Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 23 February 2016 [1]

Case C-461/14

European Commission
v

Kingdom of Spain

(Failure of a Member State to fulfil obligations — Level of proof required to establish an infringement — Directive 85/337/EEC — Environmental impact assessment — High-speed railway — Whether assessment adequate — Directive 2009/147/EC — Conservation of wild birds — Special areas of conservation — Directive 92/43/EEC — Conservation of natural habitats)

1. What constitutes an adequate environmental impact assessment, considering that the project assessed (here: the construction of a high-speed railway line) has an impact on an area of particular environmental importance? In what circumstances does the construction of infrastructure related to such a project infringe the conservation and protection objectives arising from EU environmental law?

2. From the outset, those fundamental questions would appear to form the crux of the present action brought by the European Commission against the Kingdom of Spain under Article 258(2) TFEU. However, on closer inspection, this case is essentially about whether the Commission has established the existence of a breach of the relevant environmental provisions. As I shall illustrate in the following, the Commission has only partly succeeded in that task.

I – Legal framework

A – *The EIA Directive*

3. Article 2(1) of Directive 85/337/EEC [2] on the assessment of the effects of certain public and private projects on the environment ('the EIA Directive') provides:

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

1 — Original language: English.

2 — Council Directive of 27 June 1985 (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

4. Article 3 of the directive reads:

‘The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora;

— soil, water, air, climate and the landscape;

...’

5. Article 4 of the EIA Directive provides:

‘1. … projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. … for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

…’

6. Annex I to the EIA Directive contains a list of projects subject to Article 4(1) thereto. It mentions, inter alia, the construction of motorways, express roads and lines for long distance railway traffic.

7. In point 2 of Annex III to the EIA Directive wetlands and areas classified or protected under Member States’ legislation, or special protection areas designated by Member States, are identified, amongst others, as selection criteria to which Article 4(3) of the directive refers.

B – *The Birds Directive*

8. Article 1 of Directive 2009/147/EC[3] on the conservation of wild birds (‘the Birds Directive’) reads:

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

3 — Directive of the European Parliament and of the Council of 30 November 2009 (codified version) (OJ 2010 L 20, p. 7). That directive codifies Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended. The provisions that are of relevance here have not undergone any substantive change since the adoption of Directive 79/409.

…’

9. Article 4 of the Birds Directive provides:

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

…

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

…

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

10. Amongst several other species, *Otis tarda* (the Great Bustard) is mentioned in Annex I to the directive.

C – *The Habitats Directive*

11. Article 6 of Directive 92/43/EEC[4] on the conservation of natural habitats and of wild fauna and flora (‘the Habitats Directive’) states:

‘1. For special areas of conservation, Member States shall establish the necessary conservation measures ...

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 disturbances of the species for which the areas have been designated, in so far as such disturbances could be significant in relation to the objectives of this Directive.

…’

12. Article 7 of the Habitats Directive provides that obligations arising from Article 6(2), (3) and (4) of that directive replace any obligations arising from the first sentence of Article 4(4) of the Birds Directive in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof. Those obligations are replaced as from the date of implementation of the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive, where the latter date is later.

4 — Council Directive of 21 May 1992 (OJ 1992 L 206, p. 7).

II – Background to the case and the pre-litigation procedure

13. The background of this case can be summarised as follows. The case concerns a project for the building of a high-speed railway line between Seville and Almería in Spain. So far, an environmental impact assessment has been carried out for some of the infrastructure works necessary for the operation of the high-speed railway. The environmental impact assessment was submitted for public consultation on 4 July 2006 and approved by way of decision concerning the statement on the environmental impact assessment on 24 November 2006.[5] The works relating to the high-speed railway infrastructure began on 4 December 2007. Those works were suspended in 2009.

