



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 3 September 2015<sup>1</sup>

**Case C-141/14**

**European Commission**

**v**

**Republic of Bulgaria**

(Nature conservation — Directive 2009/147/EC — Conservation of wild birds — ‘Kaliakra’ and ‘Belite Skali’ special protection areas — Directive 92/43/EEC — Conservation of natural habitats and of wild species — ‘Kompleks Kaliakra’ special protection area — Directive 2011/92/EU — Assessment of the effects of certain projects on the environment — Temporal application of the EU rules — Deterioration of natural habitats and habitats of species and disturbance of species — Wind power — Tourism)

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<sup>1</sup> – Original language: German.

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## I – Introduction

1. The protection of birds and the use of wind power are both measures aimed at conserving the environment. As the present action brought by the Commission shows, however, those two measures may come into conflict with each other. That action concerns a number of projects, relating for the most part to wind turbines, in an area of Bulgaria which many ornithologists consider to be of major importance for the protection of birds. This is a situation with which not only the Court of Justice but also the Standing Committee of the Convention on the conservation of European wildlife and natural habitats<sup>2</sup> has been concerned for quite some time.<sup>3</sup>

2. The Commission complains that Bulgaria has failed to afford adequate protection to parts of that area, in accordance with the Birds Directive<sup>4</sup> and the Habitats Directive,<sup>5</sup> but, through a number of projects, has acted in a manner adversely affecting it. Some projects have also been implemented in breach of the EIA Directive.<sup>6</sup> Other projects, it claims, have had an adverse effect on designated bird protection areas and a special area of conservation under the Habitats Directive.

3. The action is characterised by considerable factual complexity and, from a legal point of view, raises questions concerned primarily with the application of European nature-conservation law to projects which were initiated prior to Bulgaria's accession to the European Union but were not fully implemented until after accession and continue to affect areas which are already protected or in need of protection.

2 — See Council Decision of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (OJ 1982 L 38, p. 1). The Convention is reproduced in OJ 1982 L 38, p. 3.

3 — See, for example, Recommendation No 130 (2007) of the Standing Committee on the windfarms planned near Balchik and Kaliakra, and other wind farm developments on the Via Pontica route (Bulgaria) of 29 November 2007 and, most recently, Bulgaria's report of 30 March 2015 (T-PVS/Files(2015)22E).

4 — Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7).

5 — 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), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368).

6 — Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

## II – Legal framework

### A – *The Birds Directive*

4. Article 4(1) and (2) of the Birds Directive provides that the Member States are to designate the most suitable territories for the protection of the birds listed in Annex I to the Directive and of migratory birds as special protection areas ('SPAs'):

'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.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes ...'

5. The first sentence of Article 4(4) of the Birds Directive lays down requirements for the protection of SPAs:

'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.'

### B – *The Habitats Directive*

6. The Habitats Directive, too, provides for the establishment of protection areas, referred to as sites of Community importance ('SCIs'), intended to secure the conservation of particular types of habitat and individual species of animals and plants, but not targeted directly at the protection of birds. Together with the SPAs under the Birds Directive, the SCIs form the Natura 2000 network.

7. Site conservation is provided for in Article 6(2) to (4):

'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.

...'

8. Article 7 of the Habitats Directive applies these provisions to SPAs under the Birds Directive:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under 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, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under [the Birds Directive], where the latter date is later.'

### C – *The EIA Directive*

9. Article 2(1) defines the objective of the EIA Directive:

'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. Those projects are defined in Article 4.'

10. More detailed rules on the projects that must be made subject to an environmental impact assessment are contained in Article 4(1) to (3) of, and Annexes I to III to, the EIA Directive:

'1. ...

2. Subject to Article 2(4), for projects listed in Annex II, the Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (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.'

11. Point 3(i) of Annex II to the EIA Directive refers to 'installations for the harnessing of wind power for energy production (wind farms).'

12. Finally, Annex III to the EIA Directive contains the selection criteria, referred to in Article 4(3), for projects listed in Annex II:

‘1. Characteristics of projects The characteristics of projects must be considered with particular regard to:

...

(b) the cumulation with other projects,

...’

### III – Facts, pre-litigation procedure and action

#### A – *The sites concerned*

13. The area of the ‘Kaliakra’ peninsula is highly important from the point of view of nature conservation. That is why the Bulgarian Society for the Protection of Birds, a non-governmental organisation specialising in bird conservation, which represents Bulgaria in Birdlife International, the international association of bird conservation organisations, takes the view that that area, which covers some 16 000 hectares, is home to a site particularly suited to the protection of birds.<sup>7</sup>

14. On 18 December 2007, Bulgaria designated the ‘Kaliakra’ peninsula as a special protection area under the Birds Directive, although that SPA includes only some two thirds of the land area of the ‘Kaliakra’ territory identified by the Society for the Protection of Birds.

15. On the same day, Bulgaria designated a further special protection area for birds, the ‘Belite Skali’ SPA, to the west of the ‘Kaliakra’ SPA and outside the Important Bird Area (IBA).

16. Also on 18 December 2007, Bulgaria proposed to the Commission that an SCI in the same territory, to be known as the ‘Kompleks Kaliakra’ and covering almost the entire area of the two SPAs mentioned above, be designated as a special area of conservation under the Habitats Directive. On 15 December 2008, the Commission added that site to the list of SCIs.<sup>8</sup> The standard data form for that site which Bulgaria forwarded to the Commission<sup>9</sup> lists 18 habitat types, including 2 300 hectares of the priority habitat Ponto-Sarmatic Steppes (Natura 2000 Code 62C0).

#### B – *Procedure*

17. The Commission has been dealing with complaints concerning the protection of the aforementioned sites, and corresponding with Bulgaria about them, since 2007. Following two separate letters of formal notice pursuant to Article 258 TFEU in 2008, those contacts resulted in a further summary letter of formal notice on 30 September 2011 and a reasoned opinion delivered by the Commission on 22 June 2012.

7 — See <http://www.birdlife.org/datazone/sitefactsheet.php?id=18973>.

8 — Commission Decision 2009/92/EC of 12 December 2008 adopting, pursuant to Council Directive 92/43/EEC, an initial list of sites of Community importance for the Black Sea biogeographical region (OJ 2009 L 43, p. 59).

9 — See <http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=BG0000573>.

