however, that Paragraph 15(2) of the Oö NSchG, according to which 'European areas of conservation' and 'nature reserves' 'may' be the subject of countryside maintenance plans, confers discretion on the Provincial Government with regard to whether the taking of 'necessary conservation measures' is required… consideration of that kind does not fall within a discretionary power of the Member States".

"In addition, Paragraph 15(2) of the Oö NSchG does not specify the scope of the term 'authorised economic use' and it is conceivable that operations of that kind may prevent

[10]No NSchG :– Nature Protection Act of Lower Austria; Oö NSchG - Nature Protection Act of Upper Austria

necessary conservation measures from being taken. That provision is therefore incompatible with Article 6(1) of the Directive in this respect too".

(Case C-508/04, *Commission* v *Austria*, paragraphs 74 - 76, 87 - 90)

The Antwerp Port Authority submitted a development programme called the 'Demarcation of the maritime port area of Antwerp — Port development on the left bank' ('the RDIP'). While the project would permanently destroy 20 ha of Annex I habitat types within an SCI, it also proposed the recreation of the same habitat types in other places, allegedly of a higher quality than those in the original Natura 2000 site. This authority claimed that RDIP constituted conservation measures within the meaning of Article 6(1) of the Habitats Directive. The question was referred to the Court of Justice of the EU.

"In this instance, the referring court has found that the RDIP will result in the disappearance of a body of 20 hectares of tidal mudflats and tidal marshes of the Natura 2000 site in question."

"It should therefore be observed that, first, the findings of fact made by that court show **that the measures at issue in the main proceedings envisage,** inter alia, **the disappearance of a part of that site**. It follows that **such measures cannot constitute measures ensuring the conservation of that site.**"

(Case C-387&388/15, *Orleans and Others*, paragraphs 37 – 38)

In 2016, the Polish authorities approved an appendix to the forest management plan from 2012 for the territory of the major part of Puszcza Białowieska Natura 2000 site, permitting felling and removal of any type of tree in several forest habitats and in the habitats of many animal species protected in that site in order to control the spread of the spruce bark beetle, although those operations were explicitly excluded by the site management plan from 2015. The Commission submitted that the Republic of Poland has failed to fulfil its obligations under Article 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive by implementing those active forest management operations.

"It follows that implementation of the active forest management operations at issue results in loss of a part of the Puszcza Białowieska Natura 2000 site. Such operations cannot constitute measures ensuring the conservation of that site, for the purposes of Article 6(1) of the Habitats Directive (see, by analogy, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 38)."

(Case C-441/17, *Commission* v *Republic of Poland*, paragraph 218)

2. <u>Ensuring a sufficient protection regime under Article 4(1) and 4(2) of the Birds Directive</u>

Article 4(1) and (2) requires the Member States **to provide the special protection areas referred to therein with a legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species** listed in Annex I to the Directive and the breeding, moulting and wintering of migratory species which are regular visitors, albeit not listed in that Annex.

(Case C-166/97, *Commission v France* – "Seine Estuary"; C-96/98, *Commission v France* – "Poitevin Marsh"; C-415/01, *Commission v Belgium*)

*In the case over the failure to protect Messolongi lagoon SPA, the court ruled that regarding the existing legal regime applicable to the Messolonghi lagoon, the **scheme is too general and does not specifically concerns the contested SPAs or species living there.** It must therefore be*

*held that, by failing to adopt all the necessary measures to establish and implement a **coherent, specific and comprehensive legal regime** to ensure the sustainable management and effective protection of SPAs Messolonghi Lagoon having regard to the conservation objectives of the birds Directive, the Hellenic Republic has failed to fulfil its obligations under Article 4, paragraphs 1 and 2 of this Directive.*

(Case C-166/04, *Commission v Greece*, paragraphs 15, 25 – *NB Ruling in French and Greek only*)

Sufficient protection for the purposes of that provision is **not ensured** by national legislation concerning water which fails to make provision for water management or **by agri-environmental measures that are voluntary and purely hortatory in nature** in relation to farmers working holdings located in special protection areas.

(Case C-96/98, Commission v France – "Poitevin Marsh")

A protection regime under which the only status enjoyed by a special protection area is that it is part of State-owned land and of a maritime game reserve is incapable of providing adequate protection for the purposes of those provisions.

(Case C-166/97, *Commission v France* – "Seine Estuary")

The power of the Member States to reduce the extent of special protection areas can be justified only on exceptional grounds corresponding to a general interest which is superior to the general interest represented by the ecological objective of the Directive. In that context the **economic and recreational requirements referred to in Article 2 do not enter into consideration**, since that provision does not constitute an autonomous derogation from the system of protection established by the Directive.

(Case C-57/89, *Commission v Germany* - "Leybucht")

3. *Designation of SCIs as SACs, establishment and implementation of conservation measures*

The list of SCIs relating to the Macaronesian Biogeographical Region drawn up under the Habitats Directive was approved by Decision 2002/11. The Commission brought the Kingdom of Spain before the Court for **failure to designate the SCIs on this list as SACs within six years**, as required under Article 4(4) of the Habitats Directive. As the Spanish authorities had acknowledged that by 31 July 2008, none of the SCIs in the region concerned had yet been designated as SACs, the Court upheld the Commission's complaint.

In the same Ruling, the Commission also brought the Kingdom of Spain before the Court for **failure to establish conservation measures within the meaning of Article 6(1) of the Habitats Directive**. Since the Kingdom of Spain does not dispute the fact, the Court upheld the Commission's complaint.

(Case C-90/10, *Commission* v *Spain –NB Ruling exists in French and Spanish only*)

The Commission submitted that the Republic of Poland has failed to fulfil its obligations under Article 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive by implementing the active forest management operations contradicting the site management plan

for the Puszcza Białowieska Natura 2000 site. The Commission maintained that the mere inclusion of conservation measures in the 2015 site management plan, without a possibility of actually implementing them, is not sufficient to comply with Article 6(1) of the Habitats Directive. The word 'establish' requires those measures to be capable of actually being implemented. That interpretation also applies to Article 4(1) and (2) of the Birds Directive.

Finding of the Court:

"However, as the Commission rightly submits, and as the Republic of Poland indeed acknowledges, Article 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive require, if those provisions are not to be rendered redundant, that the conservation measures necessary for maintaining a favourable conservation status of the protected habitats and species within the site concerned **not only be adopted, but also, and above all, be actually implemented**.

That interpretation is, moreover, borne out by Article 1(1)(l) of the Habitats Directive, which defines a special area of conservation as an SCI in which conservation measures are 'applied' and by the eighth recital of the directive, according to which it is appropriate, in each area designated, to 'implement' the necessary measures having regard to the conservation objectives pursued."

(Case C-441/17, *Commission* v *Republic of Poland,* paragraphs 213 – 214)

4. <u>Delimitation of a site and identification of protected species present in the site</u>

"As regards identification of the protected species and habitats in each SPA, **just as the delimitation of an SPA must be invested with unquestionable binding force the identification of the species which have warranted classification of that SPA must satisfy the same requireme**nt. If that were not the case, the protective objective arising from Article 4(1) and (2) of the Birds Directive and from Article 6(2), read in conjunction with Article 7, of the Habitats Directive might not be fully attained."

(Case C-535/07, *Commission v Austria,* paragraph 64)

"With regard to **maps demarcating SPAs, they must be invested with unquestionable binding force**. If not, the boundaries of SPAs could be challenged at any time. Also, there would be a risk that the objective of protection under Article 4 of the directive on birds mentioned at paragraph 17 of this judgment would not be fully attained".

(Case C-415/01, *Commission v Belgium,* paragraph 22)

Article 6(2)

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

1. Ensuring a sufficient protection regime

The Court ruled that:

"Subject to exceptional ministerial derogation based on public interest, Article 14 of the Nature Protection Law prohibits the reduction, destruction or modification of biotopes such as ponds, fens, marshlands, land covered in reeds and rushes, hedgerows, scrub and groves. A provision such as that, which makes express reference to certain types of biotope only does not appear to be capable of ensuring, as is required by Article 6(2) of the Directive, that **all natural habitats and habitats of species found within SACs are protected against acts liable to deteriorate them.** "

"In so far as concerns protection against deterioration, as provided for by Article 6(2) of the Directive, it is plain that, whilst certain provisions of the Nature Protection Law pleaded in the present case, and in particular Articles 12 and 23, may contribute to the prevention of certain types of disturbance, the fact remains that **they are incapable of completely transposing Article 6(2) of the Directive because they do not cover all types of disturbance that are significant** in relation to the objectives of the Directive of the species for which the SACs are designated".

(Case C-75/01, *Commission* v *Luxembourg*, paragraphs 41 - 45)

"It is clear that this **provision confers only a non-mandatory power on those authorities and that it is not such as to avoid deterioration**, contrary to the requirements of Article 6(2) of the Habitats Directive. Accordingly, inasmuch as domestic law contains no express provision obliging the competent authorities to avoid the deterioration of natural habitats and the habitats of species, it involves an element of legal uncertainty as to the obligations with which those authorities must comply".

(Case C-6/04, *Commission* v *UK*, paragraphs 35 – 37)

"With regard to Ireland's argument that Regulation 14 of the Habitats Regulations, which places restrictions on operations and activities, does not **cover only landowners, occupiers or licence-holders,** but also applies to all persons provided that the operation or activity is referred to in a notice issued pursuant to Regulation 4(2) of those regulations, suffice it to hold that Regulation 14(3) of those regulations does not allow for proceedings to be brought against third parties who were not aware of that notice. The latter may, in fact, rely on the defence of 'reasonable excuse' contained in Regulation 14(3). Accordingly, the transposition of Article 6(2) of the Habitats Directive is, at the very least, not sufficiently precise".

"As to Ireland's argument that the procedure provided for in Regulations 17 and 18 of the Habitats Regulations is a separate and distinct procedure which may be implemented in respect of anyone and does not depend on the content of any particular 'notice', it is clear that there is no guarantee that it may be applied to persons who have not received the notice provided for in Regulation 4 of those regulations. Moreover, as has just been found in paragraphs 208 and 209 of this judgment, that **procedure is a merely reactive measure**; consequently, Regulations 17 and 18 of the Habitats Regulations cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive."

"With respect to the argument that the Wildlife Act provides, in sections 22, 23 and 76, for a power to act where there is evident and willful interference with the breeding place or the resting place of a protected wild animal, or where there is disturbance of protected birds as they nest, and under which the powers conferred by that statute include the power to seize equipment and vehicles used by the perpetrators, suffice it to hold that it is common ground that that statute **does not cover all types of damage likely to be caused by recreational use."**

"An examination of the criminal-law provisions on trespass on private property relied on by Ireland shows that **those provisions are not specifically linked to the protection of natural habitats and of habitats of species** against deterioration or against disturbances affecting species and that they are therefore not designed to avoid damage caused to habitats by the use of SPAs for recreational purposes. Consequently, they do not constitute a clear and precise implementation of the provisions of the Habitats Directive such as to satisfy in full the requirements of legal certainty."

(Case C-418/04, *Commission* v *Ireland,* paragraphs 216 – 221)

The Commission took the Republic of France to Court for excluding certain activities from the provisions of Article 6(2) on the grounds that they do not cause a significant disturbance. According to the national law at the time fishing, aquaculture, hunting and other hunting-related activities practiced under the conditions and in the areas authorised by the laws and regulations in force shall not constitute activities causing disturbance or activities having such an effect. The French Republic considered that the statement of objectives (the so-called DOCOBS) which is drawn up for each site and serves as the basis for the adoption of targeted measures takes full account of these activities on the site and therefore ensures that they are in line with the conservation objectives of the site.

However the Court found that as regards the statement of objectives, these do not contain directly applicable regulatory measures, instead they are considered to be a diagnostic tool which allows, on the basis of available scientific knowledge, measures to be proposed to the competent authorities which will enable the conservation objectives set by the Habitats Directive to be met. Further at the time of the case only half the sites concerned had a statement of objectives.

The Court ruled that:

"It follows that the statement of objectives cannot systematically guarantee in all cases that the activities in question will not cause disturbances likely significantly to affect those conservation objectives".

"In relation to the general rules applicable to the activities in question, it must be held that, while those rules can admittedly reduce the risk of significant disturbance, they can however remove that risk altogether only it they provide for mandatory compliance with Article 6(2) of the Habitats Directive. The French Republic does not claim that that is the situation in this case".

"It follows from the foregoing that **by providing generally that fishing, aquaculture, hunting and other hunting-related activities** practiced under the conditions and in the areas authorised by the laws and regulations in force **do not constitute activities causing disturbance** or having such an affect, the French Republic has **failed to fulfil its obligations under Article 6(2) of the Habitats Directive".**

(Case C-241/08, *Commission* v *France*, paragraphs 30 - 39)

The Commission took Austria to Court over its national legislation which it considered covered only the protection of plant, animal and bird species and measures relating to unprotected species, but did not lay down a prohibition to prevent the deterioration of special areas of conservation.

*The Court found that **national legislative provisions are insufficient if** they only ensure the protection of plant, animal and bird species and measures relating to unprotected species but **do not lay down an obligation to prevent the deterioration of special areas of conservation** explicitly required by Article 6(2). The second obligation resulting from this Article, requiring Member States to take appropriate steps to avoid disturbance of the species for which the special areas of conservation have been designated, must always be directed to species for which the SACs are designated and at those whose protection falls under Article 12 of the Directive.*

Findings of the Court:

"With regard to the first obligation laid down in Article 6(2) of the Directive, requiring Member States to take appropriate steps to avoid, **in the special areas of conservation**, the deterioration of natural habitats and the habitats of species, it must be stated, in light of the proposition advanced by the Austrian Government concerning the manner in which Article 6(2) of the Directive is transposed, that the law of the Province of Tyrol as in force at the end of the period laid down in the reasoned opinion did not contain a provision endowed with the necessary legal precision requiring the competent authorities to avoid the deterioration of those habitats."

"As to the second obligation resulting from Article 6(2) of the Directive, requiring Member States to take appropriate steps to **avoid disturbance of the species for which the special areas of conservation have been designated**, Paragraphs 22 to 24 of the Tiroler NSchG[11] likewise do not transpose this obligation, since they concern not species whose conservation makes designation of those areas necessary, that is to say species referred to in Annex II to the Directive, but species referred to in Annex IV(a) thereto, whose protection falls under Article 12 of the Directive".

(Case C-508/04, *Commission* v *Austria*, paragraphs 98 - 100)

[11] National law: Tiroler NSchG – Nature Protection Act of Province of Tyrol

After receiving several complaints, the Commission took Greece to Court for failing to protect its SPAs. Out of the 151 SPAs classified only 15 were under a specific protection regime as required under the Birds Directive. Greece claimed that that apart from those 15 SPAs, 14 others were protected as national parks according to Greek Forestry Act and 103 of them had been classed as wildlife refuges. Also 163,500 ha of wetlands were classified as Ramsar sites and a further 94,500 ha were subject to temporary inter-ministerial protection regimes.

The Court found that apart from the 15 SPAs that have been designated in accordance with Greek legislation, the other **SPAs are subject to a variety of heterogeneous legal regimes which, although appearing to contribute in varying degrees to the protection of the bird species and their habitats, do not provide the SPAs concerned with the sufficient protection required** under Article 4(1) and 4(2) of the Birds Directive or Article 6(2) of the Habitats Directive.

For example, regarding the SPAs classified as national parks under Hellenic forest legislation, the fact that activities are controlled in peripheral areas of the parks, while a regime of absolute protection of nature applies to the central portion of the site, is not enough to ensure, inter alia, that individuals are pre-emptively prevented from engaging in potentially harmful activities in peripheral areas of SPAs concerned.

It follows that the Commission' plea concerning the non-compliance or Article 4(1) and 4(2) of the Birds Directive or Article 6(2) of the Habitats Directive is well founded.

(Case C-293/07, *Commission* v *Greece, paragraphs 26- 29 – NB Ruling is in Greek and French only*)

The Commission took the Kingdom of Spain to Court for not applying an appropriate protection regime to SCIs for Macaronesian biogeographical region approved by Decision 2002/11.

As far as Article 6(2) is concerned, the Commission argued that a significant proportion of habitats and terrestrial species of Community interest situated on the territory in question were in an unsatisfactory state of conservation. In addition, the legal systems in force did not meet the objectives set out in Article 6(2) of the Habitats Directive. It was essentially a soil zoning system which was provided for in the case of the SACs, which did not ensure that individuals would be prevented from developing activities particularly harmful to the habitats and species present on the territory concerned.

The Court noted that: from the information supplied by the Kingdom of Spain and the information on which the Commission relies **a significant number of habitats and species in the SACs concerned are in a poor or inadequate state of conservation**. **It should therefore be stated that** the Kingdom of Spain, **contrary to the provisions of Article 6(2) of the Habitats Directive, has not adopted appropriate measures to avoid the deterioration** of natural habitats and significant disturbance of species in the SACs concerned.

(Case C-90/10, *Commission* v *Spain, paragraphs 53 - 54 – NB Ruling is in French and Spanish only*)

The Commission took Ireland to Court for failing to take the necessary measures to prevent the blanket bog of the Owenduff-Nephin Beg Complex SPA from being damaged by overgrazing. In considering the Case the Court made reference to the Conservation plan for the SPA

completed in 2000 which stated that the site was heavily eroded due to excessive number of sheep.

"**According to the Conservation Plan** mentioned in paragraph 28 of the present judgment, **it will be necessary to keep grazing at a sustainable level** in order to achieve objectives such as the maintenance and, where possible, the enhancement of the ecological value of both the priority habitat of the Owenduff-Nephin Beg Complex, that is to say blanket bog, and other habitats characteristic of the site and the maintenance and, where possible, increase of populations of birds mentioned in Annex I to the Birds Directive which frequent the site, including in particular the Greenland White-fronted Goose and the Golden Plover, species which provided justification for the classification of the site as an SPA. **Overgrazing by sheep is in fact causing severe damage in places and is the greatest single threat to the site**."

"It follows from the foregoing that **Ireland has not adopted the measures needed to prevent deterioration**, in the Owenduff-Nephin Beg Complex SPA, of the habitats of the species for which the SPA was designated".

(Case C-117/00, *Commission v Ireland*, paragraphs 28 - 30)

"In that regard, it must be borne in mind that Article 6(2) of the Habitats Directive, to which Article 4(5) thereof refers, requires the Member States to protect the SCIs by adopting measures to avoid the deterioration of natural habitats and the habitats of species as well as the significant disturbance of the species for which the areas have been designated. The **failure of a Member State to fulfil that obligation of protecting a particular site does not necessarily justify the declassification of that s**ite (see, by analogy, Case C-418/04 *Commission* v *Ireland* EU:C:2007:780, paragraphs 83 to 86). **On the contrary, it is for that State to take the measures necessary to safeguard that site**."

(Case C-301/12, *Cascina Tre Pini Ss***,** paragraph 32)

The German NGO Naturschutzring submitted an application to the Federal Agency for Nature Conservation seeking the prohibition of sea fishing techniques using fishing gear that touches the seabed and fixed nets in three marine SCIs, on the grounds that the use of those techniques was incompatible with Article 6(2) of Directive 92/43.. The Federal Agency for Nature Conservation claimed that it could not adopt the measures sought by the NGO since, in accordance with Article 3(1)(d) TFEU, that competence belongs exclusively to the EU. The Regulation No 1380/2013 on the Common Fisheries Policy empowers the Member States to adopt certain conservation measures but, since such measures may affect the fishing vessels of other Member States, those measures may only be taken by the Commission.

Findings of the Court:

"It follows that the concept of 'fishing vessels of other Member States' used in Article 11(1) of Regulation No 1380/2013, must be understood as referring exclusively to ships flying the flag of a Member State other than that exercising its sovereignty or jurisdiction over the area concerned and which are subject, on that basis, to the jurisdiction and effective control of the Member State whose flag they fly."

"Insofar as the referring court itself finds, as is clear from the wording of its question, that the measures that it mentions affect those vessels, those measures cannot satisfy the requirements

of Article 11(1) of Regulation No 1380/2013 and, therefore, cannot be adopted unilaterally, on that basis, by a Member State.

"It is clear from all of the foregoing considerations that Article 11(1) of Regulation No 1380/2013 must be interpreted as meaning that it precludes a Member State from adopting, with respect to the waters under their sovereignty or jurisdiction, the measures which are necessary in order for it to meet its obligations under Article 6 of Directive 92/43 and which completely prohibit, in Natura 2000 sites, using commercial fishing gear which touches the sea bed and fixed nets, since such measures affect fishing vessels flying the flag of other Member States."

(Case C-683/16, *Deutscher Naturschutzring — Dachverband der deutschen Natur- und Umweltschutzverbände eV* v *Bundesrepublik Deutschland*, paragraphs 54 - 56)

2. *Protecting sites from passive as well as active man-induced deterioration and disturbance*

To implement Article 6(2) of the directive fully, it is not sufficient to merely protect designated sites from any operation with potential to cause disturbance without also ensuring that deterioration due to neglect or inactivity is avoided. It may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments (eg natural succession) that may cause the status of species and habitats in SACs to deteriorate.

"It is clear that, in implementing Article 6(2) of the Habitats Directive, it may be necessary to **adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments** that may cause the conservation status of species and habitats in SACs to deteriorate".

(Case C-6/04, *Commission* v *UK*, paragraph 34)

The Commission took the Hellenic Republic to Court for failure to fulfill its obligations under Article 6(2) as regards the deterioration of the habitats of Caretta caretta *as well as the significant disturbance of that species in the SAC 'Dunes of Kyrarissia' by having: – authorized or tolerated building projects in the SAC; - authorized/tolerated the development of access routes to beaches in the Kyparissia area; - tolerated illegal wild camping, the operation of beach bars and allowed beach furniture and structures to remain on the beaches in the Kyparissia area as well as having allowed fishing in close proximity to the Kyparissia.*

The Court held that:

"… (i) by tolerating the construction of houses in Agiannaki in 2010, the use, without a sufficient regulatory framework, of other houses in Agiannaki which were built in 2006 and the commencement of building works relating to around 50 dwellings located between Agiannaki and Elaia and (ii) by authorising in 2012 the construction of three holiday houses in Vounaki, the Hellenic Republic has failed to fulfil its obligations under Article 6(2) of Directive 92/43".

" By confining itself (i) to bringing criminal proceedings against the executives of the company that built the roads in question and imposing administrative penalties on that company and (ii)

to claiming, before the national courts, that the roads concerned are illegal and must be removed, the Hellenic Republic has failed to fulfil the specific obligation imposed on it by Article 6(2) of Directive 92/43"

"As the Commission submits, the Hellenic Republic should have acted to ensure that those thoroughfares did not remain operational and that use of them did not significantly disturb the *Caretta caretta* sea turtle or impair the dune habitats located in the Kyparissia area."