14. The railway runs through a natural site classified by the Spanish authorities on 29 July 2008 as a special protection area (SPA) for birds. In other words, the classification was made after the approval of the project and the environmental impact assessment made by the Spanish authorities. Before the site was classified as an SPA, it had already been classified as site No 238 (cereal plains of Ecija-Osuna) in the Inventory of Important Birds Areas in the European Community (IBA) since 1998. The site hosts several species mentioned in Annex I to the Birds Directive, including *Otis tarda*.

15. Against that background, a complaint was lodged with the Commission in February 2010 regarding the sections 'Marchena-Osuna I', 'Marchena-Osuna II' and 'Variante de Osuna' of the railway line. Following that complaint, the Commission addressed a letter of formal notice to the Spanish Government on 17 June 2011. The letter of formal notice alleged that the Kingdom of Spain had failed to fulfil its obligations under Article 3 of the EIA Directive, Article 4(4) of the Birds Directive and Article 6 of the Habitats Directive.

16. The Spanish Government replied to the letter of formal notice on 20 September 2011. Notwithstanding that reply, the Commission addressed a reasoned opinion to the Kingdom of Spain on 20 June 2013 in which it contended that the Kingdom of Spain had failed to fulfil its obligations under Article 3 of the EIA Directive, Article 4(4) of the Birds Directive and Article 6(2) of the Habitats Directive.

17. On 21 August 2013, the Spanish Government replied to the reasoned opinion.

18. Taking the view that the measures taken by the Spanish Government remained insufficient, the Commission maintained its assessment and brought the present action before the Court.

III – Procedure before the Court and forms of order sought

19. By its application, the Commission claims that the Court should:

— declare that the Kingdom of Spain has failed to fulfil its obligations under Article 3 of the EIA Directive, Article 4(4) of the Birds Directive until 29 July 2008, and Article 6(2) of the Habitats Directive since the site in question was classified as an SPA;

— order the Kingdom of Spain to pay the costs.

20. The Spanish Government contends that the Court should:

— dismiss the action brought by the Commission;

5 — Resolución de 24 de noviembre de 2006 de la Delegación Provincial de la Consejería de Medio Ambiente en Sevilla, por la que se hace pública la Declaración de Impacto Ambiental relativa al Proyecto de renovación de vía, mejora del trazado y duplicación de plataforma del eje ferroviario transversal de Andalucía. Tramo Marchena-Osuna (tramos I y II), en los términos municipales de Marchena y Osuna (Sevilla), promovido por la Consejería de Obras Públicas y Transportes. That statement refers, in turn, to the actual environmental impact assessments carried out in the context of the project.

— order the Commission to pay the costs.

21. Written observations were submitted by the Commission and the Spanish Government. Pursuant to Article 76(2) of the Rules of Procedure, no hearing was held.

IV – Analysis

A – *Admissibility*

22. The Spanish Government disputes the admissibility of the Commission's action in so far as it concerns the 'Variante de Osuna' section of the railway. The Spanish Government contends that, according to settled case-law, the letter of formal notice addressed to the Member State, and subsequently the reasoned opinion issued by the Commission, delimits the subject matter of the dispute. The subject matter of the dispute may not thereafter be extended.

23. It is settled law that the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure. [6]

24. In the present case, the letter of formal notice mentions the sections of 'Marchena-Osuna I', 'Marchena-Osuna II' and 'Variante de Osuna'. Yet the facts relied upon by the Commission in order to establish the alleged infringement relate to the two first mentioned sections of the railway.

25. The Commission does not seem to disagree. In fact, in its rejoinder, the Commission explained that the facts on the basis of which it considers that certain obligations have been breached specifically relate to the sections 'Marchena-Osuna I' and 'Machena-Osuna II' of the railway. By contrast, reference to the section 'Variente de Osuna' made during the proceedings was necessary to paint a picture of the broader context of the project.

26. In those circumstances, the present action must be declared inadmissible in so far as it concerns the section 'Variante de Osuna'.

B – *First ground of complaint: Article 3 of the EIA Directive*

1. Arguments of the parties

27. The Commission claims that the Kingdom of Spain has failed to fulfil its obligations under Article 3 of the EIA Directive.