18. Bulgaria responded by sending a number of letters informing the Commission, inter alia, that, on 8 October 2013, the National Council for Biological Diversity had decided to extend the ‘Kaliakra’ SPA as far as the boundaries of the ‘Kaliakra’ IBA. On 6 November 2013, the Bulgarian Council of Ministers adopted a decision to the same effect.<sup>10</sup> Bulgaria then forwarded to the Commission an updated standard data form for the site in question.<sup>11</sup>

19. Not satisfied with Bulgaria’s responses, the Commission, on 24 March 2014, brought the present action, by which it seeks a declaration that:

- (A) by failing to include all the territories of the important bird areas in the ‘Kaliakra’ special protection area, the Republic of Bulgaria has failed to classify as a special protection area the most suitable territories in number and size for the conservation, first, of the biological species listed in Annex I to the Birds Directive and, secondly, of the regularly occurring migratory species, not listed in that annex, in the geographical sea and land area where that directive applies, and accordingly has failed to fulfil its obligations under Article 4(1) and (2) of that directive;
- (B) by approving the implementation of the projects ‘AES Geo Energy’ OOD, ‘Windtech’ OOD, ‘Brestiom’ OOD, ‘Disib’ OOD, ‘Eco Energy’ OOD and ‘Longman Investment’ OOD in the ‘Kaliakra’ region, which is important for the conservation of birds and which has not been designated as a special protection area, although it should have been so designated, the Republic of Bulgaria has failed to fulfil its obligations under Article 4(4) of the Birds Directive, as interpreted by the Court of Justice in Cases C-96/98 and C-374/98;
- (C) by approving the implementation of the projects ‘Kaliakra Wind Power’ AD, ‘EVN Enertrag Kavarna’ OOD, ‘TSID — Atlas’ EOOD, ‘Vertikal — Petkov & Cie’ OOD and, a golf course and thermal centre, ‘Thracian Cliffs Golf and Spa Resort’ OOD in the territories of the ‘Kaliakra’ SPA, in the ‘Kompleks Kaliakra’ SCI and in the ‘Belite Skali’ special area of conservation, the Republic of Bulgaria has failed to fulfil its obligations under Article 6(2) of the Habitats Directive, as interpreted by the Court of Justice in Cases C-117/03 and C-244/05, having failed to take appropriate steps to avoid the deterioration of natural habitats and the habitats of biological species as well as disturbance of the species for which the areas have been designated;
- (D) by failing to assess properly the cumulative effects of the projects ‘AES Geo Energy’ OOD, ‘Windtech’ OOD, ‘Brestiom’ OOD, ‘Disib’ OOD, ‘Eco Energy’ OOD and ‘Longman Investment’ OOD authorised in the ‘Kaliakra’ region, which is important for the conservation of birds and which has not been designated as a special protection area, the Republic of Bulgaria has failed to fulfil its obligations under Article 2(1) of the EIA Directive, in conjunction with Article 4(2) and (3) thereof and point 1(b) of Annex III thereto.

20. The Commission also claims that:

the Republic of Bulgaria should be ordered to pay the costs.

21. The Republic of Bulgaria contends that the Court should:

- (1) dismiss the action; and
- (2) order the Commission to pay the costs.

<sup>10</sup> — Annex A.27 to the application, p. 671.

<sup>11</sup> — Annex A.28 to the application, p. 676 et seq.



22. In its response, the Commission withdrew the head of claim at C, in so far as it extended to the project 'TSID — Atlas' EOOD, and the head of claim at D, in relation to the projects 'AES Geo Energy' and 'Disib' OOD.

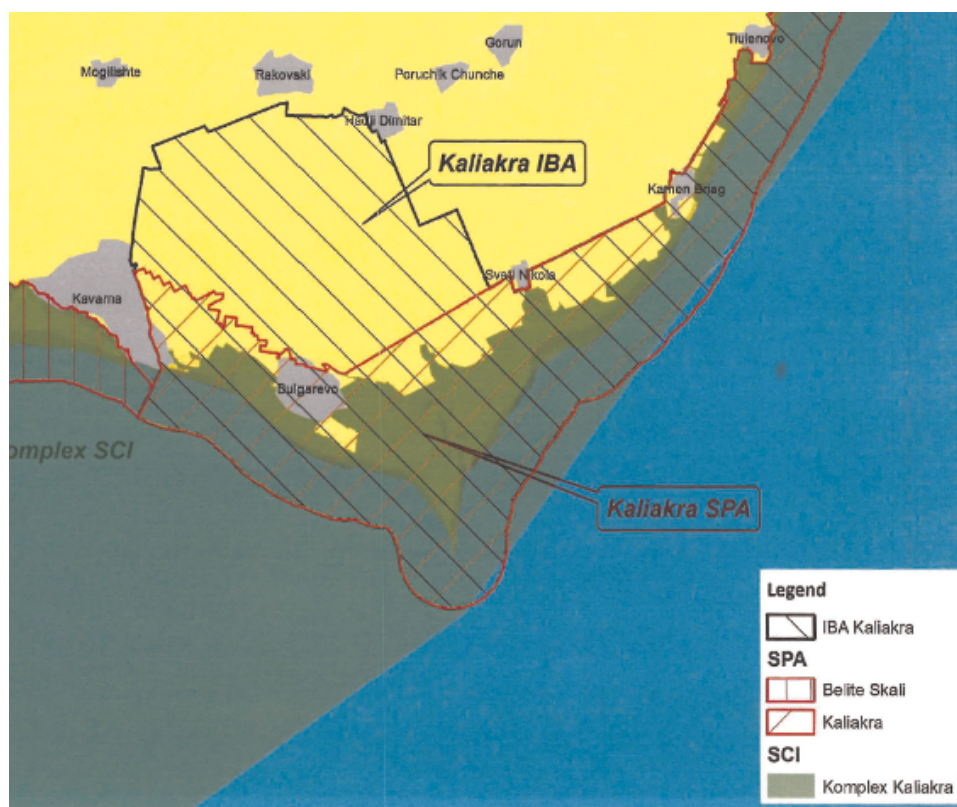
23. Following the written procedure, the parties attended the hearing on 20 May 2015.

#### IV – Legal assessment

24. In what follows, I shall look first at the head of claim at A, which concerns the need to designate certain areas as SPAs, next at the head of claim at C, concerning certain projects within the designated 'Kaliakra' and 'Belite Skali' SPAs, then at the head of claim at B, concerning projects within the areas examined under A, and finally at the head of claim at D, concerning compliance with the EIA Directive.

##### A – The designation of certain sites as bird protection areas (head of claim at A)

25. The Commission complains first of all that sites measuring just over 5 000 hectares that border on the 'Kaliakra' SPA have not also been designated as bird protection areas. The territory in question is that between Kavarna, Bulgarevo, Sveti Nikola and Rakovski, marked 'Kaliakra IBA' on the map reproduced below.<sup>12</sup>



1. Recognition of the site at issue as being in need of protection

26. The Commission takes the view that Bulgaria has recognised the need to designate the site at issue.

<sup>12</sup> — Annex A.31 to the application, p. 731.



27. In fact, Bulgaria informed the Commission that it had at least taken the first steps towards completing the 'Kaliakra' SPA even before the action was brought.<sup>13</sup> There is also a further legal measure of 6 February 2014, which, so far as it is possible to tell, formally declares the protection area to be extended with external effect.<sup>14</sup>

28. The extension of the SPA is based on, inter alia, a decision of the Bulgarian Council for Biological Diversity. It must therefore be assumed that it expresses a scientific opinion that the extension area is in need of protection.

29. Such acts of the Member States have great evidential value in the particular field of conservation, since the authorities that adopt them are more familiar with the situation on the ground than either the Commission or the Court of Justice. It would therefore be consistent with the practice previously followed by the Court<sup>15</sup> to regard such measures as constituting recognition of the need to protect those sites.

30. Bulgaria nonetheless submits that the extension of the SPA is merely an expression of its readiness to cooperate and does not constitute acceptance of the Commission's scientific opinion. That stark contradiction means that the fact that the extension was actually designated cannot be regarded as irrefutable recognition. Rather, the parties are indeed in dispute over the need for the extension and Bulgaria could even reverse the designation if its submission that the sites in question are not in need of protection prevails.<sup>16</sup>

31. However, the designation of a site affects the burden of proof. Although, in proceedings for failure to fulfil obligations, it is for the Commission to prove that a particular site must be designated as a protection area,<sup>17</sup> it may nonetheless rely to that end on the site's subsequent designation. In order to rebut that proof, the Member State must show that a designated area is not (or is no longer) one of the most suitable territories for the conservation of species of wild birds within the meaning of Article 4(1) of the Directive.<sup>18</sup> In practice, this means that Bulgaria must cast considerable scientific doubt on its suitability as such and, in particular, refute the information which it itself provided in the standard data form for the site in question. It would then be for the Commission to dispel any such doubts.