- "……. by failing to take adequate measures to enforce the prohibition on wild camping close to the beaches at Kalo Nero (Greece) and Elaia;
- by failing to take the measures necessary to restrict the operation of bars between Elaia and Kalo Nero, on the breeding beaches of the *Caretta caretta* sea turtle, and by failing to ensure that the various forms of pollution caused by those bars do not disturb that species;
- by failing to take the measures necessary to reduce, within the Kyparissia area, the furniture and various structures found on the breeding beaches of the *Caretta caretta* sea turtle and by authorising the construction of a platform near the Messina Mare Hotel;
- by failing to take the measures necessary so as to ensure that the light pollution affecting the breeding beaches of the *Caretta caretta* sea turtle in the Kyparissia area is adequately curtailed; and
- by failing to take the measures necessary to ensure that fishing in the waters off the breeding beaches of the *Caretta caretta* sea turtle in the Kyparissia area is adequately curtailed,

the Hellenic Republic has failed to fulfil its obligations under Article 6(2) of Council Directive 92/43/EEC."

(Case C-504/14, *Commission* v *Greece*, final conclusions)

"By the eighth question in Case C-293/17, the referring court asks, in essence, whether Article 6(2) of the Habitats Directive must be interpreted as meaning that measures introduced by national legislation, such as that at issue in the main proceedings, including procedures for the surveillance and monitoring of farms whose activities cause nitrogen deposition and the possibility of imposing penalties, up to and including the closure of those farms, are sufficient for the purposes of complying with that provision.

In that regard, the Court has previously held that national legislation including procedures for intervention by the competent authorities that were merely reactive and not also preventive disregarded the scope of the obligations stemming from Article 6(2) of the Habitats Directive (see, to that effect, judgment of 13 December 2007, *Commission* v *Ireland*, C-418/04, EU:C:2007:780, paragraphs 207 and 208).

In the present case, the legislation at issue in the main proceedings allows the authorities, having regard to conservation objectives, first, to impose measures both preventive and corrective. Secondly, that legislation also includes a power of coercion, also including the possibility of adopting urgent measures.

Consequently, such legislation, in so far as it makes it possible to prevent the occurrence of a certain number of risks linked to the activities at issue, constitutes an appropriate step within the meaning of Article 6(2) of the Habitats Directive.

In the light of the foregoing, the answer to the eighth question in Case C-293/17 is that Article 6(2) of the Habitats Directive must be interpreted as meaning that measures introduced

by national legislation, such as that at issue in the main proceedings, including procedures for the surveillance and monitoring of farms whose activities cause nitrogen deposition and the possibility of imposing penalties, up to and including the closure of those farms, are sufficient for the purposes of complying with that provision."

(Joined cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 133 – 137)

3. Protection of sites that should have been classified SPA or pSCIs on national lists

"In reply to the question put by the Court as to the applicability of Article 6(2) to (4) of the habitats directive to areas not yet classified as SPAs, the French Government, which acknowledges that it has not pleaded the inapplicability of those provisions to the Basses Corbières area, maintains that the substitution of the obligations contained therein for those in the first sentence of Article 4(4) of the birds directive, as provided for in Article 7 of the habitats directive, concerns only areas already classified as SPAs under the birds directive".

"It first needs to be considered whether Article 6(2) to (4) of the habitats directive apply to areas which have not been classified as SPAs but should have been so classified. In that respect, it is important to note that the text of Article 7 of the habitats directive expressly states that Article 6(2) to (4) of the directive apply, in substitution for the first sentence of Article 4(4) of the birds directive, to the areas classified under Article 4(1) or (2) of the latter directive.

"It follows that, on a literal interpretation of that passage of Article 7 of the habitats directive, only areas classified as SPAs fall under the influence of Article 6(2) to (4) of that directive. Moreover, the text of Article 7 of the habitats directive states that Article 6(2) to (4) of that directive replace the first sentence of Article 4(4) of the birds directive as from the date of implementation of the habitats directive or the date of classification by a Member State under the birds directive, where the latter date is later. That passage of Article 7 appears to support the interpretation to the effect that the application of Article 6(2) to (4) presupposes the classification of the area concerned as an SPA"."

"It is clear, therefore, that **areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the birds directive**. Thus, the fact that, as the case law of the Court of Justice shows (see, in particular, Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 22), the protection regime under the first sentence of Article 4(4) of the Birds Directive applies to areas that have not been classified as SPAs but should have been so classified does not in itself imply that the protection regime referred to in Article 6(2) to (4) of the Habitats Directive replaces the first regime referred to in relation to those areas".

"Moreover, as regards the Commission's argument concerning a duality of applicable regimes, it should be noted that the fact that the areas referred to in the previous paragraph of this judgment are, under the first sentence of Article 4(4) of the birds directive, made subject to a regime that is stricter than that laid down by Article 6(2) to (4) of the habitats directive in relation to areas classified as SPAs does not appear to be without justification."

"…A Member State cannot derive an advantage from its failure to comply with its Community obligations. In that respect, if it were lawful for a Member State, which, in breach of the Birds

Directive, has failed to classify as an SPA a site which should have been so classified, to rely on Article 6(3) and (4) of the Habitats Directive, that State might enjoy such an advantage".

"In particular, the risk is significantly increased that plans or projects not directly connected with or necessary to the management of the site, and affecting its integrity, may be accepted by the national authorities in breach of that procedure, escape the Commission's monitoring and cause serious, or irreparable ecological damage, contrary to the conservation requirements of that site."

"A situation of this kind would be likely to endanger the attainment of the objective of special protection for wild bird life set forth in Article 4 of the birds directive, as interpreted by the case-law of the Court (see, in particular, Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraphs 23 and 25)".

"As the Advocate General has, essentially argued in paragraph 102 of his Opinion, the duality of the regimes applicable, respectively, to areas classified as SPAs and those which should have been so classified gives Member States an incentive to carry out classifications, in so far as they thereby acquire the possibility of using a procedure which allows them, for imperative reasons of overriding public interest, including those of a social or economic nature, and subject to certain conditions, to adopt a plan or project adversely affecting an SPA. It follows from the above that **Article 6(2) to (4) of the habitats directive do not apply to areas which have not been classified as SPAs but should have been so classified**."

"The complaint alleging infringement of Article 6(2) to (4) of the habitats directive must therefore be rejected. It must therefore be held that, by not classifying any part of the Basses Corbières site as an SPA and by not adopting special conservation measures for that site sufficient in their geographical extent, the French Republic has failed to fulfil its obligations under Article 4(1) of the birds directive".

(Case C-374/98, *Commission* v *France* (Basses Corbières), paragraphs 43 – 57; see also judgments in case C-186/06, *Commission* v *Spain*, paragraph 27, and case C-141/14, *Commission* v *Bulgaria*, paragraphs 67 - 78)

The first sentence of Article 4(4) **requires Member States to take appropriate steps to avoid, inter alia, deterioration of habitats, not only in areas classed as special protection areas in accordance with Article 4(1), but also in areas which are the most suitable for the conservation of wild birds, even if they have not been classified as special protection areas**, **provided that they merit such classification**. It follows, with regard to the latter areas, that any infringement of the first sentence of Article 4(4) presupposes that the areas in question are among the most suitable territories in number and size for the conservation of protected species, within the meaning of the fourth subparagraph of Article 4(1), and that these areas have suffered deterioration.

(Case C-96/98, *Commission* v *France* – "Poitevin Marsh")

"The protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive."

"This does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission. If those sites are not appropriately protected from that moment, achievement of the objectives seeking the conservation of natural habitats and wild fauna and flora, as set out in particular in the sixth recital in the preamble to the Directive and Article 3(1) thereof, could well be jeopardised. Such a situation would be particularly serious as priority natural habitat types or priority species would be affected, for which, because of the threats to them, early implementation of conservation measures would be appropriate, as recommended in the fifth recital in the preamble to the Directive."

"It is apparent, therefore, that **in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists** transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, **the Member States are**, by virtue of the Directive, **required to take protective measures appropriate for the purpose of safeguarding that ecological interest"**.

(Case C-117/03, *Dragaggi and others*, paragraphs 25 - 29)

"Article 5 of the Habitats Directive provides that, during the period of bilateral consultation between the Member State and the Commission, and pending a Council decision, the site concerned is to be subject to the scheme of protection laid down by Article 6(2) of that directive".

(Case C-143/02, *Commission* v *Italy,* paragraph 12)

"**The appropriate protection regime applicable to sites which appear on a national list transmitted to the Commission, under Article 4(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites**".

"Member States must, in accordance with the provisions of national law, take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission. It is for the national court to assess whether that is the case."

(Case C-244/05, *Commission v Germany,* final conclusions)

4. Effects of projects approved before inclusion of sites into the lists of SCIs

"…. it is clear from the Court's case-law that Article 6(2) of the Habitats Directive also applies to installations the project for which was approved by the competent authority before the protection provided for in that directive became applicable to the protection area concerned (see, to that effect, judgment in *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 124)."

"The Court has already held that, **although such projects are not subject to the requirements relating to the procedure for prior assessment of the implications of the project for the site concerned, laid down by the Habitats Directive, their implementation nevertheless**

falls within the scope of Article 6(2) of that directive (judgments in *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraphs 48 and 49, and in *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 125)."

(Case C-141/14, *Commission* v *Bulgaria*, paragraphs 51 – 52;

"… implementation of a project likely to affect the site concerned significantly and not subject, before being authorised, to an assessment in compliance with the requirements of Article 6(3) of the Habitats Directive, may be pursued, after that site is placed on the list of SCIs, **only on the condition that the probability or risk of deterioration of habitats or disturbance of species, which could be significant in view of the objectives of that directive, has been excluded."**

"Article 6(2) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site, and authorised, following a **study that did not meet the requirements of Article 6(3) of that directive, before the site in question was included in the list of SCIs must be the subject of a subsequent review**, by the competent authorities, of its implications for that site if that review constitutes the only appropriate step for avoiding that the implementation of the plan or project referred to results in deterioration or disturbance that could be significant in view of the objectives of that directive. It is for the referring court to verify whether those conditions are met."

(Case C-399/14, *Grüne Liga Sachsen eV and Others*, paragraph 43,46)

"It must also be added that, even if a project was authorised before the system of protection laid down by the Habitats Directive became applicable to the site in question and, accordingly, such a project was not subject to the requirements relating to the procedure for prior assessment according to Article 6(3) of that directive, its implementation nevertheless falls within the scope of Article 6(2) of that directive. More specifically, **an activity complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives.** The very existence of a probability or risk that an activity on a protected site might cause significant disturbances is capable of constituting an infringement of that provision (see, to that effect, judgment of 14 January 2016, *Grüne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraphs 33, 41 and 42 and the case-law cited)."

(Joined cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraph 85)

5. Infringement of Article 6(2) following installations resulting from a project

"…., in order to establish failure to fulfill obligations under Article 6(2) of the Habitats Directive, the Commission does not have to establish the existence of a cause-and-effect relationship between the operation of installations resulting from a project and significant disturbance caused to the species concerned. **It is sufficient for the Commission to establish that there is a probability or risk that that operation might cause such disturbances** (see, to that effect, judgment in *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 142 and the case-law cited).

(Case C-141/14, *Commission* v *Bulgaria*, paragraph 58; case C-399/14, *Grüne Liga Sachsen eV and Others*, paragraphs 41 – 42; case C-504/14, *Commission* v *Greece*, paragraphs 29, 45)

"The fact that, according to the results of observations made by the wind farm 'AES Geo Energy', to which the Republic of Bulgaria refers, red-breasted geese still use the areas in question and that, when the wind conditions are favourable, migratory birds are concentrated in the Kaliakra site does not stand in the way of that finding. **The obligations to protect exist before any reduction in the number of birds has been observed** or before the risk of a protected species becoming extinct has materialized."

(Case C-141/14, *Commission* v *Bulgaria*, paragraph 58, 76; see also *Commission* v *Spain*, C-186/06, paragraph 36).

".. should a subsequent review, on the basis of Article 6(2) of the Habitats Directive, prove, in the present case, to be an 'appropriate step' within the meaning of that provision, that review must define what risks of deterioration or disturbance likely to be significant within the meaning of that provision are entailed by the implementation of the plan or project, and that review must be carried out in accordance with the requirements of Article 6(3) of that directive."

(Case C-399/14, *Grüne Liga Sachsen eV and Others*, paragraph 54)

Article 6(3)

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

1. *Relationship between Article 6(2) and Article 6(3)*

"Article 6(2), in conjunction with Article 7 thereof, requires Member States to take appropriate steps to avoid, in SPAs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated. Article 6(3) provides that the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of that plan or project for the site, that it will not adversely affect the integrity of the site".

"That provision thus establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project described above is authorised only to the extent that it will not adversely affect the integrity of that site. **The fact that such a plan or project has been authorised according to the procedure laid down in Article 6(3) renders superfluous,** as regards the action to be taken on the site under the plan or project, **a concomitant application of the rule of general protection laid down in Article 6(2)**. Authorisation of such a plan or project granted in accordance with Article 6(3) necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2).

"**Nevertheless, it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance**, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of **Article 6(2) makes it possible to satisfy the essential objective of the preservation and protection** of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive".

"The answer to the question must therefore be that Article 6(3) establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) establishes an obligation of general protection consisting

in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).

(Case C-127/02, *Waddenvereniging and Vogelsbeschermingvereniging*, paragraphs 31 – 38)

"…the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species…"

(Case C-258/11, *Sweetman and Others,* paragraph 32; see also case C-404/09, *Commission* v *Spain*, paragraph 142, case C-399/14, *Grüne Liga Sachsen eV and Others*, paragraph 52; case C-387&388/15, *Orleans and Others*, paragraph 32)

In 1998, the Commission brought a complaint against Italy for authorising a project in Parco Nazionale dello Stelvio which was classified as a SPA without complying with the provisions of Article 6(3) of the Directive. As a result the site had deteriorated which is in contravention to the provision of Article 6(2).

The Court ruled as follows:

"Where, as is apparent in the present case from examination of the first complaint, authorisation for a **plan or project has been granted without complying with Article 6(3)** of Directive 92/43, **a breach of Article 6(2)** in relation to a special area of conservation **may be found where deterioration of a habitat or disturbance of the species** for which the area in question was designated **has been established.** With regard to the present case, it should be recalled that almost 2 500 trees were felled in an afforested part of the area concerned, which constitutes the habitat of protected species of birds, inter alia the goshawk, the ptarmigan, the black woodpecker and the black grouse. Consequently, the disputed works destroyed the breeding sites of those species".

"The inevitable conclusion is that the works and their repercussions on SPA IT 2040044 were incompatible with the protective legal status from which that area should have benefited pursuant to Article 6(2) of Directive 92/43. Accordingly, the Commission's action must also be upheld on this point".

(Case C-304/05, *Commission* v *Italy*, paragraphs 94 - 97)

The Commission brought a complaint against Italy for agreeing a 'zonal agreement' for industrial development of the Manfredonia region without the adoption of measures designed to prevent pollution, the deterioration of habitats and disturbance affecting birds inside the SPA, and without prior assessment of the implications for that area. Italy did not dispute that the carrying out of industrial development within the context of the 'zonal agreement' involved the destruction of a part of the area, prejudicing the conservation of several species of protected birds which used that area.

"It is therefore necessary to find that, by failing to take appropriate steps to avoid, in the SPA 'Valloni e steppe pedegarganiche', the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which that area was established, the Italian Republic failed to fulfil its obligations under Article 6(2) of the Habitats Directive".

(Case C-388/05, *Commission* v *Italy,* paragraph 29)

The Commission took the Kingdom of Spain to Court for infringing Article 6(2) by failing to take the necessary measures to prevent the operation of a series of open-cast mines in and around the 'Alto Sil' SPA. It argued that certain breeding grounds of the capercaillie, one of the species for which the SPA is classified, were close to the mining operations in question and that as a result the capercaillie population had declined.

It referred to recovery plan for the Cantabrian capercaillie, approved by Decree 4/2009, which stated that, in 1982, the population of the Cantabrian capercaillie still amounted to about 1 000 specimens and that the occupation rate of the breeding grounds amounted to 85%. In 2002, however, that population did not exceed 500 to 600 specimens, spread between two sides of a mountain range, and the occupation rate of the breeding grounds was 45%.

The Kingdom of Spain acknowledged that the Cantabrian capercaillie has undergone a major decline, but argued that the populations suffering the greatest decline in the Castile- León region are those located in the areas with the highest levels of protection, such as national parks, whereas the capercaillie population present on the 'Alto Sil' site is the largest of the region and has undergone only a modest decline. It is moreover significant that the decline of the species on that site has been much greater in areas distant from the mining basin.

Findings of the Court:

"Since it has been held in the context of the first part of the second complaint that authorisation for that project was granted without complying with Article 6(3) of the Habitats Directive, the case-law shows that a breach of Article 6(2) may be found where deterioration of a habitat or disturbance of the species for which the area in question was designated has been established (*Commission* v *Italy*, paragraph 94)."

"This complaint is well founded only if the Commission demonstrates to a sufficient legal standard that the Kingdom of Spain has not taken the appropriate protective measures, consisting in preventing the operational activities of the 'Feixolín', 'Fonfría', 'Salguero-Prégame-Valdesegadas', 'Ampliación de Feixolín' and 'Nueva Julia' mines from producing **deteriorations of the habitats of the capercaillie** and disturbances of that species likely to have significant effects having regard to the objective of that directive consisting in ensuring the conservation of that species.

"In that respect, is needs to be examined, first, whether the mines in question occupy surfaces which constitute appropriate habitats for the capercaillie but cannot be used by that species during the operation of those mines, or during their subsequent 'renaturation'….The 2005 report shows that, in the context of that operation, which took place from 2001 onwards, an area of 17.92 hectares of habitat type 9230 has in fact been destroyed."

"The Kingdom of Spain argues that that loss of habitat is unimportant for the conservation of the capercaillie species, since the area concerned did not contain any breeding ground. That argument cannot be accepted, because, **even if that area were not usable as a breeding ground, it could conceivably be used by that species as a habitat for other purposes**, such as a living or hibernating area." "Moreover, **if that operation had not taken place in that area, the possibility cannot be excluded that,** following measures taken by the authorities for that purpose**, that area could have become usable as a breeding ground**."

*In the same Case, the Commission argues that the mining operations concerned are, by reason of the **noise and vibrations** which they produce and which are felt within the 'Alto Sil' SPA, likely significantly to disturb the capercaillie population protected by virtue of that SPA.*

"It is apparent from the documents before the Court that, as the Advocate General has stated in point 88 of her Opinion, bearing in mind the relatively short distances between various areas critical for the capercaillie and the open-cast mines in question, noise and vibrations caused by those operations are likely to be felt in those areas. It follows that **those nuisances are capable of causing disturbances likely significantly to affect the objectives** of the said directive, particularly the objectives of conserving the capercaillie".

"The Kingdom of Spain expresses doubts in that regard by objecting that the decline in the populations of that species, including on the 'Alto Sil' site, has also been observed outside the mining basin and is even more marked there. However, that circumstance in itself does not prevent the said nuisances produced inside the SPA by the mining operations in question from being capable of having had significant impacts on that species, even if the decline of that species may have been greater yet for populations relatively distant from those operations".

"The documents before the Court show that the abandonment of the 'Robledo El Chano' breeding ground, still occupied by the capercaillie in 1999, results from the operation of the 'Fonfría' open-cast mine as from 2001. That finding **confirms that the operation of the mines in question, particularly the noises and vibrations produced, is capable of causing significant disturbances for that species**.

*The Commission also argues that the open-cast mining operations contribute to **isolating sub-populations of capercaillie by blocking communication corridors** linking those sub-populations with other populations. It refers the report of December 2004 on the impact of mining operations on the Cantabrian capercaillie.*

"Since the Kingdom of Spain does not produce evidence refuting the conclusions of that report, the scientific value of which is undisputed, it must be held that the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín' operations are **capable of producing a barrier effect** likely to contribute to the fragmentation of the habitat of the capercaillie and the isolation of certain sub-populations of that species.

"By **allowing a situation which caused significant disturbances in the 'Alto Sil' SPA to continue for at least four years, the Kingdom of Spain omitted to take, in good time, the measures necessary to bring those disturbances to an end**. Thus, the Kingdom of Spain can be accused of the failures to fulfil obligations under Article 6(2) of the Habitats Directive in so far as they concern the 'Ampliación de Feixolín' mine.

(Case C-404/09, *Commission* v *Spain*, paragraphs 113 – 160)

The Commission took the Hellenic Republic to Court for infringing Article 6(2) by tolerating the construction and use of houses in Agiannaki and the commencement of building works relating to around 50 dwellings located between Agiannaki and Elaia, and by authorising in 2012 the construction of three holiday houses in Vounaki.

Finding of the Court:

"The Court finds that the infrastructure at issue, more specifically the development of building projects and the construction of dwellings, and its subsequent use, which are called in question by the Commission, are liable to have a significant effect on the habitats in the Kyparissia area. Likewise, the construction and use of that infrastructure, particularly on account of the noise, light and human presence entailed, are likely significantly to disturb the Caretta caretta sea turtle in the breeding period."

"Consequently, it must be found that (i) by tolerating the construction of houses in Agiannaki in 2010, the use, without a sufficient regulatory framework, of other houses in Agiannaki which were built in 2006 and the commencement of building works relating to around 50 dwellings located between Agiannaki and Elaia and (ii) by authorising in 2012 the construction of three holiday houses in Vounaki, the Hellenic Republic has failed to fulfil its obligations under Article 6(2) of Directive 92/43."

By confining itself (i) to bringing criminal proceedings against the executives of the company that built the roads in question and imposing administrative penalties on that company and (ii) to claiming, before the national courts, that the roads concerned are illegal and must be removed, the Hellenic Republic has failed to fulfil the specific obligation imposed on it by Article 6(2) of Directive 92/43 (see, by analogy, judgment of 9 November 1999, Commission v Italy, C-365/97, EU:C:1999:544, paragraph 109).

(Case C-504/14, *Commission* v *Greece*, paragraphs 35, 45 and 55)

2. *Which plans or projects are to be assessed under the Habitats Directive*

The Habitats Directive refers to any plan or project which is not directly connected with or necessary to the management of the site but does not define the terms 'plan' and 'project'. A number of Court Rulings have brought some clarification as to what should be considered a plan or project under Article 6(3) of the Habitats Directive.

The Court ruled that:

"The Habitats Directive does not define the terms 'plan' or 'project'. By contrast, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), the sixth recital in the preamble to which states that development consent for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out, defines 'project' as follows in Article 1(2):

– the execution of construction works or of other installations or schemes,
– **other interventions in the natural surroundings** and landscape including those involving the extraction of mineral resources."

"Such a definition of 'project' is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment".

"Therefore, an activity such as mechanical cockle fishing is covered by the concept of plan or project set out in Article 6(3) of the Habitats Directive. **The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year,** each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, **does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project** within the meaning of the Habitats Directive".