28. In that regard, the Commission explains first what it *does not* claim. It does not claim that the contentious environmental impact assessment does not cover the whole project. Nor does it claim that the project has been divided into sections to avoid the assessment of potential cumulative effects on the environment.

6 — See, amongst many, judgment in *Commission* v *Spain*, C-127/12, EU:C:2014:2130, paragraph 23 and the case-law cited.

29. Second, the Commission explains what it does claim. It contends, in essence, that the Kingdom of Spain has failed adequately to identify, describe and assess the direct and indirect effects of the project on the environment and on avian fauna in particular. In short, the environmental impact assessment at issue is insufficient to satisfy the requirements of Article 3 of the EIA Directive. This is because the environmental impact assessment in question did not, in the Commission's view, sufficiently take into account the fact that the project crossed an area classified as an IBA. That area was subsequently classified as an SPA ES6180017, 'Campiñas de Sevilla', in 2008.

30. As a logical corollary to the breach of Article 3 of the EIA Directive, the Commission submits that the Kingdom of Spain has also failed to inform the public of the probable effects of the project before it took the decision to go ahead with the project.

31. For its part, the Spanish Government submits that the Commission's complaint should be rejected.

32. Firstly, the Spanish Government argues that it has met the requirements of Article 3 of the EIA Directive by identifying the affected fauna and adopting the adequate measures to limit any potential detrimental effects on the environment.

33. Secondly, the Spanish Government observes that an IBA classification has no binding effect. In the view of that Government, an environmental impact assessment can meet the requirements laid down in Article 3 of the EIA Directive even if it does not mention an IBA classification.

34. Thirdly, the Spanish Government considers that the Commission has failed to explain why the contentious environmental impact assessment is not sufficient, let alone to prove that a failure to fulfil obligations has taken place.

2. Assessment

35. As I mentioned at the outset, this case is about whether the Commission has succeeded in establishing the existence of an infringement. In the following, I shall explain why I do not think that to be the case in relation to Article 3 of the EIA Directive.

36. To begin with, it is necessary clearly to define the project to which the contentious environmental impact assessment relates.

37. The environmental impact assessment — which the Commission considers to be contrary to Article 3 of the EIA Directive — concerns one specific stage of the construction of the high-speed railway line. The project, and thus the contentious environmental impact assessment, concerns infrastructure works necessary for the operation of a high-speed railway. The project includes construction works on the tracks and the rail-route, including the construction of a raised and expanded platform. Further works necessary for the operation of the railway (inter alia, electrical works for the installation of overhead lines) were beyond the scope of this project. As transpires from both the reasoned opinion and the pleadings of the Commission before the Court, the Commission does not call into question the choice of the Spanish authorities to carry out an environmental impact assessment only in relation to the improvement of infrastructure ('the project in question').

38. Nevertheless, the Commission claims that the environmental impact assessment was inadequate. This is — as I understand it — because in its view the assessment failed to take due account of the area of particular environmental importance (as recognised in the IBA inventory and later in the procedure leading to the classification of that area as an SPA) that is affected by the project in question.

39. At this point, it is useful to call to mind the purpose of an environmental impact assessment. Its purpose is to identify, describe and assess appropriately the direct and indirect effects of a project, keeping in mind the characteristics of the case at hand. The impact is to be evaluated in relation to, among other things, fauna and flora.[7] In that regard, the Court has consistently held that the scope of the EIA Directive is wide and its purpose broad.[8] Accordingly, the Court has taken a purposive approach to the interpretation of the EIA Directive. The objective of the directive is to perform an overall assessment of the environmental impact of projects or of their modification.[9]

40. However, that fact alone cannot relieve the Commission of its duty to establish that a breach of obligations has taken place. In infringement proceedings under Article 258 TFEU, it is for the Commission to prove the allegations made. It falls to that institution to provide the Court with the information needed to establish that a Member State has not fulfilled its obligations. In doing so, the Commission may not rely on mere presumptions.[10]

41. Apart from general statements regarding the alleged inadequacy of the environmental impact assessment, the Commission does not substantiate its complaint. To illustrate, let us look at the inchoate arguments put forward by the Commission.

