Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

15 May 2014*

(Environment — Directive 92/43/EEC — Article 6(3) and (4) — Conservation of natural habitats — Special areas of conservation — Assessment of the implications for a protected site of a plan or project — Authorisation for a plan or project on a protected site — Compensatory measures — Natura 2000 site Vlijmens Ven, Moerputten & Bossche Broek — Project on the route of the A2 ’s-Hertogenbosch-Eindhoven motorway)

In Case C-521/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 7 November 2012, received at the Court on 19 November 2012, in the proceedings

T.C. Briels and Others,

v

Minister van Infrastructuur en Milieu,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis (Rapporteur), J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 December 2013,

after considering the observations submitted on behalf of:

— Stichting Reinier van Arkel and Stichting Overlast A2 Vught and Others, by L. Bier, advocaat,

— the Netherlands Government, by J. Langer and M.K. Bulterman, acting as Agents,

— the United Kingdom Government, by S. Brighouse, acting as Agent, assisted by E. Dixon, Barrister,

— the European Commission, by E. Manhaeve and L. Banciella Rodríguez-Miñón and by S. Petrova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2014,

* Language of the case: Dutch.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive').

2 The request has been made in proceedings between T.C. Briels and Others and the Minister van Infrastructuur en Milieu (Minister for Infrastructure and the Environment, 'the Minister') concerning the project for widening the A2 's-Hertogenbosch-Eindhoven motorway (together, 'the A2 motorway project').

Legal context

European Union law

3 Article 1 of the Habitats Directive provides:

'For the purpose of this Directive:

…

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

The conservation status of a natural habitat will be taken as "favourable" when:

— 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, and

…

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

…

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

…'

4 Article 3(1) of Directive 2004/113 provides:

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

…’

5 Article 6 of the Habitats Directive provides:

‘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.

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.

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.

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.’

Netherlands law

6 Article 19g of the Natuurbeschermingswet 1998 (Nature Conservation Law 1998), as applicable to the facts of the main proceedings (‘the 1998 Law’), provides:

‘1. If an appropriate assessment is prescribed under Article 19f(1), the authorisation referred to in Article 19d(1) may be issued only if the provincial governments have ascertained, on the basis of the appropriate assessment, that the integrity of the site will not be affected.

2. By way of derogation from paragraph 1, if there are no alternative solutions to a project, the provincial governments may issue, for Natura 2000 sites which do not host any priority natural habitats or priority species, the authorisation referred to in Article 19d(1) for the purpose of carrying out the project in question only for imperative reasons of overriding public interest, including those of a social or economic nature.

3. By way of derogation from paragraph 1, if there are no alternative solutions to a project or other initiative, the provincial governments may issue, for Natura 2000 sites which host priority natural habitats or priority species, an authorisation as referred to in Article 19d(1) for the completion of the project in question, only:

(a) on the basis of considerations relating to human health, public safety or essential beneficial consequences for the environment, or

(b) further to an opinion from the Commission to other imperative for other reasons of overriding public interest.

4. The opinion referred to in paragraph 3(b) shall be sought by the Minister.'

7 Article 19h of the 1998 Law reads:

'1. If an authorisation referred to in Article 19d(1) is issued for imperative reasons of overriding public interest, for the purpose of carrying out projects in connection with which it has not been ascertained that they do not adversely affect the integrity of a Natura 2000 site, the provincial governments shall in any event make that authorisation subject to the obligation to take compensatory measures.

2. The provincial governments shall give the proponent of the project a suitable opportunity to put forward proposals for compensatory measures.

3. The proposals for compensatory measures referred to in paragraph 2 shall in any event set out the methods of implementation and time frame for the compensatory measures.

4. If compensatory measures are imposed for the purposes of the objectives referred to in Article 10a(2)(a) or (b), the result sought by those measures must have been achieved when the significant effect referred to in Article 19f(1) occurs, unless it can be demonstrated that that time-limit is not necessary in order to guarantee the contribution of the site concerned to Natura 2000.

5. The Minister shall, in collaboration with the other Ministers, fix by ministerial order any additional conditions to be satisfied by the compensatory measures.'

8 Article 19j of the 1998 Law provides:

'1. When it decides to draw up a plan which, in the light of the conservation objective for a Natura 2000 site, save for the objectives referred to in Article 10a(3), is liable to have a deteriorative effect on the quality of natural habitats and habitats of species in that site or cause a significant disturbance to the species for which that site was designated, the administrative body shall, irrespective of which restrictions are imposed in the field by the legislation on which it bases itself, take into account:

(a) effects which the plan may have on the site, and

(b) the management plan drawn up for that site pursuant to Article 19a or 19b, in so far as it relates to the conservation objective save for the objectives referred to in Article 10a(3).

2. For plans referred to in paragraph 1 which are project not directly connected with or necessary to the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, the administrative body shall, before drawing up the plan, make an appropriate assessment of its implications for the site in view of the site's conservation objectives, save for the objectives referred to in Article 10a(3).

3. In the cases referred to in paragraph 2, the decision referred to in paragraph 1 shall be adopted only if the conditions laid down in Articles 19g and 19h are satisfied.

4. The appropriate assessment of those plans shall form an integral part of the environmental impact assessments prescribed for those plans.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 The order for reference indicates that on 6 June 2011 the Minister adopted an order relating to the A2 motorway project concerning, inter alia, the widening of that motorway.

10 That project affects the Natura 2000 site Vlijmens Ven, Moerputten & Bossche Broek ('the Natura 2000 site'). That site was designated by the Netherlands authorities as an SAC for, in particular, the natural habitat type molinia meadows, which is a non-priority habitat type.

11 By further order of 25 January 2012, the Minister provided for a certain number of measures aimed at lessening the environmental impact of the A2 motorway project.