32. That being understood, in the present case, it is necessary substantively to examine whether the sites in question must be protected as SPAs.

## 2. The legal criteria

33. In accordance with the fourth subparagraph of Article 4(1) of the Birds Directive, Member States are to classify as special protection areas the most suitable territories in number and size for the conservation of the species listed in Annex I to that directive. In doing so, they must take into account the protection requirements of those species in the geographical sea and land area where the Directive applies. In accordance with Article 4(2), Member States must take similar measures for regularly occurring migratory species not listed in Annex I as regards their wintering areas and staging posts along their migration routes.<sup>19</sup>

13 — See point 18 above.

14 — Official Gazette No 15, 21 February 2014, p. 59 et seq.

15 — Judgments in *Commission v France* (C-202/01, EU:C:2002:713, paragraph 19 et seq.); *Commission v Finland* (C-240/00, EU:C:2003:126, paragraph 28 et seq.); *Commission v Italy* (C-378/01, EU:C:2003:176, paragraph 16); *Commission v Spain* (C-235/04, EU:C:2007:386, paragraph 51 et seq.); and *Commission v Spain* (C-186/06, Lleida, EU:C:2007:813, paragraphs 31 and 32).

16 — See judgment in *Commission v Portugal* (C-191/05, Moura, Mourão, Barrancos, EU:C:2006:472, paragraph 13).

17 — See, for example, judgment in *Commission v France* (C-237/12, EU:C:2014:2152, paragraph 32).

18 — Judgment in *Commission v Portugal* (C-191/05, EU:C:2006:472, paragraph 14).

19 — Judgment in *Commission v Austria* (C-209/04, Lauteracher Ried, EU:C:2006:195, paragraph 31).

34. This means that Member States must classify as SPAs those sites which, in accordance with ornithological criteria, appear to be the most suitable for conservation of the species in question.<sup>20</sup> On the other hand, the economic requirements mentioned in Article 2 of the Birds Directive may not be taken into account when selecting an SPA and defining its boundaries.<sup>21</sup> Although the Member States have a margin of discretion in choosing SPAs, that discretion concerns only the application of those criteria for identifying the most suitable territories for conservation of the species.<sup>22</sup>

35. In practice, Article 4(1) and (2) of the Birds Directive is put into effect by criteria which the NGO 'Birdlife International', the international umbrella association for bird-protection organisations, has developed for the purposes of identifying 'Important Bird Areas' (IBAs).<sup>23</sup> National bird-protection organisations apply those criteria in order to compile inventories of IBAs based on their knowledge of the occurrence of birds. Thus, the 'Kaliakra' IBA<sup>24</sup> comprises the SPA of the same name and the areas the failure to protect which forms the subject matter of the Commission's complaint in the present proceedings.

36. Although neither the aforementioned criteria nor the inventories which national bird-protection organisations compile on the basis of them are binding, the Court has nonetheless recognised them as providing a point of reference for assessing whether the Member State in question has classified a sufficient number and size of areas as SPAs.<sup>25</sup> The Member States may nevertheless refute that indication either by developing scientifically based ornithological criteria that are at least equally suitable for transposing Article 4(1) and (2) of the Birds Directive,<sup>26</sup> or by producing more accurate findings to rebut the information on the occurrence of birds in the territory in question.<sup>27</sup>

37. Moreover, so far as concerns the designation of particular sub-territories, the Court has already held that SPA classification cannot be the result of an isolated study of the ornithological value of each of the areas in question but must be carried out in the light of the natural boundaries of the territory in question, and has confirmed that, even in the case of sub-territories, the ornithological criteria which form the foundation of the classification must have a scientific basis.<sup>28</sup>

### 3. Application to the action brought by the Commission

38. The Commission argues that the birds breeding within the originally protected SPA are also found in the areas at issue (see, in this regard, section (a)), the importance of the areas at issue for migratory birds (see, in this regard, section (b)) and the wintering needs of the red-breasted goose (*Branta ruficollis*) (see, in this regard, section (c)).

#### a) Breeding birds

39. It might be assumed from the updated standard data form for the extended 'Kaliakra' SPA that this is a homogeneous territory which the protected species use to an equal extent throughout.

20 — Judgment in *Commission v Ireland* (C-418/04, EU:C:2007:780, paragraph 37).

21 — Judgment in *Commission v Ireland* (C-418/04, EU:C:2007:780, paragraph 39).

22 — Judgment in *Commission v Austria* (C-209/04, EU:C:2006:195, paragraph 33).

23 — See <http://www.birdlife.org/datazone/info/ibacriteuro>.

24 — See <http://www.birdlife.org/datazone/sitefactsheet.php?id=18973>.

25 — Judgments in *Commission v Netherlands* (C-3/96, EU:C:1998:238, paragraphs 68 to 70); *Commission v Spain* (C-235/04, EU:C:2007:386, paragraph 26); and *Commission v Ireland* (C-418/04, EU:C:2007:780, paragraph 52).

26 — See the judgment in *Commission v Spain* (C-235/04, EU:C:2007:386, paragraphs 29 to 34).

27 — See, for example, judgment in *Commission v Spain* (C-235/04, EU:C:2007:386, paragraph 61).

28 — Judgment in *Commission v Ireland* (C-418/04, EU:C:2007:780, paragraph 142).

40. Bulgaria argues convincingly, however, that the inland areas in question do not necessarily form a natural unit with the coastal areas that were already protected. The latter are characterised by cliffs and steppe habitats. The extension areas at issue, by contrast, are in agricultural use. They are also separated from the designated SPAs by a minor road. Bulgaria goes on to stress that the agricultural areas at issue have the same characteristics as the surrounding areas, the protection of which the Commission is not calling for.

41. While the Commission is correct in its contention that sites which must be designated as SPAs may also include agricultural areas, Bulgaria's argument, which has not been contradicted, to the effect that breeding birds concentrated in the coastal habitats originally protected breed to a much lesser extent on the adjacent agricultural areas, is nonetheless plausible.

42. The Commission also submits that the agricultural areas are important hunting grounds for the Levant sparrowhawk (*Accipiter brevipes*), the long-legged buzzard (*Buteo rufinus*) and the Eurasian eagle owl (*Bubo bubo*), which are listed as breeding birds on the standard data forms and are expressly mentioned in the assessment of the SPA. They are found in only very small numbers, however, and are not even mentioned by Birdlife International as a reason for identifying 'Kaliakra' as an IBA.<sup>29</sup> Their use as such is not therefore sufficient for the agricultural areas to be regarded as being the most suitable for the conservation of those species.

43. Contrary to the Commission's submission, therefore, the populations of breeding birds in the originally protected coastal zones do not support the inference that the agricultural areas in the hinterland also require protection.