42. First, the Commission explains that in order to take due account of an important environmental area, which should have been classified as an SPA but was not at the material time, it is not sufficient simply to list the species present in the area. In that regard, it argues also that the measures identified to attenuate the negative effects of the project (in particular, as regards avian fauna, the prohibition of removing vegetation between March and July to avoid a negative effect on reproduction) in the environmental impact assessment were insufficient. Yet it simply fails to explain *why* that is so.

43. Second, the Commission also takes issue with the fact that the statement of environmental assessment does not mention the Ojuelos lagoon, which forms part of the area later classified as an SPA. However, it transpires from the documents submitted to the Court that the Ojuelos lagoon was, in fact, mentioned in the environmental impact assessment (albeit it was not mentioned in *the statement*[11] on the environmental impact assessment). This is a point that the Commission does not contest. In that assessment, the characteristics of the lagoon were described. Reference was also made to the numerous species of avian fauna present in the area. Here too, the Commission maintains that the assessment was insufficient, but does not explain *why* it considers that to be so.

44. Third, it is certainly true that the effects of a project that has an impact on an area mentioned in an IBA inventory, and later classified as an SPA, should be assessed with particular care. That is, as the Commission points out, illustrated by Annex III to the EIA Directive. That annex mentions wetlands and SPAs as selection criteria for the assessment of projects for which there is no obligation *per se* to conduct an environmental impact assessment. In that sense, it is clear that such areas are considered to be of particular environmental importance by the EU legislature.

45. Nevertheless, the fact that the contentious environmental impact assessment omits to mention an important environmental area recognised as such under an IBA inventory (or an SPA) cannot alone amount to a failure to identify, describe and evaluate appropriately the effects of the projects in accordance with Article 3 of the EIA Directive.

7 — Judgment in *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 78.

8 — Judgment in *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 42.

9 — Judgment in *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 42.

10 — Judgment in *Commission* v *Netherlands*, 96/81, EU:C:1982:192, paragraph 6. See also judgments in *Commission* v *Portugal*, C-117/02, EU:C:2004:266, paragraph 80, *Commission* v *Italy*, C-135/05, EU:C:2007:250, paragraph 26, and *Commission* v *Spain*, C-308/08, EU:C:2010:281, paragraph 23 and the case-law cited.

11 — See footnote 5 above.

46. That is so for at least two reasons.

47. On the one hand, a failure to *mention* the IBA inventory (or an SPA) does not automatically mean that that inventory — or rather areas and species mentioned therein — has not been taken into consideration. On the other hand, as the Spanish Government correctly points out, the IBA inventory does not produce binding effects in relation to Member States. [12]

48. Regarding the importance of the area subsequently classified as an SPA, it emerges from the documents submitted to the Court that despite the absence of an explicit reference to the IBA inventory, the area was described in the environmental impact assessment as an area with particular avian fauna, namely, steppe birds. In that regard, *Otis tarda* was specifically identified in the assessment. Nevertheless, the Commission has not explained why that description is inadequate. It has simply confined itself to alleging that that was so. For the purposes of establishing a breach of obligation under Article 3 of the EIA Directive, mere allegations to that effect cannot suffice.

49. Fourth, as I understand it, the Commission is particularly concerned by the effects of the actual operation of the railway: it has repeatedly argued that the operation of the railway can potentially have a considerable impact on avian fauna, in particular, steppe birds and water birds present on the site. That is why it considers the contentious assessment to be insufficient in relation to measures identified to avoid collision (with infrastructure and trains) and electrocution of birds, in particular. In that regard, it is common ground that particular measures to avoid those risks were not specifically identified in the contentious environmental impact assessment.

50. I am by no means insensitive to those arguments. It stands to reason that the operation of a high-speed railway will have a considerable impact on an SPA such as that at issue in the present proceedings.