(Case C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging,* paragraphs 25 - 29)

National authorities approved forest management plan for the Puszcza Białowieska Natura 2000 site in 2012 and its appendix in 2016. The Commission submitted that the Republic of Poland failed to fulfil its obligations under Article 6(3) of the Habitats Directive by approving the 2016 appendix and carrying out the active forest management operations without ascertaining that that would not adversely affect the integrity of the Puszcza Białowieska Natura 2000 site. According to the Commission, the 2016 appendix, in that it amends the 2012 forest management plan, constitutes a 'plan' or a 'project' not directly connected with or necessary to the management of the Puszcza Białowieska Natura 2000 site, but likely to have a significant effect thereon on account of the tripling of the volume of harvestable timber in the Białowieża Forest District for which it provides. Unlike the 2015 site management plan, the 2012 forest management plan was not a 'management plan' within the meaning of Article 6(1) of the Habitats Directive because it did not lay down the objectives and the necessary conservation measures for Natura 2000 sites. The main purpose of the 2012 forest management plan was to regulate forest management practices, in particular by setting the maximum volume of timber which could be extracted and by establishing forest protection measures. It was therefore necessary, before adopting or amending it, to carry out an appropriate assessment of its implications for the Natura 2000 site concerned in the light of the conservation objectives of that site, in accordance with Article 6(3) of the Habitats Directive.

Finding of the Court:

"It follows that the 2016 appendix, which is thus concerned solely with increasing the volume of harvestable timber by the carrying out of the active forest management operations at issue within the Puszcza Białowieska Natura 2000 site, does not lay down in the slightest the conservation objectives and measures relating to that site, which are set out, in fact, in the 2015 PZO, adopted a short time earlier by the Polish authorities.

Therefore, the 2016 appendix and Decision No 51, in that they permit such an intervention in the natural environment intended to exploit the forest's resources, constitute a 'plan or project not directly connected with or necessary to the management' of the Puszcza Białowieska Natura 2000 site, within the meaning of the first sentence of Article 6(3) of the Habitats Directive."

(Case C-441/17, *Commission* v *Republic of Poland*, paragraphs 123 – 124)

In 2003, the Commission took Germany to court for defining the term project too restrictively when it comes to projects undertaken outside the SACs.

The national law at the time also excluded from the term 'project' the use of soil for the purposes of agriculture, forestry and fishing where the project takes account of the objectives and principles of nature protection and countryside conservation.

Additionally, the term 'project' was used to installations subject to authorisation under the Federal Law on protection against pollution and to the use of water which is subject to approval under the Law on water used. Moreover, the authorisation of installations causing emissions was refused only where it was foreseeable that they directly affected an SAC situated in an area where those installations were operated. Material nuisances caused outside such an area were therefore not taken into account.

Findings of the Court:

"In its definition of measures to be subject to an assessment of the implications, the Directive **does not distinguish between measures taken outside or inside a protected area**."

"The condition, to which the assessment of the implications of a plan or a project on a particular site is subject, which requires such an assessment to be carried out where there are doubts as to the existence of significant effects, **does not permit that assessment to be avoided in respect of certain categories of projects**, on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected sites".

"As regards, in particular, installations not subject to authorisation under the BImSchG[12], the fact that that text requires verification, that serious environmental damage which may be prevented by current technology is in fact prevented, and that damage which cannot be prevented by current technology is reduced to the minimum, cannot be sufficient to ensure compliance with the duty laid down in Article 6(3) of the Directive. The duty of verification laid down by the BImSchG is not, in any event, capable of ensuring that a project relating to such an installation does not adversely affect the integrity of the protected site. In particular, the **duty to verify whether serious environmental damage, which cannot be prevented by current technology, is reduced to the minimum, does not ensure that such a project will not give rise to such damage**".

"As regards the use of water not requiring an authorisation under the WHG, the **fact that it concerns the use of small quantities of water does not in itself preclude** the possibility that some of those uses are likely to have a significant effect on a protected site. Even assuming that such uses of water are not likely to have a significant effect on the status of a body of water, it does not follow that they are not likely to have a significant effect on neighbouring protected sites."

"In the absence of established scientific criteria which would *a priori* rule out **emissions affecting a protected site situated outside the area of impact** of the installation concerned having a significant effect on that site, the system put in place by national law in the field in question is not, in any event, capable of ensuring that the projects or plans relating to

[12] BImSchG – Federal Act on Protection against Emissions; WHG – Act on Water Management

installations causing emissions which affect protected sites situated outside their area of impact do not adversely affect the integrity of those sites, within the meaning of Article 6(3). Accordingly, it must be held that Article 6(3) of the Directive has not been properly transposed.

(Case C-98/03, *Commission* v *Germany*, paragraphs 43 –52; see also case C-142/16, *Commission* v *Germany*, paragraph 29)

The Commission took the United Kingdom to Court for exempting water abstraction licences granted under Chapter II of Part II of the Water Resources Act 1991 from complying with the requirements of Article 6(3) of the Habitats Directive. The Court ruled that:

"In **merely defining potentially damaging operations** for each site concerned, the risk is run that certain projects which on the basis of their specific characteristics are likely to have an effect on the site are not covered. Having regard to the foregoing, it must be found that the **United Kingdom has not transposed Article 6(3**) and (4) of the Habitats Directive correctly as regards water abstraction plans and projects"

In the same ruling the Commission claimed that United Kingdom legislation did not clearly require land use plans to be subject to appropriate assessment of their implications for SACs in accordance with Article 6(3) and (4) of the Habitats Directive. According to the Commission, although land use plans do not as such authorise development and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land use plans must also be subject to appropriate assessment of their implications for the site concerned. The Court ruled that:

"As a result of the **failure to make land use plans subject to appropriate assessment** of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard."

(Case C-6/04, *Commission* v *UK*, paragraphs 47, 50, 56)

In 2004, The Commission took Ireland to court for excluding plans from the provisions of Article 6(3) and for failing to make proper provision for the application of those Community provisions to projects situated outside SPAs but having significant effects inside them.

Findings of the Court:

"The Habitats Directive requires that any plan or project undergo an appropriate assessment of its implications if it cannot be excluded on the basis of objective information that that plan or project will have a significant effect on the site concerned".

"Regarding the Commission's assertion that the Irish legislation **does not make adequate provision for** the application of Article 6(3) and (4) of the Habitats Directive to **projects situated outside SPAs but having significant effects inside them**, the Court finds that it is common ground that the environmental impact assessment report, which must be commissioned by the private persons concerned, who must bear the costs thereof, amounting to a minimum of EUR 15 000, is required only for plantations of over 50 hectares, whereas the average surface area of a plantation in Ireland is approximately 8 hectares. It therefore follows

that, since the Irish legislation does not make plans subject to an appropriate assessment of their effects on SPAs, Article 6(3) and (4) of the Habitats Directive has not been adequately transposed in the Irish domestic legal order".

In the same Court Ruling, the Commission considered that Ireland had failed to apply Article 6(3) to a number of ***aquaculture programmes and drainage works*** *inside the Glen Lough SPA. It considered that, regarding aquaculture, Ireland had systematically failed to carry out a proper assessment of those projects likely to have effects on SPA.*

"The study carried out by BirdWatch Ireland refers to **a number of potential negative effects of shellfish farming**, including the loss of feeding areas and disturbances caused by increased human activity and states that, even when an aquaculture programme is inside an SPA, very little protection is provided for bird habitats. Ireland, for its part, does not allege that no aquaculture programmes have any effects on SPAs. It follows that the authorisation procedure ought to have included an appropriate assessment of the implications of each specific project. Accordingly, the Court finds that Ireland fails to ensure systematically that aquaculture programmes likely to have a significant effect on SPAs, either individually or in combination with other projects, are made subject to an appropriate prior assessment".

As to Ireland's argument that no environmental impact assessment had been required for **shellfish farms because they are small in size** and are of only limited impact on the environment, the Commission is correct in arguing that that is not an adequate reason not to assess the effects of such a plan or project. As just pointed out in paragraph 238 of this judgment, the first sentence of Article 6(3) of the Habitats Directive requires an appropriate assessment of any plan or project in combination with other plans and projects".

"Lastly, regarding Ireland's argument that **maintenance authorisation for development projects carried out without prior authorisation** is compatible with the Habitats Directive, the Court finds that the assessment of an already-completed development project cannot be regarded as being equivalent to the assessment of a plan or project within the meaning of the first sentence of Article 6(3) of the Habitats Directive.

Regarding the ***drainage work*** *in the Glen Lough SPA, the Commission argued that Ireland carried out drainage work likely to have a significant effect on the Glen Lough SPA without having previously carried out an appropriate assessment of that project or employed an adequate decision-making procedure, which led to habitat deterioration.*

"Infringement of Article 6(3) and (4) of that directive presupposes that the drainage works in question are a project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects".

"In this regard, it is common ground that **those works are a project** and that they are not directly connected with or necessary to the management of the site. It follows that, in accordance with the case-law, they had to be made subject to an assessment of their effects on the conservation objectives fixed for the Glen Lough SPA if it could not be ruled out, on the basis of objective information, that they would have a significant effect thereon, either individually or in combination with other plans or projects".

"Ireland, after stating that the works in question were merely maintenance work on existing drains, as part of a system of earlier drainage which preceded the classification of Glen Lough as an SPA, and did not have a significant impact on the wild bird habitats in that SPA, recognises, in its statement in defence, that the drain maintenance of the Silver River carried out by the Office of Public Works in 1997 seems to have reduced the hydrological response times and hence the usage of the site by whooper swans. Accordingly, the Court finds that Ireland, in **failing to assess the impact of the drains maintenance works** on the conservation objectives of the Glen Lough SPA before those works were carried out, infringed the first sentence of Article 6(3) of the Habitats Directive".

"**It follows that, contrary to Article 6(3) and (4) of the Habitats Directive, Ireland carried out a drain maintenance project** in 1997 which was likely to have a significant effect on the Glen Lough SPA without having carried out beforehand an appropriate assessment of its implications on the site or employed an adequate decision-making procedure, **which resulted in habitat deterioration**, contrary to Article 6(2) of that directive".

(Case C-418/04, *Commission* v *Ireland*, paragraphs 227, 232, 233, 239, 244, 246, 252 - 263)

In 2006, the Commission took Belgium to court for ***exempting several categories of projects*** *from the obligation of an assessment pursuant to Article 6(3) of the Habitats Directive. For instance, Class 3 installations and activities (such as a holding of 500 bovine animals) need only be the* ***subject of a prior declaration*** *to the local authority in whose territory the planned establishment is to be located. Belgium stated that the declaratory scheme applies only to installations and activities with a low impact on humans and on the environment, for which the Belgian Government has laid down comprehensive conditions.*

The Court ruled that:

"It should be borne in mind that even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration (see, to that effect, with regard to Directive 85/337, Case C‑392/96 *Commission* v *Ireland*, paragraph 66). It follows that a Member State cannot assume that categories of plans or projects defined by reference to spheres of activity and special installations will, by definition, have a low impact on humans and on the environment".

"The Kingdom of Belgium mentions the obligation to comply with the Environment Code, although it does not state specifically how the provisions of that code, read in conjunction with the general conditions, are capable of protecting the environment. It is clear from the foregoing that the Kingdom of Belgium has not provided evidence enabling the Court to determine whether the provisions which that Member State has adopted allow it to be excluded, on the basis of objective information, that any plan or project subject to that declaratory scheme will have a significant effect on a Natura 2000 site, whether individually or in combination with other plans or projects".

"In the light of the foregoing considerations, it must be held that, **by not requiring an appropriate environmental impact assessment to be undertaken for certain activities, subject to a declaratory scheme,** when those activities are likely to have an effect on a Natura

2000 site, the Kingdom of Belgium has **failed to fulfil its obligations under Article 6(3) of the Habitats Directive".**

(Case C-538/09, *Commission* v *Belgium,* paragraphs 50 - 64)

Under the existing rules of French law relating to the prior assessment of the environmental implications of a development plan or project, the competent authorities was not able in all cases to refuse authorisation on the grounds that the findings of such an assessment were negative. The environmental impact assessment could be waived in the case of certain projects because of their low cost or their purpose.

The Court ruled that Article 6(3) had not been transposed into French law with sufficient clarity and precision. Article 6(3) of the Habitats Directive **does not authorise a Member State to enact** national legislation which allows the environmental impact assessment obligation for development plans to benefit from a **general waiver because of the low costs entailed or the particular type of work planned**.

(Case C-256/98 *Commission v France,* paragraphs 34-40)

The following case concerned the maintenance dredging of the river Ems. In order to enable ships to navigate between the shipyard and the North Sea, the river Ems was deepened by means of 'required dredging operations'. By a decision of 1994, town of Papenburg and several other bodies ("Stadt Papenburg") were granted permission to dredge that river, when required. That decision is definitive and means, in accordance with German law, all future 'required dredging operations' are considered to have been granted permission. In 2006, the river Ems was proposed as a SCI within the meaning of the Habitats Directive.

In 2008, Stadt Papenburg brought an action before the national court to prevent the Federal Republic of Germany from giving its agreement on that SCI. It feared that, if Ems were included in the list of SCIs, the dredging operations required for that purpose would in future, and in every case, have to undergo the assessment provided for in Article 6(3) and (4) of the Habitats Directive.

*The national court decided to refer the following question to the Court for a preliminary ruling: '**Must on-going maintenance works in the navigable channels of estuaries**, which were definitively authorised under national law before the expiry of the time-limit for transposition of [the Habitats Directive], **undergo an assessment of their implications pursuant to Article 6(3)** or (4) of the directive where they are continued after inclusion of the site in the list of [SCIs]?'*

According to the Court:

"An activity consisting of dredging works in respect of a navigable channel may be covered by the concept of 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337, which refers to '**other interventions in the natural surroundings** and landscape including those involving the extraction of mineral resources'. Therefore, such an activity may be considered to be covered by the concept of 'project' in Article 6(3) of the Habitats Directive".

"Next, the fact that that activity has been definitively authorised under national law before the expiry of the time-limit for transposition of the Habitats Directive does not constitute, in itself, an obstacle to regarding it, **at the time of each intervention in the navigable channel, as a distinct project for the purposes of the Habitats Directive**".

"If it were otherwise, those dredging works in respect of the channel concerned, which are not directly connected with or necessary to the management of the site, would, in so far as they are likely to have a significant effect on the latter, automatically be excluded from any prior assessment of their implications for that site within the meaning of Article 6(3) of the Habitats Directive, and from the procedure provided for in Article 6(4). Furthermore, the objective of the conservation of natural habitats and of wild fauna and flora pursued by the Habitats Directive would be at risk of not being fully achieved."

"Contrary to what Stadt Papenburg and the Commission claim, **no reason based on the principle of legal certainty** or the principle of protection of legitimate expectations **precludes the dredging works** at issue in the main proceedings, although they have been permanently authorised under national law, from being subject to the procedure provided for in Article 6(3) and (4) of the Habitats Directive as distinct and successive projects".

"Finally, if, having regard in particular to **the regularity or nature of the maintenance works** at issue in the main proceedings or the conditions under which they are carried out, they **can be regarded as constituting a single operation**, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, **those maintenance works can be considered to be one and the same project for the purposes of Article 6(3)** of the Habitats Directive".

"In the light of the above, the answer to the question is that Article 6(3) and (4) of the Habitats Directive must be interpreted as meaning that **ongoing maintenance works in respect of the navigable channels of estuaries**, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, **must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessmen**t of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of Article 4(2) of that directive"

(Case C-226/08, *Stadt Papenburg* v *Bundesrepublik Deutschland*, paragraphs 35 – 51)

National authorities exempted activities such as grazing and fertilizing of agricultural land in and around Natura 2000 sites from the obligation of an appropriate assessment on the grounds that such activities were not subject to any authorization procedure. This approach was challenged by environmental organisations.

Findings of the Court:

"By the first question in Case C-293/17, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that the grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, on the ground that they are likely to have significant consequences for those sites, even if those

activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of the EIA Directive."

"It must be noted that the requirements relating to 'works' or 'interventions involving alterations to the physical aspect' or even an 'intervention in the natural surroundings' are not to be found in Article 6(3) of the Habitats Directive, that provision requiring an appropriate assessment, inter alia where a project is likely to have a 'significant' effect on a site.

Thus, Article 1(2)(a) of the EIA Directive defines the concept of 'project' for the proposes of that provision, attaching to it conditions that are not specified in the equivalent provision of the Habitats Directive.

In the same vein, it follows from the Court's case-law that, in so far as the definition of the concept of 'project' stemming from Directive 85/337 is more restrictive than that stemming from the Habitats Directive, if an activity is covered by Directive 85/337, it must, a fortiori, be covered the Habitats Directive (see, to that effect, judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraphs 26 and 27).

It follows that, if an activity is regarded as a 'project' within the meaning of the EIA Directive, it may constitute a 'project' within the meaning of the Habitats Directive. However, **the mere fact that an activity may not be classified as a 'project' within the meaning of the EIA Directive does not suffice, in itself, to infer therefrom that the activity may not be covered by the concept of 'project' within the meaning of the Habitats Directive**.

"Moreover, as the Advocate General noted, in essence, in paragraph 118 of her Opinion, **it cannot be ruled out that the grazing of cattle and the application of fertilisers on the surface of land or below its surface are covered, in any event, by the concept of 'project' within the meaning of Article 1(2)(a) of the EIA Directive**.

As regards the application of fertilisers, such an activity may alter the properties of the soil by enriching it with nutrients and thus constitute an intervention involving alterations to the physical aspect of the site within the meaning of Article 1(2)(a) of the EIA Directive and, with regard to the grazing of cattle, establishing grazing land could constitute 'the execution of construction works or of other installations or schemes' within the meaning of that provision, in particular if such execution involves, in the circumstances of the present case, an unavoidable or planned development of such grazing land, which it is for the referring court to verify.

In the light of the foregoing, the answer to the first question in Case C-293/17 is that Article 6(3) of the Habitats Directive must be interpreted as meaning that the **grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of the EIA Directive**."

(Joined cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 59, 63 – 67, 71 – 73)

“By the second question in Case C-293/17, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that a recurring activity, such as the application of fertilisers on the surface of land or below its surface, authorised under national law before the entry into force of that directive, may be regarded as one and the same project for the purposes of that provision, with the result that that activity does not fall within the scope of that provision.

In order to answer the referring court’s questions, it should be recalled that, under the first sentence of Article 6(3) of the Habitats Directive, no project likely to have a significant effect on the site concerned can be authorised without a prior assessment of its implications for that site.

In so far as the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a ‘project’ within the meaning of Article 6(3) of the Habitats Directive, it is necessary to examine the bearing on the applicability of that provision of the fact that that recurring activity was authorised under national law before the entry into force of that directive.

In that regard, the Court has previously held that such a fact does not in itself constitute an obstacle to considering such an activity, at the time of each subsequent intervention, as a distinct project within the meaning of that directive, at the risk of automatically excluding that activity from any prior assessment of its implications for the site concerned within the meaning of Article 6(3) (see, to that effect, judgment of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraphs 41 and 42).

However, if, having regard in particular to their regularity or nature or the conditions under which they are carried out, certain activities must be regarded as constituting a single operation, those activities can be considered to be one and the same project within the meaning of Article 6(3) of the Habitats Directive (see, to that effect, judgment of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 47).

In the present case, as the Advocate General noted in points 132 to 134 of her Opinion, the regular fertilising of agricultural land generally has a single common purpose, namely crop cultivation on a farm, and may constitute a single operation, characterised, in the pursuit of that common purpose, by the continuity of that activity in the same locations and under the same conditions.

In those circumstances, such a single operation, authorised and regularly practised before Article 6(3) of the Habitats Directive became applicable to the site at issue, may constitute one and the same project for the purposes of that provision, exempted from a new authorisation procedure.

The referring court is uncertain, however, as to the bearing on the applicability of Article 6(3) of the Habitats Directive and, accordingly, the requirement of an ‘appropriate assessment’ within the meaning of that provision, of the fact that, first, fertilising takes place on different plots of land, in variable quantities and following various techniques, which themselves evolve over time as a result of technical and regulatory changes, and, secondly, nitrogen deposition caused by the application of fertilisers has not, overall, increased after the entry into force of that provision.

In that regard, it should be noted that Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 118 and the case-law cited). Thus, according to the Court's settled case-law, recalled in paragraph 68 of the present judgment, the decisive criterion for establishing whether a new project requires an appropriate assessment of its implications to be carried out is whether there is a possibility that that project will have a significant effect on a protected site.

Consequently, **where there is no continuity and, inter alia, the location and the conditions in which it carried out are not the same, the recurring activity of applying fertilisers on the surface of land or below its surface cannot be classified as one and the same project for the purposes of Article 6(3) of the Habitats Directive**. It might be a case of new projects requiring an appropriate assessment within the meaning of that provision, the decision as to the obligation to conduct such an assessment depending, in each case, on the criterion relating to the risk of a significant adverse effect on the protected site on account of the changes thus brought about by such an activity.

Therefore, the fact that nitrogen deposition caused by the application of fertilisers on the surface of land or below its surface has not, as a whole, increased since the entry into force of Article 6(3) of the Habitats Directive is irrelevant to the question whether a new project requires an appropriate assessment to be carried out, in so far as that fact does not make it possible to rule out the risk that nitrogen deposition on the protected sites concerned has increased and that it now affects one of those sites significantly."

"In the light of the foregoing, the answer to the second question in Case C-293/17 is that Article 6(3) of the Habitats Directive must be interpreted as meaning that **a recurring activity, such as the application of fertilisers on the surface of land or below its surface, authorised under national law before the entry into force of that directive, may be regarded as one and the same project for the purposes of that provision, exempted from a new authorisation procedure, in so far as it constitutes a single operation characterised by a common purpose, continuity and, inter alia, the location and the conditions in which it is carried out being the same**. **If a single project was authorised before the system of protection laid down by that provision became applicable to the site in question, the carrying out of that project may nevertheless fall within the scope of Article 6(2) of that directive**."

(Joined cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 74 – 84, 86)

3. <u>The role of the competent authority</u>

In 2010, The Constitutional Court of the Kingdom of Belgium had before it a number of actions seeking to annul the decree of the Walloon Parliament from 2008 which 'ratified' the building consents for various works relating to Liège-Bierset airport, Brussels South Charleroi airport and the Brussels-Charleroi railway, that is to say, authorised them in view of 'overriding reasons in the public interest'.

The Constitutional Court decided to refer to the European Court for a preliminary ruling on several questions, one of which asked: 'Must Article 6(3) be interpreted as permitting a legislative authority to authorise projects such as those referred to in Articles 16 and 17 of that decree, even though the impact assessment carried out in that connection has been held by the Conseil d'État, in a judgment given under the emergency procedure, to be incomplete and has been contradicted in an opinion of the authority of the Walloon Region responsible for the ecological management of the natural environment?'

Findings of the Court:

"Those (Article 6(3)) obligations are incumbent on the Member States by virtue of the Habitats Directive **regardless of the nature of the national authority with competence to authorise the plan or project concerned**. Article 6(3) of the Habitats Directive, which refers to the 'competent national authorities', does not lay down any special rule for plans or projects approved by a legislative authority. That status consequently has no effect on the extent or scope of the obligations imposed on the Member States by Article 6(3) of the Habitats Directive".

"The answer to Question 5 is therefore that Article 6(3) of the Habitats Directive must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned".