#### b) Migratory birds

44. According to the information supplied by Bulgaria on the standard data form, however, the 'Kaliakra' SPA, including the extension areas, is important for migratory species too. As pointed out by the Commission and reported by Bulgaria on the standard data form for the 'Kaliakra' SPA,<sup>30</sup> the special importance of that SPA is a result of its geography. Thus, at the 'Kaliakra' peninsula, the coastline changes its course by almost 90 degrees from a north-south direction to an east-west direction. In order to continue their migration, the birds have to reposition themselves and use that landmark as a staging post. In so doing, they have to rely on the agricultural areas of the IBA, which were not included in the 'Kaliakra' SPA.

45. In keeping with the assessment of that territory as an IBA, the Commission takes the view in particular that the SPA is a 'bottleneck' for the autumn migration of certain birds.

46. The term 'bottleneck' refers to the criteria used by Birdlife International. Criterion C.5 defines a bottleneck as a site where at least 5 000 storks (*Ciconiidae*) and/or at least 3 000 raptors (*Accipitriformes* and *Falconiformes*) and/or 3 000 cranes (*Gruidae*) regularly pass on spring or autumn migration.<sup>31</sup>

47. In support of that criterion, the Commission relies in particular on a study conducted in 2005 for the specific purpose of identifying 'bottleneck sites' in Bulgaria. According to that study, over 30 000 gliding birds, mainly storks and pelicans, but also rare raptors, were observed that year at the Bulgarevo observation point, that is to say, close to 'Kaliakra'.<sup>32</sup>

29 — See <http://www.birdlife.org/datazone/sitefactsheet.php?id=18973>, downloaded on 4 June 2015.

30 — Annex A.28 to the application, p. 686.

31 — See <http://www.birdlife.org/datazone/info/ibacriteuro>, downloaded on 4 June 2015.

32 — Annex A.38 to the application, p. 794.

48. In response to the Commission's submission, Bulgaria cites a publication<sup>33</sup> and a number of studies<sup>34</sup> reporting that there is no 'bottleneck' in evidence at 'Kaliakra'. On the contrary, the birds are said to fly across a broad front in a southerly direction. While the Commission takes issue with the Bulgarian interpretation of the publication, it does not cast doubt on the observations on which the publication and the other studies are based.

49. Of particular interest in this regard are the observational data on the territory in question, which form the basis of the studies submitted by Bulgaria. These show that larger groups of migratory birds are observed in the area only irregularly.<sup>35</sup> Between 2005 and 2011, for example, the number of white storks observed exceeded 20 000 in only 2006 and 2010.<sup>36</sup> In the other four years,<sup>37</sup> the numbers of white storks sighted varied between 89 and 3 000 only. Bulgaria takes the view that the reason for this is that the birds' migration route is affected by wind conditions.<sup>38</sup> In the two years of high density, it submits, relatively strong westerly winds drove the birds to the coast.

50. These findings might raise doubts as to whether those concentrations occur with sufficient regularity to sustain the assumption that the site in question is a 'bottleneck'. On the other hand, Bulgaria's submission does at least suggest that those concentrations are not entirely random or extreme exceptions. Rather, they can be expected approximately one year in three, depending on the prevailing wind conditions. Moreover, when those concentrations arise, the birds do indeed have to use the agricultural areas in question to rest and feed, for the geographical reasons stated on the standard data form.

51. The observational data submitted by Bulgaria therefore confirm the assessment documented on the standard data form that the 'Kaliakra' SPA, including extensions, is one of the most suitable territories for the conservation of birds during migration. From this point of view, therefore, the head of claim at A is well founded.

### c) Wintering of the red-breasted goose

52. The third reason given by the Commission for including the extension areas in the 'Kaliakra' SPA is their importance for the red-breasted goose.

53. It is common ground between the parties that almost the *entire* world population (between 30 000 and 50 000 birds<sup>39</sup>) of the red-breasted goose, which is universally considered to be endangered, spends the winter on the west coast of the Black Sea, that is to say, primarily in Bulgaria and Romania.<sup>40</sup> Of particular importance in this regard are two Bulgarian lakes to the north of 'Kaliakra', where Bulgaria has designated sites as special protection areas. Red-breasted geese use these lakes, as well as certain coastal sea areas (some in or adjoining the 'Kaliakra' SPA), to roost, often alongside other types of goose.<sup>41</sup>

33 — Willem van den Bossche and others, 'Eastern European White Stork Populations: Migration Studies and Elaboration of Conservation Measures', *BfN scripten* 66, 2002 (Annex B.7 to the defence, p. 521 et seq.).

34 — Gash, *Review of the Ornithological Importance of the 'Kaliakra' IBA/SPA and Saint Nikola Wind Farm*, 2012 (Annex B.6 to the defence, p. 447 et seq.).

35 — Cited in footnote 34, Table 2, p. 467.

36 — Among more recent statistics, it is also worth drawing attention to 2013, when more than 11 000 storks and some 10 000 raptors were observed (Zehindjiev, *Bird migration monitoring in the Saint Nikola Wind Farm territory, 'Kaliakra' region in autumn 2014, and an analysis of potential impact after five years of operation*, p. 16 et seq., [www.aesgeoenergy.com/site/images/Report%20autumn%20monitoring%202014.pdf](http://www.aesgeoenergy.com/site/images/Report%20autumn%20monitoring%202014.pdf), downloaded on 6 May 2015).

37 — No figures are available for 2007.

38 — The same view is expressed in at least one of the studies submitted by the Commission; see Annex A.36 to the application, p. 745.

39 — See Annex B.4 to the reply, p. 73.

40 — See Annex B.4 to the reply, p. 77.

41 — See Annex A.45 to the application, p. 874 et seq., and Annex B.6 to the defence, p. 203.

54. On the standard data form, Bulgaria has reported only that a *smallish* number of red-breasted geese spend the winter in the region. Consequently, the designation of the extension to the ‘Kaliakra’ SPA does not constitute evidence that that extension is one of the most suitable territories for the conservation of the red-breasted goose.

55. The Commission, on the other hand, takes the view that the extensions to the ‘Kaliakra’ SPA are highly important as a feeding habitat for the red-breasted goose.

56. Although the Commission does not specify the criterion to which that submission relates, it must be assumed to be criterion C.1, which Birdlife International mentions in connection with the red-breasted goose in the ‘Kaliakra’ IBA.<sup>42</sup> This presupposes that the site regularly hosts significant numbers of a globally threatened species, or other species of global conservation concern.<sup>43</sup>

57. So far as it is possible to tell, the Commission takes as its basis the assessment made by the Bulgarian Society for the Protection of Birds,<sup>44</sup> which is nevertheless called into question by Bulgaria.

58. Both positions rely on a study evaluating observational data for the years 1995 to 2000.<sup>45</sup> Bulgaria is correct in its assertion that, according to that study, the red-breasted goose did not use the extensions to the ‘Kaliakra’ SPA as a feeding habitat every year.<sup>46</sup>

59. The Commission rightly points out, however, that, according to that study, several thousand red-breasted geese sought food in those areas in at least two of the five years of the observation period.<sup>47</sup>

60. Those results are not refuted by more recent observations showing that the areas in question are used less often,<sup>48</sup> given that the more recent observations did not begin until after a large number of wind turbines had been erected there. After all, it is not inconceivable that the wind turbines have made those territories less attractive to the geese.<sup>49</sup>

61. In summary, it follows that, before the wind turbines were erected, the extensions to the ‘Kaliakra’ SPA were an important but not permanent feeding ground for the red-breasted goose. The studies submitted also show that that species is flexible when it comes to choosing feeding grounds.