51. However, it cannot be overemphasised that the Commission has explicitly pointed out in the reasoned opinion and during the present proceedings that it does not claim that the contentious environmental impact assessment is contrary to Article 3 of the EIA Directive on the grounds that it does not cover the entire project. That institution has not specifically claimed — apart from belated remarks to that effect in the rejoinder — that a breach of the directive would result from the fact that the assessment has been limited to infrastructure improvement, instead of covering the entire project, including the actual operation of the railway. [13]

52. As defined in the statement on the environmental impact assessment, the project in question deals only with the improvement of railway infrastructure. Further installation works necessary for the subsequent operation of the railway will be subject to an additional environmental impact assessment. In that respect, any argument in relation to works that will be subject to another environmental impact assessment or, for that matter, to the operation of the railway must be considered inadmissible. Any other conclusion would seriously compromise the principle of legal certainty.

53. Fifth and last, the parties have exchanged views on the relevance of the fact that the high-speed railway line was built parallel to an existing railway dating from the 19th century. The Commission argues, seemingly without being gainsaid, that the requirements relating to an environmental impact assessment are the same, irrespective of whether the high-speed railway runs parallel to another, ordinary railway track. The Commission points out that the parallel existence of those two railways can have cumulative effects in several respects. However, in my view, those arguments are again mere

12 — See, in the context of the Birds Directive, judgments in *Commission* v *Spain*, C-235/04, EU:C:2007:386, paragraph 26, and *Commission* v *Netherlands*, C-3/96, EU:C:1998:238, paragraph 70.

13 — Cf. judgment in *Abraham and Others*, C-2/07 EU:C:2008:133, paragraph 43. In that case, the Court noted that in order to ensure an adequate overall assessment, the assessment cannot be limited to the direct effects of the works envisaged. That assessment must also take into account the environmental impact liable to result from the use and exploitation of the end product of particular works.

allegations that cannot suffice to establish that any obligations have been breached. In any event, those allegations appear to be in contradiction with the fact that the Commission has not claimed that the environmental impact assessment was insufficient due to the lack of consideration of cumulative effects.

54. In light of the above, I conclude that the first ground of complaint put forward by the Commission concerning a breach of Article 3 of the EIA Directive must fail. The corollary ground of complaint concerning a failure adequately to inform the public of the effects of the project must therefore also fail.

55. In fact, irrespective of the fate of the first ground of complaint, I do not see any good reason why the Court should deal with the additional complaint made by the Commission under the EIA Directive. The Commission has not indicated any legal basis for that ground of complaint. Apart from an incidental observation to that effect, it has not elaborated its argument on that point.

C – *Second ground of complaint: Article 4(4) of the Birds Directive*

1. Arguments of the parties

56. The Commission contends that by authorising the construction of a high-speed railway line within an area mentioned in the IBA inventory — before that area was classified as an SPA — the Kingdom of Spain also failed to fulfil its obligations under Article 4(4) of the Birds Directive.

57. In that regard, the Commission points out that the construction works required substantial alterations to the environmental characteristics of the area, such as the displacement of a large amount of earth, construction of a double security barrier and a raised platform along 16 km.[14] These changes are likely to cause significant limitations to birds' access to their breeding, resting and feeding grounds. In addition, the Commission submits that the failure of the Kingdom of Spain to fulfil its obligations under Article 3 of the EIA Directive led to inadequate identification of the potential risks posed by the project.

58. For its part, the Spanish Government argues that in order to comply with Article 4(4) of the Birds Directive it is not necessary to follow the procedures laid out in that directive regarding SPAs. In that Government's view, it is sufficient to adopt measures aimed at preserving and protecting the said area before its classification. Here, the Spanish Government submits that it has adequately taken such measures by limiting construction work during the birds' reproductive seasons and installing anti-collision equipment and walking paths along the railway.