(Case C-182/10, *Solvay and others*, paragraphs 65-70)

"In accordance with the case-law cited in paragraphs 33 and 34 of the present judgment, an appropriate assessment of the implications of a plan or project for a protected site entails, first, that, before that plan or project is approved, all aspects of that plan or project that might affect the conservation objectives of that site are identified. Second, such an assessment cannot be considered to be appropriate if it contains lacunae and does not contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the plan or project on that site. Third, all aspects of the plan or project in question which may, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field.

Those obligations, in accordance with the wording of Article 6(3) of the Habitats Directive, are borne not by the developer, even if the developer is, as in this case, a public authority, but by the competent authority, namely the authority that the Member States designate as responsible for performing the duties arising from that directive.

It follows that that provision requires the competent authority to catalogue and assess all aspects of a plan or project that might affect the conservation objectives of the protected site before granting the development consent at issue.

As also observed by the Advocate General in points 56 and 57 of her Opinion, **only those parameters as to the effects of which there is no scientific doubt that they might affect the site can be entirely left to be decided later by the developer**.

In the light of the foregoing, the answer to the eighth question is that Article 6(3) of the Habitats Directive must be interpreted as meaning that the competent authority is permitted to grant to a plan or project development consent which leaves the developer free to determine later certain parameters relating to the construction phase, such as the location of the construction compound

and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site."

(Case C-461/17, *Holohan and Others* v *An Bord Pleanála*, paragraphs 43 – 47)

4. Application of stricter rules than required by the directives

In the region of Puglia, Italy, regional law prohibits construction of all wind turbines not intended for self-consumption and with a production capacity higher than 20 kW in all Natura 2000 sites (and within a buffer zone around the site). Following a complaint to the national court, the latter asked the European Court of Justice whether such a national law, which imposes stricter conditions than is required under the Habitats Directive, does not contradict the EU law, especially the Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources and the Directive 2009/28/EC.

The Court ruled as follows:

"It should be noted, first, that the system of protection afforded by the Habitats and Birds Directives to sites forming part of the Natura 2000 network does not prohibit all human activity within those sites but simply makes authorisation of such activity conditional upon a prior assessment of the environmental impact of the project concerned".

"Moreover, according to established case‑law, in order for the mechanism for the protection of the environment provided for in Article 6(3) of the Habitats Directive to be triggered, there must be a probability or a risk that a plan or project will have a significant effect on the site concerned" It is therefore clear that the European Union legislature intended to create a protection mechanism which is triggered only if a plan or project represents a risk for a site forming part of the Natura 2000 network".

"Article 14 of the Birds Directive provides that Member States may introduce stricter protective measures than those provided for under that directive. There is no provision in the Habitats Directive that is equivalent to Article 14 of the Birds Directive. Nevertheless, since that directive was adopted on the basis of Article 192 TFEU, it should be noted that **Article 193 TFEU provides that Member States may adopt more stringent protective measures**. Under that provision, such measures are simply required to be compatible with the FEU Treaty and notified to the Commission…"

"It is apparent from both the file submitted to the Court and the parties' arguments at the hearing that the essential purpose of the **national and regional legislation** at issue in the main proceedings is the conservation of the areas forming part of the Natura 2000 network, and in particular the protection of the habitats of wild birds against the dangers which wind turbines may represent for them. It follows that legislation such as that at issue in the main proceedings which, with a view to protecting wild bird populations inhabiting protected areas forming part of the Natura 2000 network, imposes an absolute prohibition on the construction of new wind turbines in those areas, **pursues the same objectives as the Habitats Directive".**

"Article 194(1) TFEU states that European Union policy on energy must have regard for the need to preserve and improve the environment. Moreover, a measure such as that at issue in the main proceedings, which prohibits only the location of new wind turbines not intended for self-

consumption on sites forming part of the Natura 2000 network, with the possibility of exemption for wind turbines intended for self-consumption with a capacity not exceeding 20 kW, is not, in view of its limited scope, liable to jeopardise the European Union objective of developing new and renewable forms of energy."

"It must therefore be concluded that the Birds and Habitats Directives, in particular Article 6(3) of the Habitats Directive, do not preclude a more stringent national protective measure which imposes an absolute prohibition on the construction of wind turbines not intended for self-consumption within areas forming part of the Natura 2000 network, without any requirement for an assessment of the environmental impact of the individual project or plan on the site concerned forming part of that network.

(Case C-2/10, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura,* paragraphs 39 - 75*)*

5. Plans or projects not directly connected with the management of a site

The Commission took France to Court for exempting works or developments that were foreseen under its Natura 2000 contracts from the Article 6(3) procedure.

According to France the systematic exemption of these works and developments is justified by the notion that in so far as those contracts are intended to achieve fixed conservation and restoration objectives for the site, they are directly connected with or necessary for the management of the site.

However, as the Court pointed out, it cannot be ruled out that, while they may have as their objective the conservation or restoration of a site, the works or developments provided for in those contracts may, nevertheless, not be directly connected with or necessary for the management of the site.

"It follows that the mere **fact that the Natura 2000 contracts comply with the conservation objectives of sites cannot** be regarded as sufficient, in the light of Article 6(3) of the Habitats Directive, to **allow the works and developments provided for in those contracts to be systematically exempt from the assessment** of their implications for the sites. Accordingly, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, the Member State has failed to fulfil its obligations under Article 6(3)."

"Further, by **systematically exempting works and development programmes and projects which are subject to a declaratory system** from the procedures of assessment of their implication for the site, the French Republic has failed to fulfil the obligations under Article 6(3) of the Habitats Directive."

(Case C-241/08, *Commission* v *France,* paragraphs 51 - 62*)*

6. When is an AA required: Plans or projects 'likely to have a significant effect'

"The triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume – as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled 'Managing Natura 2000 Sites: The provisions

of Article 6 of the "Habitats" Directive (92/43/EEC)' – that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project".

"It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that **there be a probability or a risk** that the latter will have significant effects on the site concerned".

"In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, **such a risk exists if it cannot be excluded** on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraphs 50, 105 and 107)".

"Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that **in case of doubt as to the absence of significant effects such an assessment must be carried out**, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora".

(Case C‑127/02, *Waddenvereniging and Vogelbeschermingsvereniging,* paragraphs 49 - 44)

7. *Appropriate Assessment must not omit any stage of the development likely to affect the integrity of the site*

"Article 6(3) of Directive 92/43 must be interpreted as meaning that the competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site."

(Case C-461/17, *Holohan and Others* v *An Bord Pleanála,* final conclusions)

8. *Role of scientific opinions within the Appropriate Assessment procedure*

"Article 6(3) of Directive 92/43 must be interpreted as meaning that, where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned."

(Case C-461/17, *Holohan and Others* v *An Bord Pleanála,* final conclusions)

9. *Conditions of adoption of the national legislation exempting certain projects from the obligation of authorization on the basis of an appropriate assessment for that legislation carried out prior to its adoption*

National legislation (PAS) was adopted setting threshold values for nitrogen deposition under which no appropriate assessment of particular projects not reaching or exceeding such thresholds was not required. Adoption of PAS was preceded by appropriate assessment of all foreseeable implications of this legislation on Natura 2000 sites sensitive to nitrogen deposition. This legislation was challenged by environmental organisations arguing that such appropriate assessment carried out in advance does not fulfill requirements of Article 6(3).

"By the second question in Case C-294/17, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection."

"Having regard to the precautionary principle, where a plan or project not directly connected with or necessary to the management of a site may undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 112 and the case-law cited).

As the Advocate General noted in point 40 of her Opinion, the first sentence of Article 6(3) of the Habitats Directive generally requires the individual assessment of plans and projects.

Nonetheless, the appropriate assessment of the implications of the plan or project for the site concerned implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified (judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 40 and the case-law cited).

In that regard, as the Advocate General noted in points 42 to 44 of her Opinion, an overall evaluation of the implications carried out in advance, such as that conducted when the PAS was adopted, makes it possible to examine the cumulative effects of different sources of nitrogen deposition on the sites concerned.

The fact that an assessment at such a level of generality makes it possible to examine better the cumulative effects of various projects does not mean, however, that national legislation such as that at issue in the main proceedings necessarily meets all the requirements stemming from Article 6(3) of the Habitats Directive."

"In the light of the foregoing, the answer to the second question in Case C-294/17 is that **Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That is so, however, only in so**

far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain."

"In the case in the main proceedings, the need to obtain authorisation does not apply, first, where a project causes nitrogen deposition of less than 0.05 mol N/ha/yr. Secondly, projects causing nitrogen deposition of more than 0.05 mol N/ha/yr but less than 1 mol N/ha/yr are also permitted without prior authorisation, but must necessarily be notified.

In the present case, even though, in those two situations, the projects proposed would be exempted from authorisation, the authorisation scheme for them is based on the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, carried out when the PAS was adopted, in which the effects of plans or projects of that scale were examined.

The Court has held that, where a Member State introduces an authorisation scheme, under which there is no provision for a risk assessment depending inter alia on the characteristics and specific environmental conditions of the site concerned, that Member State must show that the provisions which it has adopted enable it to be excluded, on the basis of objective information, that any plan or project subject to that authorisation scheme will have a significant effect on a Natura 2000 site, whether individually or in combination with other plans or projects. It can be inferred from Article 6(3) of the Habitats Directive that competent national authorities may refrain from carrying out an impact assessment of any plan or project which is not directly connected with, or necessary to, the management of a Natura 2000 site only where it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on that site, whether individually or in combination with other plans or projects (see, to that effect, judgment of 26 May 2011, *Commission* v *Belgium*, C-538/09, EU:C:2011:349, paragraphs 52 and 53 and the case-law cited)."

"In particular, it must be ascertained that, even below the threshold values or limit values at issue in the main proceedings, there is no risk of significant effects being produced which may adversely affect the integrity of the sites concerned.

In the light of the foregoing, the answer to the first question in Case C-294/17 is that **Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation, such as that at issue in the main proceedings, exempting certain projects which do not exceed a certain threshold value or a certain limit value in terms of nitrogen deposition from the requirement for individual approval, if the national court is satisfied that the 'appropriate assessment' within the meaning of that provision, carried out in advance, meets the criterion that there is no reasonable scientific doubt as to the lack of adverse effects of those plans or projects on the integrity of the sites concerned**."

(Joined cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 90, 93 – 97, 104, 107 – 109, 111 - 112)

National legislation (PAS) was adopted, exempting certain activities like fertilizing and grazing, from an obligation of authorization and, consequently, of individualised appropriate assessment of implications of these activities on Natura 2000 sites. Adoption of PAS was preceded by appropriate assessment of all foreseeable implications of this legislation on Natura

2000 sites sensitive to nitrogen deposition. This legislation was challenged by environmental organisations arguing that an exemption of certain activities from the obligation of appropriate assessment contradicted the requirements of Article 6(3).

"According to the Court's case-law, the condition governing the need to undertake an assessment of the implications of a plan or a project on a particular site, in accordance with which such an assessment must be carried out where there are doubts as to the existence of significant effects, does not permit that assessment to be avoided, in respect of certain categories of plans or projects, on the basis of criteria which do not adequately ensure that those projects are not likely to have a significant effect on the protected sites. The option of generally exempting certain activities, in accordance with the rules in force, from the need for an assessment of their implications for the site concerned is not such as to guarantee that those activities do not adversely affect the integrity of the protected site. Thus, Article 6(3) of the Habitats Directive does not authorise a Member State to enact national legislation which allows the environmental impact assessment obligation for certain types of plans or projects to benefit from a general waiver (see, to that effect, judgment of 26 May 2011, *Commission* v *Belgium*, C-538/09, EU:C:2011:349, paragraphs 41 to 43 and the case-law cited).

It follows that, as the Advocate General noted in point 144 of her Opinion, should the grazing of cattle and the application of fertilisers on the surface of land or below its surface constitute 'projects' within the meaning of Article 6(3) of the Habitats Directive, dispensing with the appropriate assessment of the implications of those projects for the site concerned may be compatible with the requirements stemming from that provision only if it is ensured that those activities cause no disturbance likely significantly to affect the objectives of that directive (see, to that effect, judgment of 4 March 2010, *Commission* v *France*, C-241/08, EU:C:2010:114, paragraph 32).

In the present case, the referring court states that the authors of the appropriate assessment at issue in the main proceedings based it, inter alia, on the expected extent and intensity of the agricultural activities concerned and concluded that, for the level at which they were carried out at the time of that assessment, it could be ruled out that such activities would have significant consequences, and that, on average, an increase in nitrogen deposition caused by those activities could be ruled out. It likewise notes that the categorical exemptions at issue in the main proceedings mean that the activities concerned may be carried out regardless of the location and regardless of the nitrogen deposition that they cause.

In accordance with the Court's case-law recalled in paragraph 98 of the present judgment, the assessment carried out under the first sentence of Article 6(3) of the Habitats Directive cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects proposed on the protected site concerned.

In those circumstances, as the Advocate General also noted, in essence, in points 146, 147 and 150 of her Opinion, it does not appear possible for the adverse effects of the projects at issue in the main proceedings on the integrity of the sites concerned to be removed beyond all reasonable scientific doubt, which it is for the referring court to ascertain.

An average value is not, in principle, capable of ensuring that there are no significant effects on any single protected site as a result of fertilising or grazing, as such effects seem to depend, inter alia, on the extent and, as the case may be, the intensiveness of those activities, the

proximity which may exist between the place in which those activities are carried out and the protected site concerned, and specific conditions, for example owing to the interaction of other sources of nitrogen, potentially characterising that site.

In the light of the foregoing, the answer to the third and fourth questions is that **Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation, such as that at issue in the main proceedings, which allows a certain category of projects, in the present case the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement and, accordingly, to an individualised appropriate assessment of its implications for the sites concerned, unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites, which it is for the referring court to ascertain**."

(Joined cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 114 - 120)

10. Appropriate assessment has to be carried out prior to plan or project authorization

In 2017, the Commission took Poland to court for authorizing the 2016 appendix to the forest management plan from 2012, enabling forest management operations at the territory of the Puszcza Białowieska Natura 2000 site, following the impact assessment from 2015 based on outdated information from before 2012. Moreover, the remediation programme was approved by the Polish authorities aimed at assessing the impact of the active forest management operations provided for in the 2016 appendix on the Puszcza Białowieska Natura 2000 site, by the establishment of reference areas within which none of those operations were to be implemented.

The Court ruled as follows:

"It follows that the 2015 impact assessment could not be capable of removing all scientific doubt as to the harmful effects of the 2016 appendix on the Puszcza Białowieska Natura 2000 site.

That finding is borne out by the adoption, on the very day that the 2016 appendix was approved, of the remediation programme and, six days later, of Decision No 52.

As is apparent from the grounds of that programme and the provisions of that decision, those measures had the very purpose of assessing the impact of the active forest management operations provided for in the 2016 appendix on the Puszcza Białowieska Natura 2000 site, by the establishment, in the Białowieża and Browsk Forest Districts, of reference areas within which none of those operations were to be implemented.

According to the explanations provided by the Republic of Poland itself, those areas were, in particular, to enable assessment, over a surface area of approximately 17 000 hectares, of the development of the characteristics of that site without any human intervention, in order to compare that development with the development resulting from the active forest management

operations which were provided for in the 2016 appendix, and which would thus be implemented over the remainder of the surface area of the three forest districts at issue, amounting to approximately 34 000 hectares.

However, an appropriate assessment of the implications of the plan or project for the site concerned must precede its approval (see, inter alia, judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 53). It cannot therefore be concomitant with or subsequent to the approval (see, by analogy, judgments of 20 September 2007, *Commission* v *Italy*, C-304/05, EU:C:2007:532, paragraph 72, and of 24 November 2011, *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 104)."

(Case C-441/17, *Commission* v *Republic of Poland,* paragraphs 144 – 148)

11. When is an assessment appropriate for the purposes of the Habitats Directive?

"As regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project **must precede its approval** and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives".

"Such an assessment therefore implies that **all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those (conservation) objectives must be identified in the light of the best scientific knowledge in the field**. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed."

"As regards the conditions under which a particular activity may be authorised, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are **convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation."**

"In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) **integrates the precautionary principle** (see Case C-157/96 *National Farmers' Union and Others* [1998] ECR I- 2211, paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as

effectively ensure the fulfilment of the objective of site protection intended under that provision."

"Therefore, pursuant to Article 6(3), the competent national authorities, taking account of the conclusions of the appropriate assessment of the given project for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if **they have made certain that it will not adversely affect the integrity of that site.** That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraphs 106 and 113)."

"It can be concluded that under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the **light of the best scientific knowledge in the field**. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case **where no reasonable scientific doubt remains as to the absence of such effects**.

(Case C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging,* paragraphs 52 – 61; see also case C-441/17, *Commission* v *Republic of Poland*, paragraphs 117, 179)

In 1998, Italy launched a project to extend and improve a skiing area with a view to the holding of the 2005 World Alpine Ski Championships in Parco Nazionale dello Stelvio classified as a SPA. In 2000, the Region of Lombardy, on the basis of a study carried out by an architect, gave a favourable opinion with regard to the environmental compatibility of the project, subject to compliance with a series of conditions.

The Commission considered that the decision to approve the project was not based on an appropriate assessment of its environmental impacts. The environmental components of the two studies that had been undertaken for assessing the impacts had been examined in a summary manner and the 'flora, vegetation and habitat' component had been analysed merely in an ad hoc way.

Findings of the Court:

"It is apparent from the documents submitted to the Court that prior consideration was given to the matter on a number of occasions before authorisation was granted. The assessments which might be considered appropriate within the meaning of Article 6(3) of Directive 92/43 are, firstly, an environmental impact study prepared in 2000 and, secondly, a report submitted in 2002 (see paragraphs 21 to 24 and paragraphs 25 to 32 of this judgment)."

"With regard, firstly, to the abovementioned study, which was carried out by an architect on behalf of two public works undertakings, it should be noted that, although the study addresses the question of the impact of the proposed works on the fauna and flora of the area, it highlights itself **the summary and selective nature of the examination of the environmental repercussions** of the widening of the ski runs and of the construction of associated facilities. It

should also be noted that that study itself mentions a large number of **matters which were not taken into account**. It thus recommends, in particular, additional morphological and environmental analyses and a new examination of the impact of the works, in their global context, on the wild fauna in general and on the situation of certain protected species, in particular in the area of forest to be felled".

"The inescapable conclusion is that the study **does not constitute an appropriate assessment on which the national authorities could rely for granting authorisation** for the disputed works pursuant to Article 6(3) of Directive 92/43."

"With regard, secondly, to the IREALP report submitted in 2002, it must be noted that it also describes the proposed works, examining their impact on the hydrological regime, geomorphology and the area's vegetation. **As regards the birds for which the SPA has been designated, the report does not contain an exhaustive list of the wild birds present in the area"**.

"Although it is true that the IREALP report states that the main disturbance threatening fauna comes from the destruction of nests during the deforestation phase and from habitat fragmentation, it nonetheless **contains numerous findings that are preliminary in nature and it lacks definitive conclusions.** The report refers to the importance of assessments to be carried out progressively, in particular on the basis of knowledge and details likely to come to light during the process of implementation of the project. Furthermore, the report was designed as an opportunity to introduce other proposals for improvement of the environmental impact of the operations proposed"

"These factors mean that the IREALP report **cannot be considered an appropriate assessmen**t of the impact of the disputed works on SPA IT 2040044 either".

"It follows from all the foregoing that both the study of 2000 and the report of 2002 have gaps **and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned**. Such findings and conclusions were essential in order that the competent authorities might gain the necessary level of certainty to take the decision to authorise the works".

(Case C-304/05, *Commission* v *Italy,* paragraphs 46 - 73)

In 2010, the National Court in Greece referred a series of question to the European Court of Justice relating to the partial diversion of the upper waters of the River Acheloos to Thessaly. One of the questions asked was 'if it is possible, for the purpose of Articles 3, 4 and 6 of Directive 92/43, for the competent national authorities to grant consent authorising the carrying out of a project for the diversion of waters which is not directly connected with or necessary to the conservation of a district included within a special protection area when all the studies that are contained in the file for that project record a complete lack of information or an absence of reliable and updated data regarding the birds in that district?"

The Court ruled as follows:

"**It cannot be held that an assessment is appropriate where information and reliable and updated data concerning the birds in that SPA are lacking**".

"That said, where the development consent given to a project is annulled or revoked because that assessment was not appropriate, it cannot be ruled out that the competent national authorities may gather *a posteriori* reliable and updated data on the birds in the SPA concerned and that they may appraise, on the basis of that data and an assessment thereby supplemented, whether the project for the diversion of water adversely affects the integrity of that SPA and, where necessary, what compensatory measures must be taken to ensure that the execution of the project will not jeopardise protection of the overall coherence of Natura 2000".

"Consequently, Directive 92/43, and in particular Article 6(3) and (4) thereof, must be interpreted as precluding development consent being given to a project for the diversion of water which is not directly connected with or necessary to the conservation of a SPA, but likely to have a significant effect on that SPA**, in the absence of information or of reliable and updated data concerning the birds in that area**."

(Case C-43/10, *Commission* v *Greece,* paragraphs 106 - 117)

In 2017, the Commission took Poland to court for authorizing the 2016 appendix to the forest management plan from 2012, enabling forest managwement operations at the territory of the Puszcza Białowieska Natura 2000 site, following the impact assessment based on data from before 2012.

Finding of the Court:

"In the second place, as the Advocate General has observed in point 162 of his Opinion, it is clear from the very terms of point 4.2 of the 2015 impact assessment, according to which 'the provisions relating to the impact on the [Puszcza Białowieska] Natura 2000 site in the "environmental impact assessment" for 2012 to 2021 do not, in principle, require updating', that the 2015 impact assessment was carried out on the basis of the data used for the purpose of assessing the impact of the 2012 FMP on that site, and not on the basis of updated data.

However, an assessment cannot be regarded as 'appropriate', within the meaning of the first sentence of Article 6(3) of the Habitats Directive, where updated data concerning the protected habitats and species is lacking (see, to that effect, judgment of 11 September 2012, Nomarchiaki Aftodioikisi Aitoloakarnanias and Others, C 43/10, EU:C:2012:560, paragraph 115)."

"In the third place, the 2015 impact assessment does not refer to the conservation objectives of the protected habitats and species on the Puszcza Białowieska Natura 2000 site that were covered by the 2015 PZO, nor does it define the integrity of that site or examine carefully the reasons why the active forest management operations at issue are not liable to affect that site adversely."

(Case C-441/17, *Commission* v *Republic of Poland*, paragraphs 136 – 137, 140)

In 2009, the Commission took Spain to court for authorising a series of open cast coal mines in and around the Alto Sil SCI. It considered that the appropriate assessment did not give

sufficient consideration to the possible disturbances caused various species, such as the capercaillie and the brown bear, and that the cumulative effects of the mining were not sufficiently taken into account.

The Court ruled as follows:

"The assessments concerning the 'Nueva Julia' and 'Ladrones' open-cast mining projects **cannot be regarded as appropriate since they are characterised by gaps and by the lack of complete, precise and definitive findings** and conclusions capable of removing all reasonable scientific doubt as to the effects of those projects on the 'Alto Sil' SPA, and in particular on the capercaillie population, the protection of which constitutes one of the objectives of that area.