62. This does not mean that the extension areas must be excluded from the most suitable territories for the conservation of the red-breasted goose. After all, given that that species is globally threatened and that the European Union has a particular responsibility for its wintering territories, the requirements applicable to the identification of such territories must not be set too high.<sup>50</sup> Rather, the number of feeding grounds to be protected must be sufficient to ensure that the wintering of the red-breasted goose is not jeopardised.

63. Consequently, this head of claim is well founded also on account of the need to protect the red-breasted goose.

42 — See <http://www.birdlife.org/datazone/sitefactsheet.php?id=18973>, downloaded on 4 June 2015.

43 — See <http://www.birdlife.org/datazone/info/ibacriteuro>, downloaded on 4 June 2015.

44 — Annex A.45 to the application, pp. 877 and 878.

45 — Annex B.9 to the defence, p. 789 et seq.

46 — See Annex B.6 to the defence, p. 510 et seq.; see also p. 476 et seq.

47 — See the data for 1995/96 (Annex B.9 to the defence, p. 872) and for 1997/98 (Annex B.9 to the defence, p. 868).

48 — See Annex B.7 to the reply, pp. 226 and 227.

49 — See points 96 and 97 below.

50 — See the judgment in *Commission v Spain* (C-235/04, EU:C:2007:386, paragraph 32).



#### 4. Interim conclusion

64. It must therefore be concluded that, by having failed also to protect in their entirety, as a special protection area, the initially unprotected parts of the ‘Kaliakra’ Important Bird Area to the north of the originally designated ‘Kaliakra’ special protection area on the expiry of the period laid down by the Commission in its reasoned opinion, Bulgaria has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive.

#### B – *The projects on sites already protected or in need of protection (heads of claim at B and C)*

65. The Commission goes on to complain that, within the protection areas already designated or in need of designation, Bulgaria has authorised several projects, in particular wind turbines, but also tourist projects such as golf courses and hotels. The map below gives an overview of these projects:<sup>51</sup>

66. In what follows, I shall begin by examining the projects within the SPA, since this will make it easier to present the legal criteria that will then have to be applied in connection with the projects in the areas not initially designated. Next, I should like to put the outcome of that examination into perspective by looking briefly at the legal consequences of a judgment finding against the defendant in these two respects.

#### 1. The projects in the ‘Kaliakra’ and ‘Belite Skali’ SPAs and in the proposed ‘Kompleks Kaliakra’ SCI (head of claim at C)

67. Under its head of claim at C, the Commission seeks a declaration that, by granting authorisation for the ‘Kaliakra Wind Power’ AD, ‘EVN Enertrag Kavarna’ OOD, ‘Vertikal — Petkov & Cie’ OOD and ‘Thracian Cliffs Golf & Spa Resort’ OOD projects in the ‘Kaliakra’ and ‘Belite Skali’ SPAs and in the proposed ‘Kompleks Kaliakra’ SCI, Bulgaria has failed to fulfil its obligations under Article 6(2) of the Habitats Directive, as interpreted by the Court of Justice in Cases C-117/03 and C-244/05, inasmuch as it failed to take appropriate steps to avoid the deterioration of natural habitats and the habitats of biological species as well as disturbance of the species for which the areas have been designated.

#### a) Interpretation of the head of claim

68. At first sight, it seems unclear how this head of claim is to be understood. For that reason, its admissibility is also in doubt. Under Article 120(c) of the Rules of Procedure, the heads of claim must be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a complaint.<sup>52</sup>

69. The first contradiction lies between the provision cited, Article 6(2) of the Habitats Directive, and the two judgments cited. After all, the Court of Justice did not actually interpret Article 6(2) in those judgments. It simply pointed out that, in accordance with Article 4(5), the protective measures prescribed in Article 6(2) are required only as regards sites which are placed on the list of sites selected as SCIs.<sup>53</sup>

51 — Annex A.41 to the application, p. 825.

52 — Judgments in *Commission v Finland* (C-195/04, EU:C:2007:248, paragraph 22) and *United Kingdom v Council* (C-209/13, EU:C:2014:283, paragraph 30).

53 — Judgments in *Dragaggi and Others* (C-117/03, EU:C:2005:16, paragraphs 24 and 25) and *Bund Naturschutz in Bayern and Others* (C-244/05, EU:C:2006:579, paragraphs 35 and 36).



70. The contradictory formulation thus employed in the head of claim is explained, however, by the fact that the Commission combines the failure to fulfil two different obligations in the one head of claim. On the one hand, it complains that two designated SPAs have been adversely affected and, on the other hand, it complains that the proposed 'Kompleks Kaliakra' SCI has been adversely affected. However, interventions in designated SPAs must be assessed by reference to Article 6(2) of the Habitats Directive, while the provisional obligations for the protection of proposed conservation areas arise from the two judgments cited.

71. The head of claim must therefore be understood as meaning that the Commission alleges that there has been a failure to fulfil obligations under Article 6(2) of the Habitats Directive in relation to the two SPAs and, in addition, a failure to fulfil the provisional protection obligations arising from the two judgments cited in relation to the proposed conservation area.

72. Even as so defined, however, the objective pursued by this head of claim requires further clarification. Since the Commission objects to the authorisation given for the projects in question, the head of claim could be said to be manifestly unfounded. After all, in accordance with Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded,<sup>54</sup> Bulgaria has been bound by EU law only since its accession. The authorisations to which the Commission objects in this head of claim were granted before then, however. Consequently, by granting those authorisations, Bulgaria could not have failed to fulfil its obligations under Article 6(2) of the Habitats Directive or its provisional obligations for the protection of proposed conservation areas.

73. In the head of claim itself, however, the Commission makes it clear that it considers the infringements to lie in the fact that Bulgaria failed to take the appropriate steps to avoid the deterioration of natural habitats and the habitats of biological species as well as disturbance of the species for which the areas have been designated. From its point of view, therefore, the issue is not the authorisations as such, which, moreover, would have to be assessed primarily in accordance with the preliminary assessment procedure under Article 6(3) of the Habitats Directive, but the fact that, afterwards, nothing was actually done to ensure that the projects did not adversely affect the areas concerned, which omission comes within the scope of Article 6(2) and the provisional protection obligations. The Commission's further submissions confirm that interpretation of the head of claim at C, since, in those submissions, the Commission takes issue not with the authorisations granted prior to accession but with the implementation of those projects since accession, and in particular since the designation of the two SPAs and the proposed designation of the 'Kompleks Kaliakra' site.

74. While this lack of clarity in the head of claim at C is highly regrettable, it is not so serious as to render that head of claim inadmissible or manifestly unfounded. On the contrary, it may be correctly understood by interpretation and assessed on its merits. Furthermore, it is clear from Bulgaria's submissions that its defence was not adversely affected by the shortcomings in the head of claim.

b) The alleged failure to fulfil obligations under Article 6(2) of the Habitats Directive in relation to the 'Kaliakra' and 'Belite Skali' SPAs

75. It is therefore necessary to examine first of all whether Bulgaria failed to fulfil its obligations under Article 6(2) of the Habitats Directive in relation to the 'Kaliakra' and 'Belite Skali' SPAs, designated on 18 December 2007, by authorising the implementation of the 'Kaliakra Wind Power' AD, 'EVN Enertrag Kavarna' OOD, 'Vertikal — Petkov & Cie' OOD and 'Thracian Cliffs Golf & Spa Resort' OOD projects.