12 An initial 'Test nature A' was carried out in order to assess the negative environmental impact of the A2 motorway project on the Natura 2000 site in question. That assessment concluded that the possibility of significant adverse effects for the site's protected habitat types and species due to nitrogen deposits could not be ruled out and that it was necessary to conduct an appropriate assessment on that point. A second 'Test nature B' concluded that the A2 motorway project would have negative implications for the existing area comprising the habitat type molinia meadows. In Moerputten, 6.7 hectares of molinia meadows would be affected due to drying out and acidification of the earth. That assessment also stated that in Bossche Broek adverse effects from increased nitrogen deposits could not be ruled as a result of the widening of the motorway. The A2 motorway project would also lead to a temporary increase in nitrogen deposits in Vlijmens Ven, although it would not prevent an extension of the molinia meadows within that area. That assessment also stated that sustainable conservation and development of the molinia meadows be achieved if the hydrological system was completed.

13 In that regard the A2 motorway project provides for improvements to the hydrological situation in Vlijmens Ven, which will allow the molinia meadows to expand on the site. The Minister states that this will allow for the development of a larger area of molinia meadows of higher quality, thereby ensuring that the conservation objectives for this habitat type are maintained through the creation of new molinia meadows.

14 Briels and Others brought an action against the two ministerial orders before the referring court. They take the view that the Minister could not lawfully adopt the orders for the A2 motorway project, given the negative implications of the widening of the A2 motorway for the Natura 2000 site in question.

15 Briels and Others state that the development of new molinia meadows on the site, as provided for by the ministerial orders at issue in the main proceedings, could not be taken into account in the determination of whether the site's integrity was affected. The claimants in the main proceedings submit that such a measure cannot be categorised as a 'mitigating measure', a concept which is, moreover, absent from the Habitats Directive.

16 The Raad van State (Council of State) states that it follows from the Minister's standpoint that, where a project has negative implications for the area of a protected natural habitat type within a Natura 2000 site, it is necessary, in the assessment of whether the integrity of the site is affected, to take account of the creation of an area of equal or greater size to the existing area within the same site, in a place where that habitat type will not suffer the negative effects of the project in question. The Council of State takes the view, however, that the criteria for determining whether the integrity of the site concerned is affected are not to be found either in the Habitats Directive or the Court's case-law.

17 In those circumstances, the Raad van State 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]?'

Consideration of the questions referred

18 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether 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 an SCI, 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 and, if so, whether such measures may be categorised as 'compensatory measures' within the meaning of Article 6(4) thereof.

19 In paragraph 32 of its judgment in Case C-258/11 *Sweetman and Others* EU:C:2013:220, the Court held that 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, whilst Article 6(4) merely derogates from the second sentence of Article 6(3).

20 The Court added that, where a plan or project not directly connected with or necessary to the management of a site is likely to 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 (*Sweetman and Others* EU:C:2013:220, paragraph 30).

21 The Court thus held 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 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 (*Sweetman and Others* EU:C:2013:220, paragraph 39).

22 In the main proceedings, it is common ground that the Natura 2000 site in question was designated by the Commission as an SCI and by the Kingdom of the Netherlands as an SAC, owing to the presence of inter alia the natural habitat type molinia meadows, the conservation objective of which consists in expansion of the area of that habitat and improvement in the quality thereof.

23 The case file submitted to the Court also indicates that the A2 motorway project will have significant adverse effects for the site's protected habitat types and species and, in particular, for the existing area and for the quality of the protected natural habitat type molinia meadows, due to drying out and acidification of the earth caused by increases in nitrogen deposits.

24 Such a project is liable to compromise the lasting preservation of the constitutive characteristics of the Natura 2000 site in question and, consequently, as observed by the Advocate General in point 41 of her Opinion, adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive.

25 Contrary to the position put forward by the Netherlands Government, in which it was supported by the United Kingdom Government, the protective measures provided for in the A2 motorway project do not cast doubt on the above assessment.

26 It is to be noted first of all 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 (Case C-127/02 *Waddenvereniging et Vogelbeschermingsvereniging* EU:C:2004:482, paragraphs 57 and 58, and *Sweetman and Others* EU:C:2013:220, paragraph 41).

27 The assessment carried out under 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 works proposed on the protected site concerned (see, to that effect, *Sweetman and Others* EU:C:2013:220, paragraph 44 and the case-law cited).

28 Consequently, the application of the precautionary principle in the context of the implementation of Article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.

29 However, 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).

30 This is the case of the measures at issue in the main proceedings which, in a situation where the competent national authority has in fact found that the A2 motorway project is liable to have – potentially permanent – adverse effects on the protected habitat type on the Natura 2000 site concerned, provide for the future creation of an area of equal or greater size of that habitat type in another part of the site which will not be directly affected by the project.

31 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.

32 It should further be noted that, as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future, a point made in paragraph 87 of the order for reference. Consequently, they cannot be taken into account at the procedural stage provided for in Article 6(3) of the Habitats Directive.

33 Secondly, as rightly pointed out by the Commission in its written observations, the effectiveness of the protective measures provided for in Article 6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures – which are in reality compensatory measures – in order to circumvent the specific procedures provided for in Article 6(3) and authorise projects which adversely affect the integrity of the site concerned.

34 It is only if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the Habitats Directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, that Article 6(4) of the Habitats Directive provides that the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see Case C-304/05 *Commission* v *Italy* EU:C:2007:532, paragraph 81; Case C-182/10 *Solvay and Others* EU:C:2012:82, paragraph 72; and *Sweetman and Others* EU:C:2013:220, paragraph 34).

35 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).

36 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).

37 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).

38 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.

39 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.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

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 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.

[Signatures]