"It cannot therefore be maintained that, before the authorisation of those operations, all the aspects of the plan or project capable, by themselves or in combination with other plans or projects, of affecting the conservation objectives of the 'Alto Sil' site were identified, taking into account the best scientific knowledge on the matter. In those circumstances, the said **assessments do not demonstrate that the competent national authorities could have acquired the certainty that those operations would be free of damaging effects for the integrity of the said site**. It follows that the authorisations for the said projects did not comply with Article 6(3) of the Habitats Directive."

*In the same Case, the Commission argues that the mining operations concerned are, by reason of the **noise and vibrations** which they produce and which are felt within the 'Alto Sil' SPA, likely significantly to disturb the capercaillie population protected by virtue of that SPA.*

"It is apparent from the documents before the Court that, as the Advocate General has stated in point 88 of her Opinion, bearing in mind the relatively short distances between various areas critical for the capercaillie and the open-cast mines in question, noise and vibrations caused by those operations are likely to be felt in those areas. It follows that **those nuisances are capable of causing disturbances likely significantly to affect the objectives** of the said directive, particularly the objectives of conserving the capercaillie".

"That is all the more so as it is undisputed that the capercaillie is a sensitive species and particularly demanding as to the tranquillity and quality of its habitats. It is further apparent from the documents before the Court that **the degree of isolation and tranquillity required by that species constitutes a factor of the very first order** as it has a considerable impact on the ability of that species to reproduce".

"The Kingdom of Spain expresses doubts in that regard by objecting that the decline in the populations of that species, including on the 'Alto Sil' site, has also been observed outside the mining basin and is even more marked there. However, that circumstance in itself does not prevent the said nuisances produced inside the SPA by the mining operations in question from being capable of having had significant impacts on that species, even if the decline of that species may have been greater yet for populations relatively distant from those operations".

"The documents before the Court show that the abandonment of the 'Robledo El Chano' breeding ground, still occupied by the capercaillie in 1999, results from the operation of the 'Fonfría' open-cast mine as from 2001. That finding confirms that the operation of the mines

in question, particularly the noises and vibrations produced, is capable of causing significant disturbances for that species.

The Commission also argues that the open-cast mining operations contribute to ***isolating sub-populations of capercaillie by blocking communication corridors*** *linking those sub-populations with other populations. It refers the report of December 2004 on the impact of mining operations on the Cantabrian capercaillie, drawn up by the Ministry of the Environment and by the coordinators of the strategy for conserving the Cantabrian capercaillie in Spain."*

"Since the Kingdom of Spain does not produce evidence refuting the conclusions of that report, the scientific value of which is undisputed, it must be held that the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín' operations are **capable of producing a barrier effect** likely to contribute to the fragmentation of the habitat of the capercaillie and the isolation of certain sub-populations of that species.

(Case C-404/09, *Commission* v *Spain,* paragraphs 101 - 105, 128 - 148)

In 2002, The Commission took Austria to court for authorising an extension of a golf course in an SPA. According to the Commission the planned extension should not have been authorised as the Appropriate Assessment had identified significant negative effects.

Findings of the Court:

"Having regard to the content of those expert's reports and in the absence of evidence to the contrary, the inevitable conclusion is that at the time of the adoption of the decision of 14 May 1999, the Austrian authorities were not justified in considering that the planned extension of the golf course in question in the present case, coupled with the measures prescribed by that decision, was not such as significantly to disturb the corncrake population in the Wörschacher Moos SPA and would not adversely affect the integrity of that SPA".

"The fact that the note dated 15 July 2002 produced by Mr Gepp at the request of the Government of the Province of Styria regarding the interpretation of the assessments and conclusions contained in his own report seems to soften somewhat their implications cannot affect the finding made in the previous paragraph of this judgment. The same is true of the surveys of the corncrake population in the Wörschacher Moos SPA carried out in 2000 and 2002 and recording the presence, respectively, of three and two parading males, to which the Austrian Government refers to show that the creation of the extension of the golf course has not caused a significant reduction in that population".

"Accordingly, it must be held that, **by authorising the proposed extension of the golf course** in the district of Wörschach in the Province of Styria **despite a negative assessment of its implications** for the habitat of the corncrake (crex crex) in the Wörschacher Moos SPA situated in that district and classified as provided for in Article 4 of the Birds Directive, the Republic of **Austria has failed to fulfil its obligations under Article 6(3)** and (4), in conjunction with Article 7, of the Habitats Directive.

(Case C-209/02, *Commission* v *Austria*, paragraphs 26 - 29)

In 2004, the Commission took Portugal to Court for authorising a road project despite the negative findings of the Appropriate Assessment.

The Court ruled as follows:

"In the present case, the environmental impact study mentions the presence, in the Castro Verde SPA, of 17 species of bird listed in Annex I to Directive 79/409 and the high sensitivity of certain of them to the disturbance and/or the fragmentation of their habitat resulting from the planned route of the section of the A 2 motorway between the settlements of Aljustrel and Castro Verde. It is also **apparent from that study that the project in question has a 'significantly high' overall impact** and a 'high negative impact' on the avifauna present in the Castro Verde SPA".

"The inevitable conclusion is that, when authorising the planned route of the A 2 motorway, the Portuguese authorities **were not entitled to take the view that it would have no adverse effects on the SPA's integrity.**"

"The fact that, after its completion, the project may not have produced such effects is immaterial to that assessment. It is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see, to that effect, Case C-209/02 *Commission* v *Austria* paragraphs 26 and 27, and *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 56 and 59)."

(Case C-239/04, *Commission* v *Portugal,* paragraphs 16 - 25)

12. Significance of effects in view of the sites' conservation objectives

"As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned".

"Conversely, **where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect** on the site. As the Commission in essence maintains, in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project".

(Case C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging,* paragraphs 46 – 49)

"Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed

project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site."

(Case C-461/17, *Holohan and Others* v *An Bord Pleanála,* final conclusions)

13. Adverse effects on the integrity of the site

In Ireland a competent national authority decided to grant development consent for the Galway City Outer Bypass road scheme. Part of the proposed road was planned to cross the Lough Corrib SCI which hosts a total of 14 habitats referred to in Annex I to the Habitats Directive, of which six are priority habitat types. The road scheme involves the permanent loss within the SCI of approximately 1.47 hectares of limestone pavement, a priority habitat type. A total of 270 hectares of limestone pavement lies within the entire SCI.

In its decision the authority stated, inter alia, that it is considered that the part of the road development being approved, while having a localised severe impact on the SCI, would not adversely affect the integrity of this site. An appeal was made to the High Court against decision on the grounds that erred in its interpretation of Article 6 of the Habitats Directive. According to Mr Sweetman et al a negative impact of that kind on the site caused by that road scheme necessarily entails an adverse effect on the site's integrity. By contrast, the competent authority considered that the finding of damage to that site, whilst have a severe localised impact, is not necessarily incompatible with there being no adverse effects on its integrity.

The Case was later referred to the Supreme Court who decided to stay the proceedings and to refer the following questions to the European Court of Justice for a preliminary ruling:

- *What are the criteria in law to be applied by a competent authority to an assessment of the likelihood of a plan or project the subject of Article 6(3) of the Habitats Directive, having "an adverse effect on the integrity of the site"?*
- *Does the application of the precautionary principle have as its consequence that such a plan or project cannot be authorised if it would result in the permanent non-renewable loss of the whole or any part of the habitat in question?*
- *What is the relationship, if any, between Article 6(4) and the making of the decision under Article 6(3) that the plan or project will not adversely affect the integrity of the site?'*

The Court ruled as follows:

"It is apparent from the order for reference that the implementation of the N6 Galway City Outer Bypass **road scheme would result in the permanent and irreparable loss of part of** the Lough Corrib **SCI's limestone pavement,** which is a priority natural habitat type specially protected by the Habitats Directive…"

"In appraising the scope of the expression 'adversely affect the integrity of the site' in its overall context, it should be made clear that, as the Advocate General has noted in point 43 of her Opinion, **the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive**. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species."

"It follows that Article 6(2) to (4) of the Habitats Directive impose upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of the directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation. In this regard, according to Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is taken as 'favourable' when, in particular, its natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.

"It should be inferred that **in order for the integrity of a site as a natural habitat not to be adversely affected** for the purposes of the second sentence of Article 6(3) of the Habitats Directive **the site needs to be preserved at a favourable conservation status**; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive".

"Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – **are certain that the plan or project will not have lasting adverse effects on the integrity of that site**. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C‑404/09 *Commission* v *Spain*, paragraph 99, and *Solvay and Others*, paragraph 67)."

"It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the **Habitats Directive integrates the precautionary principle** and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 58)".

"Such an appraisal applies all the more in the main proceedings, since the natural habitat affected by the proposed road scheme is among the priority natural habitat types, which Article 1(d) of the Habitats Directive defines as 'natural habitat types in danger of disappearance' for whose conservation the European Union has 'particular responsibility'".

"The competent national authorities **cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types**. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned (see, as regards the disappearance of priority species, Case C‑308/08 *Commission* v *Spain*, paragraph 21, and Case C‑404/09 *Commission* v *Spain*, paragraph 163)."

"In the main proceedings, the Lough Corrib SCI was designated as **a site hosting a priority habitat type** because, in particular, of the presence in that site of **limestone pavement, a natural resource which, once destroyed, cannot be replaced**. Having regard to the criteria referred to above, the conservation objective thus corresponds to maintenance at a favourable conservation status of that site's constitutive characteristics, namely the presence of limestone pavement."

" Consequently, if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority **concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type** whose conservation was the objective that justified the designation of the site concerned as an SCI, **the view should be taken that such a plan or project will adversely affect the integrity of that site."**

"In those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive. Nevertheless, in such a situation, the competent national authority could, where appropriate, grant authorisation under Article 6(4) of the directive, provided that the conditions set out therein are satisfied (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 60)"

"It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that **a plan or project** not directly connected with or necessary to the management of a site **will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat** whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal."

(Case C-258/11, *Peter Sweetman and Others* v *An Bord Pleanála)*

14. <u>Assessing cumulative effects</u>

Findings of the Court (in relation to the Habitats Directive):

"As regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment."

"None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval **and take into account the cumulative effects** which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives". Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field."

(Case C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging,* paragraphs 52 - 54)

"It is clear from paragraphs 99 to 103 of this judgment that the Spanish authorities **did not assess indirect and cumulative environmental effects of projects** doubling of sections 1 and 4 of the M- 501. It follows that those authorities cannot be considered to have assessed the impact that the projects could have on the SPA " Encinares Alberche del río y río Cofio " in a way that provides certainty, that they would not, individually or in combination with other projects, adversely affect the integrity of the SPA."

(Case C-560/08, *Commission* v *Spain*, paragraphs 133, 134 – *NB Ruling in French and Spanish only)* .

Findings of the Court (in relation to the EIA Directive):

"The purpose of the EIA Directive cannot be circumvented by the **splitting of projects** and the failure to take account of the **cumulative effect** of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive."

(C-392/96, *Commission* v *Ireland*, paragraphs 76, 82; C-142/07, *Ecologistas en Acción-CODA*, paragraph 44; C-205/08, *Umweltanwalt von Kärnten,* paragraph 53; *Abraham and Others*, paragraph 27; C-275/09, *Brussels Hoofdstedelijk Gewest and Others*, paragraph 36)

"Contrary to what the Kingdom of Spain argues, it cannot be inferred from the use of the conditional, in the note concerning point 4 of Annex IV to Directive 85/337 as amended, to the effect that '[t]his description should cover ... any ... cumulative ... effects of the project', that the assessment of the environmental impacts does not necessarily have to cover the cumulative effects of the various projects on the environment, but that such an analysis is merely desirable."

"Given the extended scope and very broad objective of Directive 85/337 as amended, which are apparent from Articles 1(2), 2(1) and 3 of the latter (see, to that effect, Case C‑72/95 *Kraaijeveld and Others* [1996] ECR I‑5403, paragraphs 30 and 31), the mere fact that there may have been uncertainty as to the exact meaning of the use of the conditional in the expression '[t]his description should cover' used in a note to point 4 of Annex IV to Directive 85/337 as amended, even if that also appears in other language versions of that directive, cannot prevent **a broad interpretation from being given to Article 3** of the latter."

" Therefore, that provision should be taken as meaning that, **where the assessment of the environmental impacts must, in particular, identify, describe and assess in an appropriate manner the indirect effects of a project, that assessment must also include an analysis of the cumulative effects on the environment which that project may produce** if considered jointly with other projects, in so far as such an analysis is necessary in order to ensure that the assessment covers examination of all the notable impacts on the environment of the project in question. "

(Case C-404/09, *Commission v Spain,* paragraphs 77, 80, 197)

"As to the objection of the Member State that it is unreasonable to take into consideration the cumulative effect of a project with other projects, including those for which the implementation

is not foreseen, it cannot be accepted. It is clear from those provisions of Directive 85/337 that the assessment of the cumulative effect of all existing projects is required."

"As the Spanish authorities have not conducted an assessment of environmental impacts of projects doubling sections 2 and 4, or in any event, have not assessed their indirect and cumulative effects they have failed to comply with the requirements of Articles 6, paragraph 2, and 8 of the Directive."

(Case C-560/08, *Commission v Spain*, paragraph 100, 109 - 110 – *NB Ruling in French and Spanish only*).

"As regards the question whether it was necessary, having regard to the combined application of Article 4(2) and (3) of Directive 2011/92 and of point 1(b) of Annex III thereto, to examine the cumulative effect of the various wind-power projects approved in the Kaliakra IBA, the Court has already held that the characteristics of a project must be assessed, inter alia, in relation to its cumulative effects with other projects. Failure to take account of the cumulative effect of a project with other projects may mean in practice that it escapes the assessment obligation when, taken together with the other projects, it may have significant effects on the environment (judgment in *Marktgemeinde Straßwalchen and Others*, C-531/13, EU:C:2015:79, paragraph 43 and the case-law cited)".

" It follows that a national authority, in ascertaining whether a project has to be made subject to an environmental impact assessment, must examine its potential impact jointly with other projects (judgment in *Marktgemeinde Straßwalchen and Others*, C-531/13, EU:C:2015:79, paragraph 45). In the present case, it is clear from the file submitted to the Court that the **decisions in question merely state that no cumulative effects were to be expected**. As the Advocate General observes in point 161 of her Opinion**, the mere claim, by the Republic of Bulgaria, that there will be no cumulative effects does not, however, prove that that finding was established on the basis of a detailed assessment, since that Member State has, moreover, adduced no evidence in that regard".**

(Case C-141/14, *Commission v Bulgaria*, paragraphs 95 - 96)

When authorizing the Moorburg plant in 2008, the city of Hamburg did not take into account in the impact assessment the potential cumulative effects with the Geesthacht pumped-storage power plant built in 1958, arguing that it did not have to be taken into account, since it was already in operation on the date of the adoption of the Habitats Directive.

Findings of the Court:

"Under Article 6(3) of the Habitats Directive, national authorities are required, when assessing cumulative effects, to take into account all projects which, in combination with the project for which an authorisation is sought, are likely to have a significant effect on a protected site in the light of the objectives pursued by that directive, even where those projects precede the date of transposition of that directive."

"Projects which, like the Geesthacht pumped-storage power plant, are likely to cause, as a result of their combination with the project to which the impact assessment relates, deterioration or

disturbance likely to affect the migratory fish present in the river and consequently result in the deterioration of the site concerned in the light of the objectives pursued by the Habitats Directive, are not to be excluded from the impact assessment required under Article 6(3) of the Habitats Directive."

"It follows from the foregoing considerations that, by failing to assess appropriately the cumulative effects resulting from the Moorburg plant together with the Geesthacht pumped-storage power plant, the Federal Republic of Germany has failed to fulfil its obligations under Under Article 6(3) of the Habitats Directive."

"multi-phase monitoring, such monitoring cannot be considered as sufficient to ensure performance of the obligation laid down in Article 6(3) of the Habitats Directive".

(Case C-142/16, *Commission v Germany*, paragraphs 43, 61 – 63)

15. EIA and AA have different legal consequences

In 2000, Ireland introduced a requirement in its Planning and Development Act to consider the likely significant effects on the environment of certain plans, including regional planning guidelines, development plans and local area plans. The Commission however complained that this did not satisfy the requirements of Article 6(3).

The Court upheld the Commission's view, pointing out that:

"Those two (EIA and SEA) Directives contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only certain projects and plans. By contrast, under the second sentence of Article 6(3) of the Habitats Directive, a plan or project can be authorised only after the national authorities have ascertained that it will not adversely affect the integrity of the site. Accordingly, **assessments carried out pursuant to the EIA Directive or SEA Directive cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive**".

(Case C-418/04, *Commission* v *Ireland*, paragraphs 229 – 231)

16. Application of Article 6(3) to plans or projects approved prior to EC accession

Findings of the Court:

"According to the Court's settled case-law, the principle that projects likely to have significant effects on the environment must be subjected to an environmental assessment does not apply where the application for authorisation for a project was formally lodged before the expiry of the time-limit for transposition of a directive (see, with respect to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraphs 29 and 32, and Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23)".

"The Court has held that that formal criterion is the only one which accords with the principle of legal certainty and preserves a directive's effectiveness. The reason for that is that a directive such as the Habitats Directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time-consuming by the specific requirements imposed by the directive and for situations already established to be affected by it (see, by analogy, *Gedeputeerde Staten van Noord-Holland*, paragraphs 23 and 24)".

"Both Directive 85/337 and the Habitats Directive pertain to the assessment of the effects of certain public and private projects on the environment. In both cases, the assessment procedure takes place before the project is finally decided upon. The results of that assessment must be taken into consideration when the decision on the project is made, and the decision may be amended depending on the results. The various phases of examination of a project are so closely connected that they represent a complex operation. The fact that the content of some requirements differs does not affect this assessment. It follows that this complaint must be considered as at the date on which the project was formally presented, namely the date referred to in paragraph 54 of this judgment".

"Next, it should be borne in mind that, in accordance with the provisions of acts of accession, the rights and obligations resulting from Community law are, save where otherwise provided, immediately applicable in the new Member States (see, to that effect, Case C-179/00 *Weidacher* [2002] ECR I-501, paragraph 18). It follows from the Act of Accession that the obligations under the Birds Directive and the Habitats Directive entered into force with respect to the Republic of Austria on 1 January 1995 and that no derogation or transitional period was granted to it".

"Accordingly, **the procedure for authorisation of the project** for the construction of the S 18 carriageway **was formally initiated prior to the date of accession** of the Republic of Austria to the European Union. **It follows tha**t, in the present case, in accordance with the case-law referred to in paragraph 56 of this judgment, the obligations under the Habitats Directive did not bind the Republic of Austria and that **the project for the construction of the S 18 carriageway was not subject to the requirements laid down in that directive**."

(Case C-209/04, *Commission* v *Austria*, paragraphs 56 - 62)

17. *Authorisation of plans or projects affecting pSCIs on the national list*

In 2002, the Upper Bavarian government approved the plan for the construction of a section of the A 94 motorway that would cross, in particular, the Hammerbach and Isen rivers and their tributaries, the Lappach, Goldach and Rimbach. These are parts of areas which have been identified by the German authorities, on 29 September 1994, as sites eligible to be considered sites of Community importance.

Following a series of complaints on the decision, the Administrative Court of Bavaria decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling: What protection regime is required under Article 3(1).., as a result of Case C-117/03 in respect of sites which could be designated sites of Community importance, particularly those

with priority natural habitat types or priority species, before they appear in the list of sites of Community importance adopted by the Commission?

Findings of the Court:

"It follows, as the Court ruled in Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 25, that the protective measures prescribed in Article 6(2) to (4) of the Directive are required only as regards sites which are placed on the list of sites selected as sites of Community importance. However, the Court pointed out at paragraph 26 of that judgment that that did not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission".

"At paragraph 29 of that judgment, the Court held that, in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures 'appropriate' for the purpose of safeguarding that ecological interest".

"The Court also pointed out, in Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 23, that, having regard to the fact that, when a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States, it cannot, of its own accord, exclude sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level".

"In that regard, it must be remembered that, in accordance with the **first part of Annexe III** to the Directive, the ecological characteristics of a site identified by the competent national authorities must reflect the assessment criteria which are listed there, namely, the degree of representativity of the habitat type, its area, its structure and functions, the size and density of the population of the species present on the site, the features of the habitat which are important for the species concerned, the degree of isolation of the population present on the site and the value of the site for conservation of the habitat type and species concerned".

"Member States **cannot therefore authorise interventions which may pose the risk of seriously compromising the ecological characteristics of a site, as defined by those criteria**. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics".

"The answer to the first and second questions **must therefore be that the appropriate protection scheme applicable to the sites which appear on a national list transmitted to the Commission under Article 4(1) of the Directive requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those site**s".

(Case C-244/05, *Bund Naturschutz and Others,* paragraphs 35 - 47)

In 2010, the Commission took Cyprus to court for failing to include the site Paralimni in the national list of SCIs and for tolerating activities in that site which degrade or damage the habitat of the species concerned

Findings of the Court:

"The appropriate protection scheme applicable to the sites which appear on a national list transmitted to the Commission under Article 4(1) of the Habitats Directive requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics (see *Bund Naturschutz in Bayern and Others*, paragraphs 46 and 47)".

"If that were not the case, the European Union decision-making process, which is not only based on the integrity of the sites as notified by the Member States, but is also characterised by the ecological comparisons between the different sites proposed by the Member States, would run the risk of being distorted and the Commission would no longer be in a position to fulfil its duties in the area concerned, namely, in particular, to draw up the list of selected sites as sites of Community importance in order to form a coherent European ecological network (see *Bund Naturschutz in Bayern and Others*, paragraphs 41 and 42)".

"The **above considerations also appl**y, in any event, mutatis mutandis, **to the sites which the Member State at issue does not dispute** satisfy the ecological criteria in Article 4(1) of the Habitats Directive and which, therefore, **should have been included in the national list of SCIs sent to the Commission.** It cannot be permitted, under the Habitats Directive and the objectives which it pursues, that a site such as that at issue in the present case, which the Member State concerned does not dispute must be included in that list, does not enjoy any protection".

(Case C-340/10, *Commission* v *Cyprus,* paragraphs 44 - 47)

"The **areas which were listed in the national list of SCIs** transmitted to the Commission pursuant to the second subparagraph of Article 4(1) of Directive 92/43 and were then included in the list of SCIs adopted by Commission´s decision **were entitled**, after notification of that decision to the Member State concerned, **to the protection of that directive before that decision was published**. In particular, after that notification, the Member State concerned also had to take the protective measures laid down in Article 6(2) to (4) of the directive".

(Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others,* paragraph 105)

18. Taking account of conservation or protective measures not yet implemented in the appropriate assessment

"By the fifth to seventh questions in Case C-293/17 and the third to fifth questions in Case C-294/17, the referring court asks, in essence, whether, and under which conditions, an 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive may take into account the existence of 'conservation measures' within the meaning of paragraph 1 of that

article, ‘preventive measures’ within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or ‘autonomous’ measures, in so far as those measures are not part of that programme.”