<sup>54</sup> — OJ 2005 L 157, p. 203.

i) The temporal applicability of Article 6(2) of the Habitats Directive

76. Bulgaria takes the view that Article 6(2) of the Habitats Directive is not at all applicable to projects authorised before its accession, and not, therefore, in relation to their implementation either.

77. Bulgaria relies in this regard on the judgment concerning the ‘Lauteracher Ried’, in which the Second Chamber of the Court of Justice at the time held, on grounds of legal certainty,<sup>55</sup> that the obligations under the Habitats Directive did not apply to a project the procedure for authorising which was initiated prior to the accession of the Member State concerned to the European Community.<sup>56</sup> On that basis, the Habitats Directive would certainly not apply to projects authorised prior to accession.

78. Since then, however, the Court’s Grand Chamber has — rightly<sup>57</sup> — abandoned the aforementioned case-law concerning the temporal application of the Habitats Directive on the ground that, until such time as a project has been authorised, there is no established situation<sup>58</sup> to which the principle of legal certainty can apply.

79. Although the latter judgment does not concern projects already authorised prior to accession, the Court has nonetheless made it clear that, once the Habitats Directive has become applicable, Article 6(2) applies to projects the operation of which was authorised before the system of protection laid down by the Habitats Directive became applicable to the protection area concerned.<sup>59</sup> This must also be true of projects that were authorised prior to accession.

80. Although such projects are not subject to the provisions of Article 6(3) of the Habitats Directive, concerning a preliminary assessment of their implications for the site concerned, Article 6(2) nonetheless requires the Member States to take appropriate steps to ensure that the *implementation* of the projects does not lead to the deterioration of natural habitats and the habitats of species in the special areas of conservation or 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 that directive.<sup>60</sup>

81. The implementation of projects authorised prior to Bulgaria’s accession and before the Habitats Directive and the Birds Directive became applicable therefore comes under Article 6(2) of the Habitats Directive.

82. It should also be noted that, read in conjunction with Article 7, Article 6(2) of the Habitats Directive does not apply to SPAs until the sites in question have been designated as such. Until then, those sites are subject to the provision, which is stricter from the point of the justification of interventions on the sites in question, contained in the first sentence of Article 4(4) of the Birds Directive,<sup>61</sup> although the Commission has not referred to that provision in the head of claim at C.

55 — Judgment in *Commission v Austria* (C-209/04, EU:C:2006:195, paragraph 57).

56 — Judgment in *Commission v Austria* (C-209/04, EU:C:2006:195, paragraph 62).

57 — See my Opinion in *Commission v Austria* (C-209/04, EU:C:2006:653, points 55 to 64).

58 — Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 103).

59 — Judgment in *Commission v Spain* (C-404/09, Spanish brown bear, EU:C:2011:768, paragraph 124).

60 — Judgments in *Stadt Papenburg* (C-226/08, EU:C:2010:10, paragraphs 48 and 49) and *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 125); see also, to the same effect, *Commission v Italy* (C-491/08, ‘Is Arenas’, EU:C:2010:330, in particular paragraph 38).

61 — Judgments in *Commission v France* (C-374/98, Basses Corbières, EU:C:2000:670, paragraphs 47 and 57); *Commission v Italy* (C-388/05, Valloni e steppe pedegarganiche, EU:C:2007:533, paragraph 18); and *Commission v Spain* (C-186/06, EU:C:2007:813, paragraph 27 et seq.).

ii) The criterion laid down in Article 6(2) of the Habitats Directive

83. An activity is consistent with Article 6(2) of the Habitats Directive only if it is ensured that it causes no disturbance likely significantly to affect the objectives of that directive, in particular its conservation objectives.<sup>62</sup> In proceedings for failure to fulfil obligations, a complaint of failure to fulfil obligations under Article 6(2) will therefore be well founded only if the Commission demonstrates to a sufficient legal standard that the Member State has not taken the appropriate protective measures to prevent the operational activities of projects — in so far as these took place after the protection area concerned had been designated — from giving rise to deteriorations of the habitats of the species concerned and disturbances of those species likely to have significant effects having regard to that directive's objective of ensuring the conservation of that species.<sup>63</sup>

84. However, in order to establish that there has been a failure to fulfil obligations under Article 6(2) of the Habitats Directive, the Commission does not have to prove a cause-and-effect relationship between the operation of a project and significant disturbance to the species concerned. Rather, it is sufficient for the Commission to establish that there is a probability or risk that that operation might cause significant disturbances for that species.<sup>64</sup>

85. While the Court has applied the criterion of probability or risk only for the purposes of examining significant disturbances for species, there is no obvious reason why it cannot also be used to examine the other type of adverse effect provided for in Article 6(2) of the Habitats Directive, namely the deterioration of habitats.

86. After all, the reason for that criterion lies in the fact that the preliminary assessment of a project under Article 6(3) of the Habitats Directive is also subject to the existence of such a risk.<sup>65</sup> In that case, authorisation is possible only where either the assessment shows that the site as such is not adversely affected or the project is justified under Article 6(4). Since the provisions of Article 6(2) and (3) are intended to guarantee the same level of protection,<sup>66</sup> the same criterion must also be used for the purposes of establishing a failure to fulfil obligations under Article 6(2).

87. However, the establishment of a failure to fulfil obligations by reference to that criterion does not necessarily provide definitive proof that a measure — such as the operation of projects — is impermissible. On the contrary, any proof so established can be rebutted by an appropriate assessment of the effects on the site or the measure may be justified under Article 6(4) of the Habitats Directive.<sup>67</sup>

iii) Adverse effects on the 'Kaliakra' SPA

88. The Commission objects to four projects on the original sites of the 'Kaliakra' and 'Belite Skali' SPAs. These projects were authorised prior to Bulgaria's accession to the European Union, although, in each case, the construction work was not completed until after the site had been designated as an SPA. The projects in question are three projects for the production of energy from wind power and one tourist project.

62 — Judgments in *Commission v France* (C-241/08, EU:C:2010:114, paragraph 32) and *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 126).

63 — Judgment in *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 128).

64 — Judgment in *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 142).

65 — Judgments in *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 43); *Commission v Italy* (C-179/06, EU:C:2007:578, paragraph 33); and *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* (C-2/10, EU:C:2011:502, paragraph 41).

66 — Judgments in *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 43); *Commission v France* (C-241/08, EU:C:2010:114, paragraph 30); and *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 142).

67 — Judgment in *Commission v Spain* (C-404/09, EU:C:2011:768, paragraphs 156 and 192).

89. The ‘Kaliakra Wind Power’ AD project for the erection of 35 wind turbines was authorised in 2006 and came into operation on 5 June 2008. The ‘EVN Enertrag Kavarna’ OOD project involved the erection of 32 wind-turbine installations and was authorised on 26 July 2006. The authorisation was retrospectively restricted to 20 installations, of which, according to information supplied by Bulgaria, eight were erected and have been in operation since 8 June 2012. Three further installations were authorised as part of the ‘Vertikal — Petkov & Cie’ OOD project in 2005. Proceedings brought against those decisions concluded in a settlement reached on 26 July 2007. Two installations entered into operation on 24 April 2008 and 14 February 2011. The third installation is not going to be erected.