2. Assessment

59. The allegations made by the Commission concerning the inadequacy of the environmental impact assessment permeate the entire reasoning of that institution. That is so in relation to this head of complaint too. Given the particularities of the present case, one could mistakenly be led to think that an unavoidable correlation exists between a finding of an infringement under the EIA Directive and a similar finding under the Birds (and the Habitats) Directive (or the absence thereof). In my view, that is not so. Those questions must be clearly dissociated. Simply because a breach of obligations under Article 3 of the EIA Directive has not been established does not automatically mean that there has

14 — Of which 13 km is situated within the sections 'Marchena-Osuna I' and 'Marchena-Osuna II'.

been no breach of Article 4(4) of the Birds Directive (and Article 6(2) of the Habitats Directive), or vice versa. This is because the obligations flowing from Article 3 of the EIA Directive are essentially procedural in nature. Those arising from Article 4(4) of the Birds Directive (and Article 6(2) of the Habitats Directive) are, by contrast, substantive.

60. Therefore, irrespective of the conclusion reached as regards the first ground of complaint, the second (and third) ground of complaint must be examined on its own merits.

61. Turning now to the allegation of a breach of Article 4(4) of the Birds Directive, certain elements of the case-law are of particular relevance.

62. Most importantly for the present purposes, the obligations stemming from Article 4(4) also apply to areas that should have been classified as an SPA but, like 'Campiñas de Sevilla', were not. In fact, those obligations remain effective until the area is classified as an SPA. [15]

63. In actions brought by the Commission — where a breach of obligations has been found to have taken place — the Court has been provided with evidence of actual deterioration of the birds' habitats, [16] serious deterioration of the bird population and the actual destruction of areas of particular environmental importance. [17]

64. Of particular significance for present purposes is also that the case-law indicates that Member States may not alter or reduce the geographical reach of an SPA. In that context, the Court has held that the construction of a new road involved a reduction of the SPA area contrary to Article 4(4) of the Birds Directive. The reduction of the area was aggravated by the construction of new buildings and disturbances caused by the road works. [18]

65. On this point, the Commission claims that significant deterioration and disturbance are bound to occur as a consequence of substantial changes to the environmental characteristics of the area. It also expresses concerns in relation to the risks of electrocution and collision at later stages of the construction and operation of the railway.

66. I have no doubt that the construction of a high-speed railway through an area that hosts several species mentioned in Annex I to the Birds Directive amounts to deterioration of the environmental characteristics of the area and disturbance of the species requiring special protection. Indeed, the construction works (that have been authorised so far) necessitate, as does any major railway construction project, the displacement of earth, the building of tracks and a raised platform, as well as an array of other types of intervention in the morphology of the area. This is attested by the contentious environmental impact assessment.

67. By contrast, the arguments put forward by the Commission concerning electrocution and collision should be deemed inadmissible.

68. That inadmissibility stems from a peculiarity of the present case. Unlike what one would assume generally to be the case, there is no indication that the project will be finalised. According to the parties, it has been halted since 2009 owing to lack of funding. What is more, any further works to complete the infrastructure will necessitate a further environmental impact assessment (and thus, authorisation).

15 — Judgment in *Commission* v *Spain*, C-186/06, EU:C:2007:813, paragraph 27 and the case-law cited.

16 — Judgment in *Commission* v *Ireland*, C-117/00, EU:C:2002:366, paragraphs 27 to 30.

17 — Judgment in *Commission* v *France*, C-96/98, EU:C:1999:580, paragraphs 45 and 46.

18 — Judgment in *Commission* v *Spain*, C-355/90, EU:C:1993:331, paragraphs 35 to 37. See to that effect also judgment in *Commission* v *Germany*, C-57/89, EU:C:1991:89, paragraphs 20 and 21.

69. Admittedly, it is true that the effectiveness of Article 4(4) of the Birds Directive would be seriously compromised if infringement occurred only when actual harm was caused and not at the time of State action that allows harm to occur in the future.[19] However, in the present case, the project authorised by the Spanish authorities concerns, as noted, the improvement of infrastructure, including the construction and extension of a raised platform. It does not concern further installation works needed for the operation of the railway. Bearing that in mind, the risks of electrocution and collision relate to hypothetical effects that will materialise only if authorisation for the next phase of the project is given subsequent to an additional environmental impact assessment.