“In that regard, it should be noted that it would be contrary to the effectiveness of Article 6(1) and (2) of the Habitats Directive for the effects of necessary measures under those provisions to be invoked in order to grant, under paragraph 3 of that article, the authorisation of a plan or project which has implications for the site concerned before they are actually implemented (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 213).

Nor can the positive effects of the necessary measures under paragraphs 1 and 2 of Article 6 of the Habitats Directive be invoked in order to grant, under paragraph 3 of that article, authorisation to projects which have an adverse effect on protected sites.”

“Moreover, according to the Court’s case-law, it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the ‘appropriate assessment’ within the meaning of Article 6(3) of the Habitats Directive (see, to that effect, judgments of 26 April 2017, *Commission* v *Germany*, C-142/16, EU:C:2017:301, paragraph 38, and of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 51).”

“The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such ‘measures’ if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty.”

“In the light of the foregoing, the answer to the fifth to seventh questions in Case C-293/17 and the third to fifth questions in Case C-294/17 is that Article 6(3) of the Habitats Directive must be interpreted as meaning that an ‘appropriate assessment’ within the meaning of that provision may not take into account the existence of ‘conservation measures’ within the meaning of paragraph 1 of that article, ‘preventive measures’ within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or ‘autonomous’ measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment.””

(Joined cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 121, 123, 124, 126, 130, 132)

19. <u>Distinguishing between mitigation and compensation measures</u>

In 2012, The Netherlands decided to approve a project to widen the A2 motorway despite the fact that was found to have potential negative implications for the Natura 2000 and in particular for the habitat type molinia meadows within that site. The Minister considered this

was acceptable since the project provided also for improvements to the hydrological situation in other parts of the site, which will allow for the development of a larger area of Molinia meadows of higher quality, thereby ensuring that the conservation objectives of the site for this habitat type are maintained through the creation of new Molinia meadows.

Briels and Others brought an action against ministerial orders stating that the development of new Molinia meadows on the site could not be taken into account in the determination of whether the site's integrity was affected. The claimants submitted that such a measure cannot be categorised as a 'mitigating measure', a concept which is, moreover, absent from the Habitats Directive.

Therefore, the authorities decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is the expression "will not adversely affect the integrity of the site" in Article 6(3) of [the Habitats Directive] to be interpreted in such a way that, where the project affects the area of a protected natural habitat type within [a Natura 2000 site], the integrity of the site is not adversely affected if in the framework of the project an area of that natural habitat type of equal or greater size [to the existing area] is created within that site?

2. [If not], is the creation of a new area of a natural habitat type then to be regarded in that case as a "compensatory measure" within the meaning of Article 6(4) of the [Habitats Directive]?'

Findings of the Court:

'Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site of Community importance, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site. Such measures can be categorised as 'compensatory measures' within the meaning of Article 6(4) only if the conditions laid down therein are satisfied. (...) It is clear that these measures are not aimed either at avoiding or reducing the significant adverse effects for that habitat type caused by the project; rather, they tend to compensate after the fact for those effects. They do not guarantee that the project will not adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive '

(C-521/12 paragraphs 29–35, 38–39; see also C-387&388/15 paragraph 48).

In connection with these findings, the Court stated that *'...measures, contained in a plan or project not directly connected with or necessary to the management of a site of Community importance, providing, prior to the occurrence of adverse effects on a natural habitat type present thereon, for the future creation of an area of that type, but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on the integrity of that site, may not be taken into consideration in that assessment*.' (

C-387&388/15 paragraph 64).

A plan to build a wind farm located in an Irish SPA classified for hen harrier was proposed which would result in permanent loss of 162.7 hectares of foraging habitat of that bird species. Part of the project proposal was site management plan envisaging to develop new foraging areas to ensure that the total area providing suitable habitat will not be reduced and could even be enhanced. The competent authority authorized the project but its decision was contested at the national court which turned to the Court with a request for preliminary ruling, asking if the measures aimed at maintaining or even enhancing the hen harrier foraging habitat can be considered mitigation measures.

Findings of the Court:

"Article 6 of Council Directive 92/43/EEC… must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive."

(Case C-164/17, *Edel Grace, Peter Sweetman* v *An Bord Pleanála*)

20. Mitigation measures are not applicable at the screening stage

A project consisting of the works necessary to lay the cable connecting a wind farm to the electricity grid was proposed next to the SCI designated for conservation of freshwater pearl mussel. The screening report concluded that in the absence of protective measures, there was potential for the release of suspended solids into waterbodies along the proposed route and therefore, there would be a negative impact on the pearl mussel population. Subsequently, 'protective measures' were also analysed by that report. Based on that, the developer who was a public authority determined that no appropriate assessment, within the meaning of Article 6(3) of the Habitats Directive, was required. This conclusion was contested at the High Court which turns do the Court with the request for preliminary ruling, asking "whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under Article 6(3) of the Habitats Directive?" More specifically, the court asks whether measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned can be taken into consideration at the screening stage, in order to determine whether it is necessary to carry out an appropriate assessment of the implications, for the site, of that plan or project.

Findings of the Court:

"As the applicants in the main proceedings and the Commission submit, the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is

necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.

That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive."

"It is, moreover, from Article 6(3) of the Habitats Directive that persons such as the applicants in the main proceedings derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment (see, to that effect, judgment of 8 November 2016, Lesoochranárske zoskupenie VLK, C 243/15, EU:C:2016:838, paragraph 49).

In the light of all the foregoing considerations, the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site."

(Case C-323/17, *People Over Wind, Peter Sweetman* v *Coillte Teoranta*)

21. Appropriate assessment of unlawfully implemented projects

"Consequently, Article 6(3) of Directive 92/43 does not apply in respect of any action whose implementation was subject to authorisation but which was carried out without authorisation and thus unlawfully. That being the case, there can in this regard be no finding of failure to fulfil obligations on account of an infringement of Article 6(3)."

(Case C-504/14, *Commission* v *Greece,* paragraph 122)

Article 6(4)

Text of the paragraph

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

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

1. *Article 6(4) applies after an Appropriate Assessment has been made*

"Article 6(4) of Directive 92/43 **can apply only after the implications of a plan or project have been studied in accordance with Article 6(3)** of that directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified".

(Case C-304/05, *Commission* v *Italy,* paragraph 83)

"As an exception to the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) can apply only after the implications of a plan or project have been analysed in accordance with Article 6(3) (Case C-239/04 *Commission* v *Portugal* EU:C:2006:665, paragraph 35, and *Sweetman and Others* EU:C:2013:220, paragraph 35)."

"Knowledge of those implications in the light of the conservation objectives relating to the site concerned is a necessary prerequisite for application of Article 6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (Case C-404/09 *Commission* v *Spain* EU:C:2011:768, paragraph 109)."

"In such a situation, the competent national authority can, where appropriate, grant authorisation under Article 6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied (see, to that effect, *Sweetman and Others* EU:C:2013:220, paragraph 47)."

(Case C-521/12, *Briels and Others*, paragraphs 35 – 37)

(See also case C-399/14, *Grüne Liga Sachsen eV and Others*, paragraphs 56 – 57; case C-142/16, *Commission* v *Germany,* paragraphs 70 – 72; case C-441/17, *Commission* v *Republic of Poland*, paragraphs 190 - 191)

2. <u>The examination of alternatives is not part of the Article 6(3) appropriate assessment</u>

" First, according to settled case‑law, **the appropriate assessment** of the implications for the site which must be carried out pursuant to Article 6(3) implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 54, and *Commission* v *Ireland*, paragraph 243). Such an assessment **does not therefore involve an examination of the alternatives to a plan or project**".

"Second, it must be pointed out that the **obligation to examine alternative solutions to a plan or project does not come within the scope of Article 6(3)** of the Habitats Directive, **but within the scope of Article 6(4)** (see, to that effect, Case C‑441/03 *Commission* v *Netherlands* [2005] ECR I‑3043, paragraph 27 et seq.)."

"In accordance with Article 6(4) of the Habitats Directive, the examination referred to in that provision, which concerns, in particular, the absence of alternative solutions, can only be undertaken where the assessment required under Article 6(3) of that directive is negative and where the plan or project must nevertheless be carried out for imperative reasons of overriding public interest (see, to that effect, *Commission* v *Netherlands*, paragraphs 26 and 27)".

"Thus, following the assessment of the implications undertaken pursuant to Article 6(3) of the Habitats Directive and in the event of a negative assessment, **the competent authorities have the choice of either refusing authorisation** for the plan or project **or of granting authorisation under Article 6(4)** of that directive, provided that the conditions laid down in that provision are satisfied (see Case C‑239/04 *Commission* v *Portugal* [2006] ECR I‑10183, paragraph 25, and, to that effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 60)."

(Case C-241/08, *Commission* v *France*, paragraphs 69 - 72)

" In order to determine the scope of the obligation to carry out an appropriate assessment of a plan or project likely to affect a site which falls within the scope of Article 6(3) of Directive 92/43, it must be stated, as a preliminary point, that the protection scheme established by that article consists of several aspects designed to permit examination of the effects of such a plan or project, and various stages of assessment where the plan or project is likely to have serious repercussions on a protected site.

"As the Advocate General stated in points 12 and 13 of her Opinion, this '**appropriate assessment' is not a merely formal process of examination, but must allow a detailed analysis which satisfies the conservation objectives of the site in question**, as set out in Article 6, particularly as regards the protection of natural habitats and priority species. In accordance with Article 6(3), it is only in the second stage, that is on completion of the appropriate assessment and in the light of the conclusions on the implications for the site in question of the plan or project, that the competent authorities adopt a decision on it".

" Within the procedural context thus outlined, it is only where the assessment required under Article 6(3) of Directive 92/43 is negative and in the absence of alternative solutions that, where the plan or project must nevertheless be carried out for imperative reasons of overriding public interest, the examination laid down in Article 6(4) must be undertaken. It is stated in Article 6(3) that the decision is to be adopted by the competent authorities 'subject to the provisions of paragraph 4'".

"As to the examination which must be carried out within the framework of Article 6(4), it should be noted that the complex factors to which it relates, such as the absence of alternative solutions and the existence of imperative reasons of overriding public interest, are intended to enable a Member State to take all compensatory measures to ensure that the overall coherence of Natura 2000 is preserved. Furthermore, where the site concerned hosts a priority natural habitat type and/or a priority species, only a limited number of such imperative reasons may be relied on in order to justify a plan or project nevertheless being carried out".

"In those circumstances, **having regard to the particular characteristics of each of the stages referred to in Article 6 of Directive 92/43, it must be held that the various requirements set out in Article 6(4) cannot constitute elements that the competent national authorities are obliged to take account of where they carry out an appropriate assessment provided for in Article 6(3)**."

(Case C-441/03, *Commission* v *Netherlands,* paragraphs 15 – 29)
(See also case C-239/04, *Commission* v *Portugal – Castro Verde,* paragraphs 25 – 39)

3. <u>The absence of alternatives must be demonstrated</u>

Findings of the Court:

"**Article 6(4)** of the Habitats Directive provides that, if, in spite of a negative assessment carried out pursuant to the first sentence of Article 6(3) and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

That provision, which permits a plan or project which has given rise to a negative assessment under the first sentence of Article 6(3) to be implemented on certain conditions, **must, as a derogation** from the criterion for authorisation laid down in the second sentence of Article 6(3), **be interpreted strictly.**

"Thus, the implementation of a plan or project under Article 6(4) is, *inter alia*, subject to the condition that the **absence of alternative solutions be demonstrated**. In the present case, it is common ground that the Portuguese authorities examined and rejected a number of solutions whose routes bypassed the settlements surrounding the Castro Verde SPA but crossing the western side of it".

"On the other hand, it **is not apparent from the file that those authorities examined solutions falling outside that SPA** and to the west of the settlements, although, on the basis of information supplied by the Commission, it cannot be ruled out immediately that such solutions were capable of amounting to alternative solutions within the meaning of Article 6(4), even if they were, as asserted by the Portuguese Republic, liable to present certain difficulties. Accordingly, **by failing to examine that type of solution, the Portuguese authorities did not demonstrate the absence of alternative solutions** within the meaning of that provision."

(Case C-239/04, *Commission* v *Portugal,* paragraphs 25 – 39)

4. *Economic costs of alternatives alone are not determining factors for the choice of alternatives*

"So far as concerns the economic cost of the steps that may be considered in the review of alternatives, including the demolition of the works already completed, as relied on by the referring court, it must be stated, as the Advocate General states in point 70 of her Opinion, that that is not of equal importance to the objective of conserving natural habitats and wild fauna and flora pursued by the Habitats Directive. Therefore, account being taken of the strict interpretation of Article 6(4) of that directive, as noted in paragraph 73 of the present judgment, it cannot be accepted that the economic cost of such measures alone may be a determining factor in the choice of alternative solutions under that provision."

(Case C-399/14, *Grüne Liga Sachsen eV and Others*, paragraph 77)

5. *Interpretation of the term "imperative reasons of overriding public interest" (IROPI)*

In 2010, The Constitutional Court of the Kingdom of Belgium had before it a number of actions seeking to annul the decree of the Walloon Parliament which 'ratified' the building consents for various works on the grounds of overriding reasons in the public interest.

The Constitutional Court decided to refer to the European Court for a preliminary ruling on several questions, one of which asked: must Article 6(4) of [the Habitats] Directive ... be interpreted as permitting the creation of infrastructure designed to accommodate the management centre of a private company and a large number of employees to be regarded as an imperative reason of overriding public interest?'

Findings of the Court:

"An interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, the implementation of a plan or project **must be both 'public' and 'overriding'**, which means that it must be of such an importance that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora. **Works intended for the**

location or expansion of an undertaking satisfy those conditions only in exceptional circumstances."

"It **cannot be ruled out that** that is the case **where a project, although of a private character,** in fact by its very nature and **by its economic and social context presents an overriding public interest** and it has been shown that there are no alternative solutions. In the light of those criteria, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive."

"The answer to Question 6 is therefore that Article 6(4) of the Habitats Directive must be interpreted as meaning that **the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest**, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.

(Case C-182/10, *Solvay and Others,* paragraphs 71 – 79)

In 2010, the National Court in Greece referred a series of question to the European Court of Justice relating to the partial diversion of the upper waters of the River Acheloos to Thessaly. One of the questions asked was: For the purpose of Articles 3, 4 and 6 of Directive 92/43, can reasons for which a project to divert waters is undertaken that relate principally to irrigation and secondarily to water supply constitute the imperative public interest which that directive requires in order for that scheme to be permitted to be carried out notwithstanding its adverse effects on areas protected by that directive?

"Irrigation and the supply of drinking water meet, in principle, those conditions and are therefore capable of justifying the implementation of a project for the diversion of water in the absence of alternative solutions. However, where the SCI concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised, under the second subparagraph of Article 6(4) of Directive 92/43, are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

"As regards irrigation, it is evident that it cannot in principle qualify as a consideration relating to human health or public safety. On the other hand, it appears more plausible that irrigation may, in some circumstances, have beneficial consequences of primary importance for the environment. In contrast, the supply of drinking water is, in principle, to be included within considerations relating to human health".

"In the light of the foregoing, the answer to the twelfth question is that Directive 92/43, and in particular Article 6(4) thereof, must be interpreted as meaning that grounds linked, on the one hand, to **irrigation and**, on the other, to **the supply of drinking water**, relied on in support of a project for the diversion of water, **may constitute imperative reasons of overriding public interest** capable of justifying the implementation of a project which adversely affects the integrity of the sites concerned".

"Where such a project adversely affects the integrity of a **SCI hosting a priority natural habitat type and/or a priority species**, its implementation may, in principle, be justified by

grounds linked with the supply of drinking water. In some circumstances, **it might be justified by reference to beneficial consequences of primary importance which irrigation has for the environmen**t. On the other hand, **irrigation cannot, in principle, qualify as a consideration relating to human health or public safety**, justifying the implementation of a project such as that at issue in the main proceedings."

(Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others,* paragraphs 120 – 128)

6. *Compensatory measures*

In 2010, the National Court in Greece referred a series of question to the European Court of Justice relating to the partial diversion of the upper waters of the River Acheloos to Thessaly. One of the questions asked was: In determining the sufficiency of the compensatory measures which are necessary to ensure that the overall coherence of the Natura 2000 network, where that is harmed by a project to divert waters, is protected, for the purpose of Articles 3, 4 and 6 of Directive 92/43 should criteria such as the scale of that diversion and the extent of the works which the diversion entails be taken into account?

Findings of the Court:

"The first sentence of the first subparagraph of Article 6(4) of Directive 92/43 provides that if, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. As stated in paragraph 114 of this judgment, in order to determine the nature of any compensatory measures, the adverse impact of the project on the site concerned must be precisely identified".

"The **extent of the diversion of water and the scale of the works involved in that diversion are factors which must necessarily be taken into accoun**t in order to identify with precision the adverse impact of the project on the site concerned and, therefore, **to determine the nature of the necessary compensatory measures** in order to ensure the protection of the overall coherence of Natura 2000."

(Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others,* paragraphs 130 – 132)

"It should be observed in that regard that, in the application of Article 6(4), the fact that the measures envisaged have been implemented on the Natura 2000 site concerned has no bearing on any 'compensatory' measures for the purposes of that provision. For the reasons set out by the Advocate General in point 46 of her Opinion, Article 6(4) of the Habitats Directive covers any measure liable to protect the overall coherence of Natura 2000, whether it is implemented within the affected site or in another part of the Natura 2000 network".

"Consequently, it follows from the foregoing considerations that **Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project** not directly connected with or necessary to the management of a site of Community importance, **which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site**. Such measures can be categorised as

‘compensatory measures’ within the meaning of Article 6(4) only if the conditions laid down therein are satisfied.

(Case C-521/12, *Briels and Others*, paragraphs 38 - 39)

7. *Interpretation of the term „human health“*

“Whilst the construction of a platform designed to facilitate the movement of disabled persons may, in principle, be regarded as having been carried out for imperative reasons of overriding public interest relating to human health, for the purposes of Article 6(4) of Directive 92/43, such a justification requires there to be inter alia an examination of whether there are other, less detrimental solutions and a weighing up of the interests concerned, based on an assessment under Article 6(3) of the directive of the implications for the conservation objectives of the protected site”.

(Case C-504/14, *Commission* v *Greece,* paragraph 77)

PART III –
RELEVANT ECJ RULINGS ON EIA AND SEA DIRECTIVES

The appropriate assessment according to Article 6(3) of the Habitats Directive has often been compared, both from procedural and content point of view, with environmental impact assessment and strategic impact assessment under the EIA and SEA Directives. Despite the major legal differences between these two types of assessments, a number of common principles exist, which has also been reflected in the Court rulings.

The Commission has produced a separate document on the Rulings of the Court of Justice as regards the environmental impact assessment of projects[13]*. The following section contains extracts from some of the rulings most relevant to Article 6 of the Habitats Directive. For fuller details please consult the afore-mentioned document.*

Directive 85/337/EEC (EIA Directive)

1. *Integration of the environmental impact assessment into the existing procedures for consent*

Article 2(2) of Directive 85/337 adds that the environmental impact statement may be integrated into the existing procedures for consent to projects or failing that, into other procedures or into procedures to be established to comply with the aims of that directive.

That provision means that the **liberty left to the Member States** extends to the determination of the rules of procedure and requirements for the grant of the development consent in question. However, that **freedom may be exercised only within the limits imposed by that directive** and provided that the choices made by the Member States ensure full compliance with its aims.

(Case C-50/09, *Commission* v *Ireland,* paragraphs 73 - 75)

2. *The obligation to remedy the failure to carry out an EIA*

Under Article 10 EC [Article 4(3) TEU] **the competent authorities are obliged to take**, within the sphere of their competence, **all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1)** of the EIA Directive.

The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).

[13] Environmental Impact Assessment (EIA) of Projects - Rulings of the Court of Justice 2013, http://ec.europa.eu/environment/legal/law/cases_judgements.htm

In that regard, **it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended** in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of the EIA Directive, or alternatively, if the individual so agrees, whether it is possible for the latter to claim **compensation** for the harm suffered.

(Case C-201/02, *Wells,* paragraph 70, operative part 3)

"Member States are required to nullify the unlawful consequences of a breach of Community law under the principle of cooperation in good faith laid down in Article 10 EC [Article 4(3) TEU]. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States. This cannot be taken to mean that a **remedial environmental impact assessment**, undertaken to remedy the failure to carry out an assessment as provided for and arranged by the EIA Directive, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive."

"A Member State fails to fulfil its obligations under the EIA Directive, which **after the event gives to retention permission**, which can be issued even where **no exceptional circumstances** are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to **Articles 2(1)** and 4(1) and (2) of that directive, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment."

(Case C-215/06, *Commission* v *Ireland*, paragraphs 59 - 61)

3. *Consent procedure comprising several stages and EIA*

Articles 2(1) and 4(2) of the EIA Directive are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of **consent comprising more than one stage**, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.

(C-290/03, *Barker - Crystal Palace*, paragraph 49, operative part 2)

4. *Beginning of works and EIA*

Article 2(1) of the EIA Directive must necessarily be understood as meaning that, **unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question**, if the requirements of the directive are not to be disregarded. That analysis is valid for all projects within the scope of the EIA

Directive, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.

A literal analysis of that kind of **Article 2(1)** is moreover consonant with the objective pursued by the EIA Directive, set out in particular in recital 5 of the preamble to the EIA Directive, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.

(Case C-215/06, *Commission* v *Ireland,* paragraphs 51 - 53)

If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, **the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedur**e.

(Case C-275/09, *Brussels Hoofdstedelijk Gewest and Others*, paragraph 36)

5. *Splitting of projects – cumulative effects*

The purpose of the EIA Directive **cannot be circumvented by the splitting of projects** and the **failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment** when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive.

(C-392/96, *Commission* v *Ireland*, paragraphs, 76, 82; C-142/07, *Ecologistas en Acción-CODA*, paragraph 44; C-205/08, *Umweltanwalt von Kärnten*, paragraph 53; *Abraham and Others*, paragraph 27; C-275/09, *Brussels Hoofdstedelijk Gewest and Others*, paragraph 36)

"As regards the question whether it was necessary, having regard to the combined application of Article 4(2) and (3) of Directive 2011/92 and of point 1(b) of Annex III thereto, to examine the cumulative effect of the various wind-power projects approved in the Kaliakra IBA, the Court has already held that the characteristics of a project must be assessed, inter alia, in relation to its cumulative effects with other projects. Failure to take account of the cumulative effect of a project with other projects may mean in practice that it escapes the assessment obligation when, taken together with the other projects, it may have significant effects on the environment (judgment in *Marktgemeinde Straßwalchen and Others*, C-531/13, EU:C:2015:79, paragraph 43 and the case-law cited)".