90. The ‘Thracian Cliffs Golf & Spa Resort’ OOD tourist project in the ‘Belite Skali’ SPA involves the construction of a golf course and thermal centre. An initial building consent was granted on 22 December 2005, and the operating authorisation was issued on 6 April 2010.

91. Since, in accordance with Article 7 of the Habitats Directive, Article 6(2) of that directive is not applicable before the sites in question have been designated as SPAs, an assessment of the effects of erecting those installations in the light of that provision presupposes that the Commission has indicated which works necessary for their construction were carried out after that date. That information is unavailable, however. All that is known, from the uncontradicted information provided by Bulgaria, is that the groundworks necessary for those projects were carried out even before Bulgaria acceded to the European Union. Consequently, the erection of those facilities is not open to assessment.

92. It is established, however, that none of those installations came into operation until after the sites in question had been designated as SPAs. It is therefore necessary to examine whether those operations in the two SPAs are compatible with Article 6(2) of the Habitats Directive.

93. With regard to the wind-turbine installations, although the Commission points to the risk that birds might be killed by colliding with them (bird strike), Bulgaria rebuts that argument by reference to the results of ornithological observations. These indicate that only three dead birds, namely one great white pelican (*Pelecanus onocrotalus*) and two corn buntings (*Miliaria* or *Emberiza calandra*), were found during the first year of operation of the ‘Kaliakra Wind Power’ ODD wind farm. It is true that both species are mentioned on the standard data form for the ‘Kaliakra’ SPA. However, in view of the large populations of great white pelicans (2 000 to 3 000) and corn buntings (500 to 1 200), these losses appear to be much smaller than the natural population fluctuations.

94. The Commission also takes the view that the wind-turbine installations and the ‘Thracian Cliffs Golf & Spa Resort’ OOD installations disturb the bird species concerned and cause deterioration to their habitats. The estimates it gives for the losses are even taken from information supplied by a Bulgarian bird protection organisation.

95. In response to that calculation, Bulgaria properly raises the objection that the information in question does not make it clear how those figures were arrived at. Those estimates of the numbers of sites allegedly lost cannot therefore be used to substantiate the claim that there has been a failure to fulfil obligations under Article 6(2) of the Habitats Directive.

96. It is nonetheless clear that the operation of wind-turbine installations and the presence of hotel buildings and a golf course support the probability or risk that the habitats of the bird species protected in the SPA will deteriorate and that those species will be significantly disturbed.

97. Thus, the wind farm built by ‘Kaliakra Wind Power’ AD comprises 35 wind turbines operated at high density over an area of three to four square kilometres in the middle of the ‘Kaliakra’ SPA. The areas between the turbines and in the immediate vicinity of the wind farm are in all probability no longer as attractive to any of the protected bird species as they were before the wind farm was built. The same is true, to a lesser extent, of the two smaller wind-power projects. It is for this reason that



Bulgaria has expressly prohibited the erection of any further wind turbines in the ‘Kaliakra’ SPA.<sup>68</sup>

98. Moreover, those parts of the ‘Belite Skali’ SPA that are occupied by the ‘Thracian Cliffs Golf & Spa Resort’ OOD cannot possibly be as beneficial to protected bird species as they were before that project was implemented. The operation of a golf course and leisure facilities changes the characteristics of the habitats concerned and, even if the bird species concerned could nonetheless still use them for breeding, resting or searching for food, the presence of tourists would frighten them away.<sup>69</sup>

99. According to the Commission’s submissions concerning alleged losses of territory, this must be assumed to be true, inter alia, in the case of the following species listed in Annex I to the Birds Directive, which also appear on the standard data forms for the two SPAs: the pied wheatear (*Oenanthe pleschanka*), the calandra lark (*Melanocorypha calandra*), the greater short-toed lark (*Calandrella brachydactyla*), the stone curlew (*Burhinus oedicephalus*), the long-legged buzzard (*Buteo rufinus*), the Levant sparrowhawk (*Accipiter brevipes*) and the European roller (*Coracias garrulus*).

100. The onus is therefore on Bulgaria to refute that indication of a probability or risk of deterioration of the habitats of the protected bird species and of their disturbance. However, Bulgaria has not commented on the disturbance of the species concerned or on the deterioration of their habitats.

101. It must therefore be assumed that the operation of the aforementioned projects constitutes an infringement of Article 6(2) of the Habitats Directive.

102. Consequently, by failing to take the appropriate steps to ensure that the operation of the ‘Kaliakra Wind Power’ AD, ‘EVN Enertrag Kavarna’ OOD and ‘Vertikal — Petkov & Cie’ OOD wind-power plants and the installations of the ‘Thracian Cliffs Golf & Spa Resort’ OOD in the ‘Kaliakra’ and ‘Belite Skali’ SPAs does not lead to the deterioration of the habitats of the protected bird species and the disturbance of those species, Bulgaria has failed to fulfil its obligations under Article 6(2) of the Habitats Directive.

c) Provisional protection of the proposed ‘Kompleks Kaliakra’ site

103. The Commission further complains that Bulgaria has not adequately protected the proposed ‘Kompleks Kaliakra’ SCI against adverse effects arising from the ‘Kaliakra Wind Power’ AD, ‘EVN Enertrag Kavarna’ OOD, ‘Vertikal — Petkov & Cie’ OOD and ‘Thracian Cliffs Golf & Spa Resort’ OOD projects. In this regard, it objects to the destruction of the Ponto-Sarmatic Steppes priority habitat (Natura 2000 Code 62C0).

104. Under the Habitats Directive, Member States must take appropriate protective measures to preserve the characteristics of sites which host natural habitat types and/or priority species and which have been identified by Member States with a view to their inclusion on the Community list. Member States cannot therefore authorise intervention where there is a risk that the ecological characteristics of those sites will be seriously compromised as a result. This is particularly the case where 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.<sup>70</sup>

105. That obligation to protect would be infringed if Bulgaria were to allow a priority habitat type within a proposed conservation area to be largely destroyed.

68 — Point 8.6 of the legal measure referenced in footnote 14.

69 — By way of illustration, see the judgments in *Commission v Austria* (C-209/02, ‘Golfplatz Wörschach’, EU:C:2004:61, paragraph 24) and *Commission v Italy* (C-491/08, EU:C:2010:330, paragraphs 32 to 34).

70 — Judgments in *Bund Naturschutz in Bayern and Others* (C-244/05, EU:C:2006:579, paragraphs 46 and 47); *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 163); and *Commission v Cyprus* (C-340/10, Cypriot grass snake, EU:C:2012:143, paragraph 44).

106. That said, that obligation, like all other obligations under EU law, cannot apply any sooner than from the time of Bulgaria's accession. However, Bulgaria submits, without contradiction, that the groundworks for the aforementioned projects which destroyed the habitat type were carried out prior to accession. The adverse effects on the habitat type were not therefore, it argues, capable of infringing EU law.

107. If, however, the habitat type on the sites in question has already been destroyed, the subsequent implementation of the projects cannot impair it any further.

108. The head of claim at C is therefore unfounded in this regard and the Commission's action must to that extent be dismissed.

## 2. The projects on the sites not initially protected (head of claim at B)

109. By the head of claim at B, the Commission seeks a declaration that, by granting authorisation for the projects 'AES Geo Energy' OOD, 'Windtech' OOD, 'Brestiom' OOD, 'Disib' OOD, 'Eco Energy' OOD and 'Longman Investment' OOD in the 'Kaliakra' area, which is important for the conservation of birds and which has not been designated as a special protection area, although it should have been so designated, the Republic of Bulgaria has failed to fulfil its obligations under Article 4(4) of the Birds Directive, as interpreted by the Court of Justice in Cases C-96/98 and C-374/98.