70. The question remains, however, whether it can be established that the Kingdom of Spain has not taken appropriate steps to avoid deterioration of habitats or disturbances that are *significant* in light of the objectives of Article 4 of the Birds Directive.

71. The Spanish Government asserts that the population of birds actually increased during and after the construction period.

72. The Court has held before now that the protection and conservation obligations stemming from Article 4(4) of the Birds Directive are triggered before any reduction in the relevant bird populations.[20] Similarly, proof of an increase in the bird population affected does not necessarily imply that the Member State has fulfilled its obligations. Indeed, Article 4 of the Birds Directive requires the Member State to preserve, maintain and re-establish habitats *as such*, because of their ecological value.

73. Migratory birds are a case in point. In fact, they form the majority of wild birds in the EU territory.[21] For such species, including the partially migratory *Otis tarda* (the main subject of debate between the parties), the bird population cannot be crucial to the assessment. This is because the protection of habitats, in which birds listed in Annex I to the directive are encountered, ensures that the population of birds staying in or making their way to a given area can find sanctuary within the European Union.

74. Seen in that light, the possible increase in bird population in the affected area is irrelevant for the purposes of establishing whether a Member State has fulfilled its obligations under Article 4(4) of the Birds Directive.

75. Irrespective of whether the construction of the high-speed railway will be continued in the future, the fact remains that in addition to disturbances caused by the works themselves, a raised platform now traverses the SPA in question. It can safely be assumed that that significantly alters the characteristics of the habitat in question, making it less suitable for species adapted to steppe landscapes.[22]

76. In its defence, the Spanish Government has referred to several measures which it has undertaken to balance out the construction works. Those include limiting construction work during the bird reproductive seasons and installing anti-collision equipment as well as walking paths along the railway.

19 — Opinion of Advocate General Kokott in *Commission* v *Spain*, C-186/06, EU:C:2007:254, point 29.

20 — Judgment in *Commission* v *Spain*, C-355/90, EU:C:1993:331, paragraph 15.

21 — See recital 4 of the Birds Directive.

22 — It further transpires from the case file that, according to the environmental impact assessment, the effects of the project on *Otis tarda* were considered to be severe.

77. To be sure, Member States must adopt measures to reduce harm, which may, in certain circumstances, limit deterioration (or even exclude it). However, in this particular case, the measures to which the Spanish Government refers do not, as I see it, in any way alter the underlying problem: that a raised railway platform now traverses an important habitat for species adapted to steppe landscapes. Admittedly, those measures might help to ensure that the bird species affected do not disappear. Yet those measures in no way attenuate the reduction and fragmentation of the area in question.

78. For those reasons, I conclude that the second ground of complaint put forward by the Commission concerning a breach of Article 4(4) of the Birds Directive must be upheld.

D – *Third ground of complaint: Article 6(2) of the Habitats Directive*

1. Arguments of the parties

79. The Commission submits that since the 'Campiñas de Sevilla' site was classified as an SPA, the Kingdom of Spain has failed to fulfil its obligations pursuant to Article 6(2) of the Habitats Directive. In essence, the arguments put forward are the same as those under the second ground of complaint.

80. The Spanish Government submits that it has, since July 2008, complied with the requirements of Article 6(2) of the Habitats Directive. In its view, the Commission has failed to demonstrate, since July 2008, any actual disturbance of the birds or any deterioration in their protection. The Spanish Government considers that the risks alluded to by the Commission concern the 'second project' (that is, further works and the entry into service of the high-speed railway). In any event, those risks were adequately taken into account in the environmental impact assessment of the project in question.