" It follows that a national authority, in ascertaining whether a project has to be made subject to an environmental impact assessment, must examine its potential impact jointly with other

projects (judgment in *Marktgemeinde Straßwalchen and Others*, C-531/13, EU:C:2015:79, paragraph 45). In the present case, it is clear from the file submitted to the Court that the **decisions in question merely state that no cumulative effects were to be expected**. As the Advocate General observes in point 161 of her Opinion**, the mere claim, by the Republic of Bulgaria, that there will be no cumulative effects does not, however, prove that that finding was established on the basis of a detailed assessment, since that Member State has, moreover, adduced no evidence in that regard".**

(Case C-141/14, *Commission* v *Bulgaria*, paragraphs 95 - 96)

6. *Transboundary projects*

"Projects listed in **Annex I** to the EIA Directive which **extend to the territory of a number of Member States** cannot be exempted from the application of the Directive solely on the ground that it does not contain any express provision in regard to them. Such an exemption would seriously interfere with the objective of the EIA Directive. Its effectiveness would be seriously compromised if the competent authorities of a Member State could, when deciding whether a project must be the subject of an environmental impact assessment, leave out of consideration that part of the project which is located in another Member State. That finding is strengthened by the terms of Article 7 of the EIA Directive, which provide for inter-State cooperation when a project is likely to have significant effects on the environment in another Member State."

(Case C-205/08, *Umweltanwalt von Kärnten*, paragraphs 54 - 56)

7. *Criterion for the temporal application of the EIA Directive – transitional rules*

"The EIA Directive and in particular **Article 12(1)**, must be interpreted as precluding a Member State which has transposed it into its national legal order after 3 July 1988, the time-limit for transposition, from waiving the obligations imposed by the directive in respect of a project consent procedure initiated after that time-limit. The sole criterion which may be used, since it accords with **the principle of legal certainty** and is designed to safeguard the effectiveness of the directive, to determine the date on which the procedure was initiated is the **date when the application for consent was formally lodged**, disregarding informal contacts and meetings between the competent authority and the developer."

(C-431/92, *Commission* v *Federal Republic of Germany,* 28-33; C-81/96, *Gedeputeerde Staten van Noord-Holland*, paragraphs 23 - 28; C-301/95, *Commission* v *Germany*, paragraph 29; C-150/97, *Commission* v *Portuguese Republic,* paragraphs 18; C-416/10, *Križan*, paragraph 99)

"It is settled case-law that there is nothing in the EIA directive which could be construed as authorising the Member States to exempt projects in respect of which the consent procedures were initiated after the deadline of 3 July 1988 from the obligation to carry out an environmental impact assessment (Case C-396/92 Bund Naturschutz in Bayern and Others [1994] ECR I-3717, paragraph 18). Accordingly, in the case of such projects the principle stated in Article 2(1) of the EIA directive applies, according to which projects likely to have significant effects on the environment are subject to an environmental assessment.

However, since the EIA directive does not make provision for transitional rules covering projects in respect of which the consent procedure was initiated before 3 July 1988 and which

were still in progress on that date, the Court has held that that principle does not apply where the application for consent for a project was formally lodged before 3 July 1988. It has stated that that formal criterion is the only one which accords with the principle of legal certainty and enables the effectiveness of the directive to be safeguarded (Case C-431/92 Commission v Germany [1995] ECR I-2189, paragraph 32).

The reason for that is that the directive is primarily designed to cover large-scale projects which will most often require a long time to complete. **It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time- consuming by the specific requirements imposed by the directive, and for situations already established to be affected by it."**

(Case C-81/96, *Gedeputeerde Staten van Noord-Holland,* paragraphs 22 - 24)

"It is apparent from settled case-law that an authorisation within the meaning of Directive 85/337 may be formed by the combination of several distinct decisions when the national procedure which allows the developer to be authorised to start works to complete his project includes several consecutive steps (see, to that effect, Case C-201/02 *Wells* [2004] ECR I-723, paragraph 52, and Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 102). It follows that, in that situation, **the date on which the application for a permit for a project was formally lodged must be fixed as the day on which the developer submitted an application seeking to initiate the first stage of the procedure."**

(Case C-416/10, *Križan,* paragraph 103)

8. *Fresh consent procedure*

"However, the circumstances of this case do not concern a consent procedure for a project which is subject to an assessment, which was formally initiated before 3 July 1988, and which was still in progress on that date. On the contrary, it concerns an application made after 3 July 1988 seeking **fresh consent** for a project listed in Annex I of the directive and incorporating the development provided for in a project for which consent was obtained years or even decades previously, without any environmental assessment being made in accordance with the requirements of the directive. Despite that, scarcely any progress was made in implementing the project, the developer for which is a public authority.

In such a case, the considerations which led the Court to hold that the requirement of an environmental assessment need not apply in case C-431/92 cannot apply in this case, particularly as national legal remedies are available in respect of the new consent procedure. Accordingly, **where for reasons inherent in the applicable national rules, a fresh procedure is formally initiated after 3 July 1988, that procedure is subject to the obligations regarding environmental assessments imposed by the directive**. Any other solution would run counter to the principle that an environmental assessment must be made of certain major projects, set out in Article 2 of the directive, and would compromise its effectiveness."

"The EIA directive is to be interpreted as not permitting Member States to waive the obligations regarding environmental assessments in the case of projects listed in Annex I of the directive

where: - the projects have already been the subject of a consent granted prior to 3 July 1988, the date by which the directive was to have been transposed into national law, - the consent was not preceded by an environmental assessment in accordance with the requirements of the directive and no use was made of it, and - a fresh consent procedure was formally initiated after 3 July 1988."

(Case C-81/96, *Gedeputeerde Staten van Noord-Holland*, paragraphs 25 - 28)

9. Right of environmental protection NGOs

Non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, can derive from the last sentence of the third paragraph of Article 10a of Directive 85/337 **a right to rely before the courts, in an action contesting a decision authorising projects** 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, **even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.**

(C-115/09, *Trianel Kohlekraftwerk Lünen*, paragraph 59)

Directive 2001/42/EC (SEA Directive)

1. Definition of plan or programme.

The following questions were referred to the European Court:

"By its second question, which it is appropriate to consider first since it concerns the very concept of plans and programmes, the national court asks the Court whether the condition set out in Article 2(a) of Directive 2001/42 that the plans and programmes envisaged in that provision are those 'which are required by legislative, regulatory or administrative provisions' must be interpreted as being intended to apply to plans and programmes, such as the land development plans at issue in the main proceedings, which are provided for by national legislation but whose adoption by the competent authority would not be compulsory".

"It must be stated that an interpretation which would result in excluding from the scope of Directive 2001/42 all plans and programmes, inter alia those concerning the development of land, whose adoption is, in the various national legal systems, regulated by rules of law, solely because their adoption is not compulsory in all circumstances, cannot be upheld.

"Such an interpretation of Article 2(a) of Directive 2001/42, by appreciably restricting the directive's scope, would compromise, in part, the practical effect of the directive, having regard to its objective, which consists in providing for a high level of protection of the environment (see, to this effect, Case C‑295/10 *Valčiukienė and Others* [2011] ECR I‑8819, paragraph 42). That interpretation would thus run counter to the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment, which define the criteria and the detailed rules for the development of land and normally concern a multiplicity

of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures".

"It follows that **plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required'** within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down".

"It follows from the foregoing that the answer to the second question is that the concept of plans and programmes 'which are required by legislative, regulatory or administrative provisions', appearing in Article 2(a) of Directive 2001/42, must be interpreted as also concerning specific land development plans, such as the one covered by the national legislation at issue in the main proceedings".

"By its first question, the Cour constitutionnelle asks whether the total or partial repeal of a plan or programme falling within Directive 2001/42 must be subject to an environmental assessment within the meaning of Article 3 of that directive."

"Given the objective of Directive 2001/42, which consists in providing for a high level of protection of the environment, **the provisions which delimit the directive's scope**, in particular those setting out the definitions of the measures envisaged by the directive, **must be interpreted broadly**."

"In this regard, **it is possible that** the partial or total **repeal of a plan or programme is likely to have significant effects on the environment**, since it may involve a modification of the planning envisaged in the territories concerned. Thus, a repealing measure may give rise to significant effects on the environment because, as has been observed by the Commission and by the Advocate General in points 40 and 41 of her Opinion, such a measure necessarily entails a modification of the legal reference framework and consequently alters the environmental effects which had, as the case may be, been assessed under the procedure prescribed by Directive 2001/42."

"In light of the characteristics and the effects of the measures repealing that plan or programme, to regard those measures as excluded from the scope of Directive 2001/42 would be contrary to the objectives pursued by the European Union legislature and such as to compromise, in part, the practical effect of the directive."

"On the other hand, it must be made clear that, in principle, that is not the case if the repealed measure falls within a hierarchy of town and country planning measures, as long as those measures lay down sufficiently precise rules governing land use, they have themselves been the subject of an assessment of their environmental effects and it may reasonably be considered that the interests which Directive 2001/42 is designed to protect have been taken into account sufficiently within that framework".

"It follows from the foregoing considerations that the answer to the first question is that Article 2(a) of Directive 2001/42 must be interpreted as meaning **that a procedure for the total or partial repeal of a land use plan**, such as the procedure laid down in Articles 58 to 63 of the CoBAT, **falls in principle within the scope of that directive**, so that it is subject to the rules relating to the assessment of effects on the environment that are laid down by the directive."

(Case C-567/10, *Inter-Environnement Bruxelles and Others)*

2. *Annulment of a plan or programme that is in breach of the Directive*

"This reference for a preliminary ruling concerns the interpretation of Article 3(2)(a), (3), (5), 11(1) and (2) of Directive 2001/42/EC (SEA Directive) in a case when, based on national legislation, two detailed plans governing the construction of an intensive pig-rearing complex with capacity for 4,000 pigs and the proper use of plots of land where the complexes would be based was exempted from the scope of the SEA Directive."

"By its question, and in view of the developments in the main proceedings, the referring court asks in essence whether, in circumstances such as those at issue in the main proceedings, where it has before it an action for annulment of a national measure constituting a 'plan' or 'programme' within the meaning of Directive 2001/42 and it finds that the plan or programme was adopted in breach of the obligation laid down by that directive to carry out a prior environmental assessment, but finds that the contested measure implements Directive 91/676 appropriately, it may make use of a provision of its national law which would allow it to maintain some of the past effects of the measure until the date on which measures designed to remedy the irregularity which has been established entered into force."

"It is clear from settled case‑law that, under the principle of cooperation in good faith laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law (see, inter alia, Case 6/60 Humblet v Belgian State [1960] ECR 559, p. 569, and Joined Cases C‑6/90 and C‑9/90 Francovich and Others [1991] ECR I‑5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (Case C‑8/88 Germany v Commission [1990] ECR I‑2321, paragraph 13, and Wells, paragraph 64 and the case‑law cited)."

"It follows that where a 'plan' or 'programme' should, prior to its adoption, have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 2001/42, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (see, by analogy, Wells, paragraph 68)".

"Courts before which actions are brought in that regard **must adopt**, on the basis of their national law, **measures to suspend or annul the 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment** (see, by analogy, Wells, paragraph 65). The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment".

(Case C-41/11, *Inter-Environnement Wallonie and Terre wallonne*, paragraphs 40 – 47)

3. *Need for an SEA and/or EIA for plans which determine the use of small areas*

In this case the following questions were referred to the Court:

- *Can the determination that a strategic assessment of effects on the environment need not be carried out in the case of documents relating to land planning at local level, in which only one subject of economic activity is mentioned,*
- *does the fact that an assessment has been carried out pursuant to Directive 85/337 mean that the obligation to carry out an assessment of effects on the environment pursuant to the requirements of Directive 2001/42, in a situation such as that which has arisen in the present case, would be regarded as constituting duplication of assessment within the meaning of Article 11(2) of Directive 2001/42?*
- *does Directive 2001/42, including Article 11(2) thereof, place Member States under an obligation to provide in national law for joint or coordinated procedures governing the assessment to be carried out pursuant to Directive 2001/42 and Directive 85/337 with a view to avoiding duplication of assessment?'*

For plans for small areas with a single economic activity, the Court ruled that:

"It should be noted that plans such as those at issue in the main proceedings are referred to in Article 3(2)(a) of Directive 2001/42 as plans for which, subject to Article 3(3), an environmental assessment must be carried out and that, in practical terms, they set, as is apparent from the order for reference, the framework for the implementation of projects listed in point 17 of Annex I to Directive 85/337."

"In this respect, Article 3(2)(a) of Directive 2001/42 must be interpreted as meaning **that it also covers a plan which, in only one sector, sets the framework for a project which has only one subject of economic activity**... any other interpretation would have the effect of appreciably restricting the field of application of that provision and therefore jeopardising the fundamental objective pursued by Directive 2001/42. The consequence of such an interpretation would be that major projects might not be covered by that directive if they concerned only one subject of economic activity."

"Lastly, it must be stated that the plans at issue in the main proceedings are capable of falling within the scope of Article 3(3) of Directive 2001/42, under which plans which determine the use of small areas at local level require an environmental assessment only where the Member States 'determine that they are likely to have significant environmental effects'."

"Pursuant to Article 3(5) of Article 2001/42, the Member States are to determine, either **through case-by-case examination** or by specifying types of plans and programmes, whether plans, such as those at issue in the main proceedings, are likely to have significant environmental effects thereby requiring an assessment to be carried out in accordance with that directive. According to that provision, Member States may also decide to combine both approaches".

"Consequently, a Member State which establishes a criterion which leads, in practice, to an entire class of plans being exempted in advance from the requirement of environmental assessment would exceed the limits of its discretion under Article 3(5) of Directive 2001/42, in conjunction with Article 3(2) and (3), unless all plans exempted could, on the basis of relevant criteria such as, inter alia, their objective, the extent of the territory covered or the sensitivity of the landscape concerned, be regarded as not being likely to have significant effects on the environment .."

"That requirement is not met by the criterion that the land planning document in question mentions only one subject of economic activity. Such a criterion, besides being contrary to Article 3(2)(a) of Directive 2001/42, is not one which can determine whether or not a plan has 'significant effects' on the environment."

As regards the need for an EIA and/or SEA, the Court ruled that:

"According to the very wording of Article 11(1) of Directive 2001/42, an environmental assessment carried out under that directive is without prejudice to any requirements under Directive 85/337. 58 It follows that **an environmental assessment carried out under Directive 85/337**, when required by its provisions, **is in addition to an assessment carried out under Directive 2001/42."**

"Similarly, an assessment of the effects on the environment carried out under Directive 85/337 is without prejudice to the specific requirements of Directive 2001/42 and **cannot dispense with the obligation to carry out an environmental assessment pursuant to Directive 2001/42** in order to comply with the environmental aspects specific to that directive."

"As assessments carried out pursuant to Directive 2001/42 and Directive 85/337 differ for a number of reasons, **it is necessary to comply with the requirements of both of those directives concurrently**."

"In that regard, it should be pointed out that, on the assumption that a coordinated or joint procedure was provided for by the Member State concerned, it is clear from Article 11(2) of Directive 2001/42 that, in the context of such a procedure, it is mandatory to verify that an environmental assessment has been carried out in accordance with the dispositions of the different directives in question".

"Article 11(1) and (2) of Directive 2001/42 must be interpreted as meaning that an environmental assessment carried out under Directive 85/337 does not dispense with the obligation to carry out such an assessment under Directive 2001/42. However, it is for the referring court to assess whether an assessment which has been carried out pursuant to Directive 85/337 may be considered to be the result of a coordinated or joint procedure and whether it already complies with all the requirements of Directive 2001/42. If that were to be the case, there would then no longer be an obligation to carry out a new assessment pursuant to Directive 2001/42".

(Case C-295/10, *Valčiukienė and Others*, paragraphs 35 - 54, 55 – 63).

4. *Does the need for an SEA of a particular plan depend on the preconditions requiring an assessment under the Habitats Directive?*

In its referral to the European Court, The Greek Supreme Court asks in essence, whether Article 3(2)(b) of the SEA Directive must be interpreted as meaning that the obligation to make a particular plan subject to an environmental assessment within the meaning of that directive depends on the preconditions requiring an assessment under the Habitats Directive being met in respect of that plan.

"With regard to Article 3(2)(b) of the SEA Directive, that provision requires an environmental assessment every time an assessment is required under Articles 6 or 7 of the Habitats Directive. Consequently, the scope of those articles must be examined in order to determine the scope of Article 3(2)(b) of the SEA Directive."

"Article 4(5) of the Habitats Directive provides that sites of Community importance, including sites of Community importance designated as special areas of conservation by the Member States, are subject to Article 6(2), (3) and (4) of that directive. It follows from the wording of Article 6(3) of the Habitats Directive, read in conjunction with Article 4(5) of that directive, that an assessment is required for any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects."

"The first sentence of Article 6(3) of the Habitats Directive makes the requirement of an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that that plan or project will have a significant effect on the site concerned (Case C‑127/02 Waddenvereniging and Vogelbeschermingsvereniging [2004] ECR I-7405, paragraph 43). That condition is fulfilled if it cannot be excluded, on the basis of objective information, that that plan or project will have a significant effect on the site concerned (see, to that effect, Case C‑418/04 Commission v Ireland [2007] ECR I‑10947, paragraph 227)."

"It follows that an examination carried out to determine whether a plan or project is likely to have a significant effect on a site, within the meaning of Article 6(3) of the Habitats Directive, is necessarily limited to the question of whether it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on the site concerned. That interpretation is also required with regard to the areas referred to in Article 4(1) and (2) of the Birds Directive, given that Article 7 of the Habitats Directive extends the scope of Article 6(3) of the latter directive to those areas."

"The answer to the question referred is therefore that Article 3(2)(b) of the SEA Directive must be interpreted as meaning that **the obligation to make a particular plan subject to an environmental assessment depends on the preconditions requiring an assessment under the Habitats Directive, including the condition that the plan may have a significant effect on the site concerned, being met in respect of that plan**. The examination carried out to determine whether that latter condition is fulfilled is necessarily limited to the question as to whether it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on the site concerned."

(Case C-177/11, *Syllogos Ellinon Poleodomon kai chorotakton*)

Annex I:
ECJ Rulings according to key provisions of Article 6 of the Habitats Directive

REQUIREMENTS	ECJ RULINGS	KEYWORDS
Article 6.1		
Take the necessary conservation measures	C-508/04, *Commission* v *Austria*, paragraphs 74-76, 87-90	• The Directive requires the adoption of necessary conservation measures, a fact which excludes any discretion in this regard on the part of the Member States • Community legislature sought to impose on the Member States the obligation to take the necessary conservation measures
Designation of SCIs as SACs and introduction of appropriate conservation measures	C-90/10, *Commission* v *Spain*	• Failure to designate the SCIs on this list as SACs within six years • Failure to establish conservation measures within the meaning of Article 6(1) of the Habitats Directive
Delimitation of a site and identification of protected species present in the site	C-535/07, *Commission* v *Austria*, paragraph 64 C-415/01, *Commission* v *Belgium*, paragraph 22	• Just as the delimitation of an SPA must be invested with unquestionable binding force the identification of the species which have warranted classification of that SPA must satisfy the same requirement. • Maps demarcating SPAs must be invested with unquestionable binding force
Destruction of a part of a site cannot represent conservation measures	C-387&388/15, *Orleans and Others*, paragraphs 37 – 38	• The disappearance of a part of a site, even though accompanied by the creation of new habitats outside that site, cannot constitute measures that ensure the conservation of the original site.
Measures leading to site destruction are not conservation measures	C-441/17, *Commission* v *Republic of Poland,* paragraph 218	• Implementation of the active forest management operations at issue results in loss of a part of the Natura 2000 site. Such operations cannot constitute measures ensuring the conservation of that site
Proper meaning of "establishment of conservation measures"	C-441/17, *Commission* v *Republic of Poland,* paragraphs 213 – 214	• Conservation measures within the site concerned must not only be adopted, but also, and above all, be actually implemented
Article 6.2		
Ensuring a sufficient protection regime	C-75/01, *Commission* v *Luxembourg*, paragraphs 41 – 45 C-6/04,	• Must be capable of ensuring that all natural habitats and habitats of species found within SACs are protected against acts liable to deteriorate them. • (the national law) does not transpose Article 6(2) because it does not cover all types of disturbance that are significant

	Commission v *UK*, paragraphs 35 – 37	• (the national law) does not transpose Article 6(2) because it confers only a non-mandatory power on those authorities and that it is not such as to avoid deterioration
	C-418/04, *Commission* v *Ireland*, paragraphs 216 – 221	• (the national law) does not transpose Article 6(2) because it - covers only landowners, occupiers or licence-holders - the procedure is a merely reactive measure - does not cover all types of damage likely to be caused by recreational use. - those provisions are not specifically linked to the protection of natural habitats and of habitats of species
	C-241/08, *Commission* v *France*, paragraphs 30-39	• Failure to fulfill obligations under Article 6(2) by providing generally that fishing, aquaculture, hunting and other hunting-related activities practiced under the conditions and in the areas authorized by the laws and Regulations in force does not constitute activities causing disturbance
	C-508/04, *Commission* v *Austria*, paragraphs 98 – 100	• National legislative provisions are insufficient if they do not lay down an obligation to prevent the deterioration of habitats and the disturbance of the species, for which the special areas of conservation have been designated
	C-293/07, *Commission* v *Greece*, paragraphs 26-29	• SPAs subject to a variety of heterogeneous legal regimes which …do not provide the SPAs concerned with the sufficient protection required
	C-90/10, *Commission* v *Spain*, paragraph 53- 54	• The Court notes that a significant number of habitats and species in the SACs concerned are in a poor or inadequate state of conservation. Therefore contrary to the provisions of Article 6(2), (the government) has not adopted appropriate measures to avoid the deterioration of habitats and the disturbance of the species in the SACs
	C-117/00, *Commission* v *Ireland*, paragraphs 28-30	• Overgrazing by sheep is causing severe damage in places …it follows that (the country) has not adopted the measures needed to prevent deterioration
	C-301/12, *Cascina Tre Pini Ss*, paragraph 32	• Article 6(2) of the Habitats Directive requires the Member States to protect the SCIs by adopting measures to avoid the deterioration of natural habitats and the habitats of species

		as well as disturbance of the species for which the areas have been designated. It is for that State to take the measures necessary to safeguard that site
Complete prohibition of use of commercial fishing gear in marine Natura 2000 not possible	C-683/16, *Deutscher Naturschutzring — Dachverband der deutschen Natur- und Umweltschutzverbände eV* v *Bundesrepublik Deutschland*, paragraphs 41 - 56	Regulation No 1380/2013 must be interpreted as meaning that it precludes a Member State from adopting, with respect to the waters under their sovereignty or jurisdiction, the measures which are necessary in order for it to meet its obligations under Article 6 of Directive 92/43 and which completely prohibit, in Natura 2000 sites, using commercial fishing gear which touches the sea bed and fixed nets, since such measures affect fishing vessels flying the flag of other Member States."
Protecting sites from passive as well as active man-induced deterio-ration and disturbance	C-6/04, *Commission* v *UK*, paragraphs 34	• It is clear that in implementing Article 6(2) it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments
Taking protective measures to prevent the project from giving rise to deterioration of the habitats and disturbance of species	C-504/14, *Commission* v *Greece*	• Tolerating the building and operation of infrastructure capable of deteriorating habitats and disturbing species which have never been subject to Art. 6(3) appropriate assessment represents breaching of provision of Art. 6(2)
Effects of projects authorized before the establishment of Natura 2000 sites	C-226/08, *Stadt Papenburg*, paragraphs 48 and 49 C-404/09, *Commission* v *Spain*, paragraphs 124 – 125 C-141/14, *Commission* v *Bulgaria*, paragraphs 51 – 52 C-399/14, *Grüne Liga Sachsen eV and Others*, paragraph 33 C-293/17 &C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraph 85	• Article 6(2) of the Habitats Directive also applies to projects for installations approved by the competent authority before the protection provided for in that directive became applicable to the area concerned
Mere probability or risk that project may cause deterioration or	C-404/09, *Commission* v *Spain*, paragraph 142	• In order to establish failure to fulfil obligations under Article 6(2) of the Habitats Directive, the Commission does not have to

disturbances suffices to prove breaching Art. 6(2)	C-141/14, *Commission* v *Bulgaria*, paragraph 58 C-399/14, *Grüne Liga Sachsen eV and Others*, paragraphs 41 – 42 C-504/14, *Commission* v *Greece*, paragraphs 29, 45	establish the existence of a cause-and-effect relationship between the operation of installations resulting from a project and significant disturbance caused to the species concerned. It is sufficient for the Commission to establish that there is a probability or risk that that operation might cause such disturbances
Ensuring a sufficient protection regime under Article 4.1 and 4.2 of the Birds Directive	C-166/97, C-96/98, *Commission* v *France* C-415/01, *Commission* v *Belgium* C-166/04, *Commission* v Greece, paragraphs 15, 25 C-96/98, *Commission* v *France* – "Poitevin Marsh" C-166/97, *Commission* v *France* – "Seine Estuary" C-57/89, *Commission* v *Germany* - "Leybucht"	• Provide SPAs legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species in Annex I …. • Scheme is too general and does not specifically concern the contested SPAs or species living there… (must be able to) adopt all the necessary measures to establish and implement a coherent, specific and comprehensive legal regime • Sufficient protection not ensured by agri-environmental measures that are voluntary and purely hortatory in nature • The protection regime under which the only status enjoyed by an SPA is that it is part of State-owned land and of a maritime game reserve is incapable of providing adequate protection • The power of the Member States to reduce the extent of special protection areas can be justified only on exceptional grounds. In that context the economic and recreational requirements referred to in Article 2 do not enter into consideration…
P*rotection of IBAs or pSCIs on national lists*	C-374/98, *Commission* v *France* - "Basses Corbières C-96/98, *Commission* v *France* – "Poitevin Marsh"	• Where a given area fulfills the criteria for classification as an SPA it must be made the subject of special conservation measures capable of ensuring, the survival and reproduction of the bird species in Annex I • The first sentence of Article 4(4) requires Member States to take appropriate steps to avoid deterioration of habitats, not only in areas classed as PA but also in areas which are most suitable for the conservation of wild birds, even if they have not been classified as SPA • It is apparent that in the case sites eligible for identification as sites of Community

	C-117/03, *Dragaggi and Others*, paragraphs 25, 29 C-244/05, *Commission* v *Germany* C-141/14, *Commission* v *Bulgaria*, paragraphs 67 - 78	importance which are included in the national lists, Member States are, by virtue of the Directive, required to take protective measures that are appropriate for the purposes of safeguarding that ecological interest. • The appropriate protection regime applicable to sites which appear on a national list transmitted to the Commission, under Article 4(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites • Authorization of an installation in the territory of the IBA which was not classified as an SPA, although it should have been, represents breaching the obligations under Article 4(4) of the Birds Directive
Requirements for the national law transposing provisions of Art. 6(2)	C-293/17 & C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 133 – 137	• Appropriate legislation should allow the authorities, having regard to conservation objectives, first, to impose measures both preventive and corrective • Secondly, that legislation should also include a power of coercion, also including the possibility of adopting urgent measures
Implementation of a project authorized before site designation without subsequent appropriate assessment	C-399/14, *Grüne Liga Sachsen eV and Others*, paragraph 30, 43	• Implementation of a project likely to affect the site concerned significantly and not subject, before being authorised, to an [appropriate assessment], may be pursued, after that site is placed on the list of SCIs, only on the condition that the probability or risk of deterioration of habitats or disturbance of species, which could be significant in view of the objectives of that directive, has been excluded
Article 6.3		
Relationship between Article 6(2) and Article 6(3)	C-127/02 *Waddenvereniging and Vogelsbeschermingvereniging*, paragraphs 31 – 38)	• The fact that such a plan or project has been authorised according to the procedure laid down in Art. 6(3) renders superfluous • a concomitant application of the rule of general protection laid down in Art. 6(2). • Nevertheless, it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance • Art. 6(2) makes it possible to satisfy the essential objective of the preservation and protection

	C-304/05 *Commission* v *Italy*, paragraphs 94 – 97; C-388/05 *Commission* v *Italy* C-404/09 *Commission* v *Kingdom of Spain*, paragraphs 113 – 160 C-258/11 *Sweetman and Others,* paragraph 32; C-404/09 *Commission* v *Spain*, paragraph 142; C-399/14 *Grüne Liga Sachsen eV and Others*, paragraph 52; C-387&388/15 *Orleans and Others*, paragraph 32 C-293/17 &C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 74 – 84, 86	• Where a plan or project has been granted without complying with Article 6(3), a breach of Article 6(2) may be found where deterioration of a habitat or disturbance of the species has been established • As to the claim that the loss of habitat is unimportant for the conservation of the capercaillie species, since the area concerned did not contain any breeding ground. That argument cannot be accepted, because, even if that area were not usable as a breeding ground, it could conceivably be used by that species as a habitat for other purposes. Moreover, if that operation had not taken place in that area, the possibility cannot be excluded that, following measures taken by the authorities for that purpose, that area could have become usable as a breeding ground • The operation of the mines in question, particularly the noises and vibrations produced, is capable of causing significant disturbances for that species • Allowing a situation which caused significant disturbances in the 'Alto Sil' SPA to continue for at least four years, Spain omitted to take, in good time, the measures necessary to bring those disturbances to an end.The provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Article 6(2) and 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species • A recurring activity, such as the application of fertilisers on the surface of land or below its surface, authorised under national law before the entry into force of that directive [92/43], may be regarded as one and the same project for the purposes of [Art. 6(3)], provision, exempted from a new authorisation procedure, in so far as it constitutes a single operation characterised by a common purpose, continuity and, inter alia, the location and the conditions in which it is carried out being the same. If a single project was authorised before the system of protection laid down by that provision became applicable to the site in question, the carrying out of that project may nevertheless fall within the scope of Article 6(2)
Which plans or projects are to be assessed under the Habitats Directive	C-127/02, *Waddenvereniging and Vogelbeschermingsver*	• The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be

	eniging, paragraphs 25 – 29 C-98/03, *Commission* v *Germany*, paragraphs 43 –52 C-142/16, *Commission* v *Germany*, paragraph 29 C-6/04, *Commission* v *United Kingdom,* paragraphs 47, 50, 56 C-418/04, *Commission* v *Ireland*, paragraphs 227, 232, 233, 239, 244, 246, 252 - 263 C-538/09, *Commission* v *Belgium*, paragraphs 50-64 C-256/98, *Commission* v *France*, paragraphs 34 - 40 C-226/08, *Stadt Papenburg* v *Bundesrepublik Deutschland*, paragraphs 35 – 51	obtained for it every year does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project • The Directive does not distinguish between measures taken outside or inside a protected area • The Directive does not permit the assessment to be avoided in respect of certain categories of projects • The fact that it concerns the use of small quantities of water does not in itself preclude the possibility that some of those uses are likely to have a significant effect on a protected site • In merely defining potentially damaging operations and failing to failure to make land use plans subject to appropriate assessment the UK has not transposed Art 6(3) • National law must make adequate provision for projects situated outside SPAs but having significant effects inside them • Shellfish farms are not exempted from Article 6(3) because they are small in size • In failing to assess the impact of the drains maintenance works on the conservation objectives of the Glen Lough SPA before those works were carried out, Ireland has infringed the first sentence of Article 6(3) • By not requiring an appropriate environmental impact assessment to be undertaken for certain activities, subject to a declaratory scheme, when those activities are likely to have an effect on a Natura 2000 site, Belgium has failed to fulfil its obligations under Article 6(3) of the Habitats Directive". • Article 6(3) does not authorise a Member State to enact national legislation which allows the environmental impact assessment obligation for development plans to benefit from a general waiver because of the low costs entailed or the particular type of work planned. • Article 6(3) and (4) of the Habitats Directive must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their

	C-293/17 &C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 59, 63 – 67, 71 – 73	implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of SCIs • The grazing of cattle and the application of fertilisers in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of the EIA Directive
Requirements of a "plan or project directly connected with or necessary to the management"	C-441/17, *Commission* v *Republic of Poland*, paragraphs 123 – 124	• [A forest management plan] which is concerned solely with increasing the volume of harvestable timber by the carrying out of the active forest management operations within the Natura 2000 site, does not lay down in the slightest the conservation objectives and measures relating to that site • Such a plan constitutes a 'plan or project not directly connected with or necessary to the management' of the Natura 2000 site, within the meaning of the first sentence of Article 6(3) of the Habitats Directive.
The role of the competent authority authorised to a plan or project	C-182/10, *Solvay and others*, paragraphs 65 – 70 C-461/17, *Holohan and Others* v *An Bord Pleanála*, paragraphs 43 – 47	• Article 6(3) obligations are incumbent on the Member States by virtue of the Habitats Directive regardless of the nature of the national authority with competence to authorise the plan or project concerned • Article 6(3) requires the competent authority to catalogue and assess all aspects of a plan or project that might affect the conservation objectives of the protected site before granting the development consent • Those obligations, in accordance with the wording of Article 6(3), are borne not by the developer, even if the developer is, as in this case, a public authority, but by the competent authority, namely the authority that the Member States designate as responsible for performing the duties arising from that directive
Application of stricter rules than required by the directives	C-2/10, *Azienda Agro-Zootecnica Franchini et al*, paragraphs 39 – 75	• Article 193 TFEU provides that Member States may adopt more stringent protective protection measures in Natura 2000 sites (ban all windfarms)
Plans or projects not directly connected with the management of a site	C-241/08, *Commission* v *France*, paragraphs 51 - 62	• The fact that the Natura 2000 contracts comply with the conservation objectives of sites cannot be regarded as sufficient, in the light of Article 6(3), to allow the works and developments provided for in those contracts to be systematically exempt from the assessment of their implications for the sites • It is not possible to systematically exempt works and development programmes and projects which are subject to a declaratory system

Appropriate assessment must not omit any stage of the development likely to affect the integrity of the site	C-461/17, *Holohan and Others* v *An Bord Pleanála,* final conclusions	• The competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site
Role of scientific opinions within the Appropriate Assessment procedure	C-461/17, *Holohan and Others* v *An Bord Pleanála,* final conclusions	• Where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned
Conditions for adoption of the national legislation exempting certain projects from the obligation of authorization on the basis of an appropriate assessment for that legislation carried out prior to its adoption	C-293/17 & C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 90, 93 – 97, 104, 107 – 109, 111 – 112	• Article 6(3) does not preclude national programmatic legislation, such as that at issue in the main proceedings, exempting certain projects which do not exceed a certain threshold value or a certain limit value in terms of nitrogen deposition from the requirement for individual approval, if the national court is satisfied that the 'appropriate assessment' within the meaning of that provision, carried out in advance, meets the criterion that there is no reasonable scientific doubt as to the lack of adverse effects of those plans or projects on the integrity of the sites concerned
	C-293/17 & C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 114 - 120	• Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation, such as that at issue in the main proceedings, which allows a certain category of projects, in the present case the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement and, accordingly, to an individualised appropriate assessment of its implications for the sites concerned, unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites, which it is for the referring court to ascertain.
Appropriate assessment has to be carried out prior to plan or project authorization	C-441/17, *Commission* v *Republic of Poland,* paragraphs 144 – 148	• An appropriate assessment of the implications of the plan or project for the site concerned must precede its approval. It cannot therefore be concomitant with or subsequent to the approval
When is an AA required: Plans or projects 'likely	C-127/02, *Waddenvereniging and Vogelbeschermingsver*	• If there be a probability or a risk • Such a risk exists if it cannot be excluded on the basis of objective information that the

to have a significant effect'	*eniging*, paragraphs 49 - 44	plan or project will have significant effects on the site concerned • In case of doubt as to the absence of significant effects such an assessment must be carried out
When is an assessment appropriate for the purposes of the Habitats Directive	C-127/02, *Waddenvereniging and Vogelbeschermingsver eniging*, paragraphs 52 – 61	• An appropriate assessment of the implications for the site concerned of the plan or project must precede its approval • All the aspects of the plan or project which can affect those (conservation) objectives must be identified in the light of the best scientific knowledge in the field. • Competent national authorities must approve the plan or project only after having made sure that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects
	C-441/17, *Commission* v *Republic of Poland*, paragraphs 117, 179	• An assessment cannot be regarded as 'appropriate', within the meaning of the first sentence of Article 6(3) of the Habitats Directive, where updated data concerning the protected habitats and species is lacking
	C-441/17, *Commission* v *Republic of Poland*, paragraphs 136 – 137, 140	• An [appropriate] assessment must refer to the conservation objectives of the protected habitats and species on the Natura 2000 site and define the integrity of that site or examine carefully the reasons why the active forest management operations at issue are not liable to affect that site adversely.
	Case C-304/05, *Commission* v *Italy*, paragraphs 46 – 73	• As regards the birds for which the SPA has been designated, the (AA) report does not contain an exhaustive list of the wild birds present in the area. The report contains numerous findings that are preliminary in nature and it lacks definitive conclusions. These factors mean that the report cannot be considered an appropriate assessment. • Both the study of 2000 and the report of 2002 have gaps and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned. Such findings and conclusions were essential in order that the competent authorities might gain the necessary level of certainty to take the decision to authorise the works".
	Case C-43/10, *Commission* v *Greece*, paragraphs 106 – 117	• It cannot be held that an assessment is appropriate where information and reliable and updated data concerning the birds in that SPA are lacking
	Case C-404/09,	• The assessments concerning the open-cast mining projects cannot be regarded as

	Commission v *Spain*, paragraphs 101 - 105, 128 - 148)	appropriate since they are characterised by gaps and by the lack of complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of those projects • The assessments do not demonstrate that the competent national authorities could have acquired the certainty that those operations would be free of damaging effects for the integrity of the said site.
	C-209/02, *Commission* v *Austria*, paragraphs 26 - 29	• By authorising the proposed extension of the golf course despite a negative assessment of its implications for the habitat of the corncrake (crex crex) Austria has failed to fulfil its obligations under Article 6(3)
	C-239/04, *Commission* v *Portugal,* paragraphs 16 - 25	• It is apparent from that study that the project has a 'significantly high' overall impact and a 'high negative impact' on the avifauna present in the SPA. The inevitable conclusion is that, when authorising the planned route of the A 2 motorway, the authorities were not entitled to take the view that it would have no adverse effects on the SPA's integrity.
Significance of effects in view of the conservation's objectives	C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 46 – 49	• Where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect
	C-461/17, *Holohan and Others* v *An Bord Pleanála,* final conclusions	• An 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site
Adverse effects on the integrity of the site	C-258/11, *Peter Sweetman and Others* v *An Bord Pleanála*	• The provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. • In order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive • Authorisation for a plan or project may therefore be given only on condition that the

		competent authorities are certain that the plan or project will not have lasting adverse effects on the integrity of that site. • The authorisation criterion laid down in the second sentence of Article 6(3) integrates the precautionary principle • The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types • A plan or project will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs.
Distinguishing between mitigation measures and compensation measures	Case C-521/12, *Briels and Others*, paragraphs 18 – 32, 39	• Protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3). • It is clear that these measures are not aimed either at avoiding or reducing the significant adverse effects for that habitat type caused by the A2 motorway project; rather, they tend to compensate after the fact for those effects. They do not guarantee that the project will not adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive. • Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site of Community importance, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site. Such measures can be categorised as 'compensatory measures' within the meaning of Article 6(4) only if the conditions laid down therein are satisfied
	C-164/17, *Edel Grace, Peter Sweetman* v *An Bord Pleanála*	• Where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the

		project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4)
Mitigation measures are not applicable at the screening stage	C-323/17, *People Over Wind, Peter Sweetman* v *Coillte Teoranta*	• In order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site
Assessing cumulative and in combination effects	C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging,* paragraphs 52-54	• An appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives
	C-392/96, *Commission* v *Ireland*, paragraphs, 76, 82; C-142/07 *Ecologistas en Acción-CODA*, paragraph 44; C-205/08 *Umwelt-anwalt von Kärnten,* paragraph 53	• The purpose of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive.
	C-141/14, *Commission v Bulgaria*, paragraphs 95 – 96	• The mere claim, by the Republic of Bulgaria, that there will be no cumulative effects does not, however, prove that that finding was established on the basis of a detailed assessment, since that Member State has, moreover, adduced no evidence in that regard
	C-142/16, *Commission v Germany*, paragraphs 61 – 63	• Under Article 6(3), national authorities are required, when assessing cumulative effects, to take into account all projects, even where those projects precede the date of transposition of the Habitats Directive
EIA and AA have different legal consequences	C-418/04, *Commission* v *Ireland*, paragraphs 229 – 231	• Assessments carried out pursuant to the EIA Directive or SEA Directive cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive
Application of Article 6(3) to plans or projects	C-209/04, *Commission* v *Austria*, paragraphs 56 - 62	• The procedure for authorisation of the project for the construction of the S 18 carriageway was formally initiated prior to the date of

approved prior to EC accession		accession of Austria to the EU. It follows that, in the present case, in accordance with the case-law referred to in paragraph 56 of this judgment, the obligations under the Habitats Directive did not bind Austria and that the project for the construction of the S 18 carriageway was not subject to the requirements laid down in that directive
Authorisation of plans or projects affecting pSCIs on the national list	C-244/05, *Bund Naturschutz and Others,* paragraphs 35 - 47 C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others,* paragraph 105	• The appropriate protection scheme applicable to the sites which appear on a national list transmitted to the Commission under Article 4(1) of the Directive requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites. • The areas which were listed in the national list of SCIs transmitted to the Commission and were then included in the list of SCIs adopted by Commission´s decision were entitled, after notification of that decision to the Member State concerned, to the protection of that directive before that decision was published. In particular, after that notification, the Member State concerned also had to take the protective measures laid down in Article 6(2) to (4)
Taking into account of conservation or protective measures not yet implemented in the appropriate assessment	C-293/17 &C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu* v *College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, paragraphs 121, 123, 124, 126, 130, 132	• An 'appropriate assessment' within the meaning of [Article 6(3)] may not take into account the existence of 'conservation measures' within the meaning of Article 6(1), 'preventive measures' within the meaning of Article 6(2), measures specifically adopted for a programme or 'autonomous' measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment
Appropriate assessment of unlawfully implemented projects	C-504/14 *Commission* v *Greece,* paragraph 122	• Article 6(3) does not apply in respect of any action whose implementation was subject to authorisation but which was carried out without authorisation and thus unlawfully.
Article 6.4		
Article 6(4) applies after an AA has been made	C-304/05, *Commission* v *Italy,* paragraph 83 C-258/11, *Sweetman and Others,* paragraph 35 C-521/12, *Briels*, paragraph 35 C-399/14, *Grüne Liga Sachsen eV and Others*, paragraphs 56 – 57; C-142/16, *Commission* v *Germany,* paragraphs 70 – 72;	• Article 6(4) can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive.

	C-441/17, *Commission* v *Republic of Poland*, paragraphs 190 - 191	
The examination of alternatives is not part of the AA	C-241/08, *Commission* v *France*, paragraphs 69 - 72 C-441/03, *Commission* v *Netherlands,* paragraphs 15 – 29	• Obligation to examine alternative solutions to a plan or project does not come within the scope of Article 6(3) but within the scope of Article 6(4) • The appropriate assessment is not a merely formal process of examination, but must allow a detailed analysis which satisfies the conservation objectives of the site in question • Having regard to the particular characteristics of each of the stages referred to in Article 6, it must be held that the various requirements set out in Article 6(4) cannot constitute elements that the competent national authorities are obliged to take account of where they carry out an appropriate assessment provided for in Article 6(3).”
The absence of alternatives must be demonstrated	C-239/04, *Commission* v *Portugal,* paragraphs 25 – 39	• Article 6(4), which permits a plan or project which has given rise to a negative assessment under the first sentence of Article 6(3) to be implemented on certain conditions, must, as a derogation from the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly • Thus, the implementation of a plan or project under Article 6(4) is, *inter alia*, subject to the condition that the absence of alternative solutions be demonstrated • It is not apparent from the file that those authorities examined solutions falling outside that SPA and to the west of the settlements, although, on the basis of information supplied by the Commission, it cannot be ruled out immediately that such solutions were capable of amounting to alternative solutions within the meaning of Article 6(4). Accordingly, by failing to examine that type of solution, the Portuguese authorities did not demonstrate the absence of alternative solutions within the meaning of that provision.”
Economic costs of alternatives alone are not determining factors of choice of alternatives	C-399/14, *Grüne Liga Sachsen eV and Others*, paragraph 77	• It cannot be accepted that the economic cost of the steps that may be considered in the review of alternatives alone may be a determining factor in the choice of alternative solutions.
Interpretation of the term “imperative reasons of overriding public interest” (IROPI)	C-182/10, *Solvay and Others,* paragraphs 71 – 79	• An interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, the implementation of a plan or project must be both ‘public’ and ‘overriding’, which means that it must be of such an importance that it can be weighed up against that directive’s objective of the conservation of natural habitats and wild

	C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others,* paragraphs 120 – 128	fauna and flora. Works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances." • The creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, • Grounds linked, on the one hand, to irrigation and, on the other, to the supply of drinking water, relied on in support of a project for the diversion of water, may constitute imperative reasons of overriding public interest capable of justifying the implementation of a project which adversely affects the integrity of the sites concerned • Where such a project adversely affects the integrity of a SCI hosting a priority natural habitat type and/or a priority species, its implementation may, in principle, be justified by grounds linked with the supply of drinking water. In some circumstances, it might be justified by reference to beneficial consequences of primary importance which irrigation has for the environment. On the other hand, irrigation cannot, in principle, qualify as a consideration relating to human health or public safety, justifying the implementation of a project such as that at issue in the main proceedings.
Interpretation of the term „human health"	C-504/14, *Commission* v *Greece,* paragraph 77	• The construction of a platform designed to facilitate the movement of disabled persons may be regarded as having been carried out for imperative reasons of overriding public interest relating to human health for the purposes of Article 6(4), provided the other requirements of the latter paragraph have been fulfilled.
Compensatory measures	C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others,* paragraphs 130 – 132)	• The extent of the diversion of water and the scale of the works involved in that diversion are factors which must necessarily be taken • into account in order to identify with precision the adverse impact of the project on the site concerned and, therefore, to determine the nature of the necessary compensatory measures in order to ensure the protection of the overall coherence of Natura 2000.