2. Assessment

81. 'Campiñas de Sevilla', the site at issue in the present case, was classified as an SPA on 29 July 2008. Article 7 of the Habitats Directive provides that the obligation arising from Article 4(4) of the Birds Directive is replaced by the obligations arising from, inter alia, Article 6(2) of the Habitats Directive as of the date of the classification of an SPA by a Member State under the Birds Directive. [23]

82. While the wording of Article 4(4) of the Birds Directive appears more stringent than that of the corresponding provision in the Habitats Directive, it would seem difficult to sustain a view according to which Member States' leeway in interfering with SPAs is wider once a given area has been classified as such. [24] Or more precisely, it would be contrary to the conservation objectives underlying the Habitats Directive — which are similar to those of the Birds Directive — to allow more far-reaching disturbances to occur once the classification has in fact taken place.

83. That is why my analysis above concerning the breach of Article 4(4) of the Birds Directive must apply with equal force here. Suffice it therefore simply to add the following.

23 — See also judgment in *Commission* v *France*, C-374/98, EU:C:2000:670, paragraphs 44 and 46.

24 — Article 6(4) of the Habitats Directive allows Member States to pursue projects in SPAs despite potential negative implications for the site under certain strict conditions. Such derogations are allowed in so far as no alternative solutions exist. The project must only be carried out for imperative reasons of overriding public interest, including those of a social or economic nature. In that situation, compensatory measures necessary to ensure the overall coherence of the Natura 2000 are to be taken and the Commission is to be informed. However, that provision has not been invoked in the present proceedings.

84. The Court's case-law indicates that an activity is deemed compatible with Article 6(2) of the Habitats Directive provided that that activity will not cause any disturbance *likely significantly to affect the objectives of that directive*, particularly its conservation objectives.[25] In that regard, the Court has accepted a relatively low level of proof as regards deterioration and disturbance. More specifically, it is sufficient that the Commission shows the existence of a probability or risk of significant disturbances.[26]

85. As I have explained above, a significant effect on the environment — especially on the habitat of the bird population present in the area in question — appears likely, if not certain, simply because a raised platform alters and fragments an area classified as an SPA. However, for the purposes of establishing an infringement under the Habitats Directive, the static existence of a railway platform within the confines of the SPA at the material time, namely as of 29 July 2008, cannot suffice to establish an infringement of Article 6(2) of the Habitats Directive. In fact, that provision requires some form of active and/or passive deterioration or disturbance to take place for that provision to apply. Otherwise, the existence of any earlier installation within an area later classified as an SPA could lead to a breach of obligations under that provision.

86. Here, however, it is clear from the pleadings of the parties that the construction works relating to the project in question continued (and were in full swing) at the relevant point in time. The construction works were halted only in 2009. Failing any argument to the effect that the works that were carried out after 29 July 2008 were minor improvements to a ready-built infrastructure or that they only concerned a minor part of the railway line within the SPA, I must agree with the Commission.

87. As regards risks related to future works and the operation of the railway, the Spanish Government argues that Article 6(2) of the Habitats Directive does not require the immediate adoption of corrective or preventive measures for risks that may (or may not) occur in the future. I agree. On that issue, I refer to my observations in point 69 above.

88. Hence, I agree with the Commission that the Kingdom of Spain has failed to fulfil its obligations under Article 6(2) of the Habitats Directive, from the date on which the area in question was classified as an SPA.

V – Costs

89. Under Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. The Commission having been successful only partly in its action, the parties should be ordered to bear their own costs.

VI – Conclusion

90. In the light of the above, I propose that the Court should:

— declare, as regards the sections 'Marchena-Osuna I' and 'Machena-Osuna II' of the contested railway project, that the Kingdom of Spain has failed to fulfil its obligations under Article 4(4) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds until the date on which the natural site affected by the project was classified as a special protection area, and Article 6(2) of Directive 92/43/EEC of the Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora since the date on which the natural site affected by the project was classified as a special protection area,

25 — Judgment in *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 126.

26 — Judgment in *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 142 and the case-law cited.

— dismiss the remainder of the action, and

— order the parties to bear their own costs.