110. Although this head of claim is framed in a similar fashion to the claim at C, it does not suffer from the same shortcomings, since it concerns a different factual and legal situation.

111. There is some lack of clarity, however, inasmuch as the Commission bases this head of claim on Directive 2009/147, which repealed the former version of the Birds Directive. It might be assumed, therefore, that this head of claim is intended to cover infringements which occurred after Directive 2009/147 had entered into force on 15 February 2010.

112. That directive, according to recital (1) in its preamble, was intended to codify the Birds Directive and did not change the first sentence of Article 4(4) as it had appeared in the earlier versions. Moreover, the first paragraph of Article 18 states that the previously applicable version of the Birds Directive is repealed 'without prejudice to the obligations of the Member States'. It would therefore be excessively formalistic in the present case, which involves an ongoing, substantively identical obligation and facts which have not changed, to consider only circumstances which have arisen since the codification directive was adopted.<sup>71</sup>

### a) Legal criteria

113. In keeping with my foregoing submissions in Section IV.A, it must be assumed that the projects are located on sites which Bulgaria ought to have classified as SPAs. Their designation as such did not take place, however, until after the relevant point in time by which the situation in the present case should have been assessed, that is to say, the date of expiry of the period laid down in the reasoned opinion,<sup>72</sup> 22 August 2012.

71 — See the judgments in *Commission v Greece* (C-286/08, EU:C:2009:543, paragraph 8); *Commission v France* (C-492/08, EU:C:2010:348, paragraph 32); *Commission v Poland* (C-281/11, EU:C:2013:855, paragraph 38); and *Gruber* (C-570/13, EU:C:2015:231, paragraphs 26 to 28).

72 — Judgment in *Commission v Spain* (C-186/06, EU:C:2007:813, paragraph 32).



114. It is settled case-law that areas that have not been classified as SPAs, but which should have been so designated, fall under the first sentence of Article 4(4) of the Birds Directive.<sup>73</sup> That provision requires Member States to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds in the SPA, in so far as these would be significant having regard to the objectives of that article.

115. In order to establish that there has been a failure to fulfil obligations under the first sentence of Article 4(4) of the Birds Directive, reliance may be placed on the criterion which the Court of Justice has developed in connection with Article 6(2) of the Habitats Directive, since the content of the latter provision is largely the same as that of the first sentence of Article 4(4) of the Birds Directive.<sup>74</sup> According to that criterion, a failure to fulfil obligations is to be deemed to exist where the Commission is able to show that there is a probability or risk that a project will cause deterioration to the habitats of protected species of birds or cause significant disturbance to those species.<sup>75</sup> The Court has in practice already adopted the approach of establishing the existence of a failure to fulfil obligations under the first sentence of Article 4(4) of the Birds Directive on the basis of the probability or risk of adverse effects,<sup>76</sup> although it has not expressly referred to that criterion.

b) The projects

116. By this head of claim, the Commission objects to six projects.

i) The three projects that were not carried out

117. In the case of three projects, that is to say ‘Windtech’ OOD, ‘Brestiom’ OOD and ‘Eco Energy’ OOD, Bulgaria submits, without contradiction in this regard, that it was simply decided that an environmental impact assessment was not necessary. No further authorisations were granted and the installations were not built. Moreover, the decisions concerning the need for an environmental impact assessment have since become ineffective.

118. Nonetheless, those decisions might in and of themselves support the inference that there was an increased risk or threat of disturbances to, or adverse effects on, the site that was still present at the time when the period laid down in the reasoned opinion expired.<sup>77</sup> After all, an environmental impact assessment would increase the likelihood of disturbances or adverse effects being identified and avoided.

119. Even so, such a purely procedural threat to the site is not in itself sufficient to sustain a finding of failure to fulfil obligations under the first sentence of Article 4(4) of the Birds Directive. After all, if no further steps are taken in the procedure, the threat remains hypothetical.

120. Moreover, while the conduct of an environmental impact assessment would be desirable, it is not an express requirement under the first sentence of Article 4(4) of the Birds Directive — in contrast to the position under the first sentence of Article 6(3) of the Habitats Directive. Consequently, the present analysis need now look only at the decision on the need for an environmental impact assessment as a possible infringement of the EIA Directive.

73 — Judgments in *Commission v France* (C-374/98, EU:C:2000:670, paragraphs 47 and 57); *Commission v Italy* (C-388/05, EU:C:2007:533, paragraph 18); and *Commission v Spain* (C-186/06, EU:C:2007:813, paragraphs 27 and 28).

74 — Judgments in *Commission v Ireland* (C-117/00, Owenduff-Nephin Beg, EU:C:2002:366, paragraph 26); *Commission v Italy* (C-388/05, EU:C:2007:533, paragraph 26); and *Commission v Greece* (C-517/11, Lake Koroneia, EU:C:2013:66, paragraph 34).

75 — See points 83 to 87 above.

76 — Judgment in *Commission v Spain* (C-186/06, EU:C:2007:813, paragraphs 33, 34 and 36).

77 — For further detail in this regard, see points 145 and 146 below.

ii) The three projects that were carried out

121. In the case of the remaining three projects, the Bulgarian authorities granted the necessary further authorisations and the wind-turbine installations were built accordingly.

122. Following an environmental impact assessment in 2008, the ‘AES Geo Energy’ OOD project was granted authorisation for the construction of 52 wind turbines, which came into operation on 15 November 2011.

123. On 4 January 2007, it was decided that no environmental impact assessment was necessary for the ‘Disib’ OOD project. A wind-turbine installation was subsequently authorised and has been in operation since 22 May 2008.

124. The position is much the same in the case of the ‘Longman Investment’ OOD project. Following a decision on 11 December 2007 that no environmental impact assessment was required, a wind-turbine installation was authorised and has been in operation since 16 June 2008.

c) Adverse effects on the site

125. The merits of constructing and operating wind-turbine installations on the sites subsequently protected as extensions to the ‘Kaliakra’ SPA must be assessed in the same way as if those installations were within the original SPA.

126. After all, as is the case within the original SPA, there is a sufficient probability or risk that the construction and operation of a total of 54 wind-turbine installations will make the sites less attractive to the protected bird species than they were before.<sup>78</sup>

127. Moreover, the fact that, according to observational data from the ‘AES Geo Energy’ OOD wind farm, on which Bulgaria relies, red-breasted geese still use the sites in question and that, when the wind conditions are favourable, migratory birds are concentrated in ‘Kaliakra’, does not militate against that probability or risk. After all, the obligation to protect exists before any reduction in the number of birds has been observed or before the risk of a protected species becoming extinct has materialised.<sup>79</sup>

128. What is more, the data in question can at least be regarded as an indication of a loss of attractiveness. The use of the sites by red-breasted geese is less than it was at its peak values in the period before the wind turbines were built. Furthermore, there is no documentary evidence that migratory birds still rest there in large numbers, even during the occasional concentrations on the coast.

d) Interim conclusion

129. Consequently, by failing to take the necessary steps to ensure that the operation of the ‘AES Geo Energy’ OOD, ‘Disib’ OOD and ‘Longman Investment’ OOD wind-power projects in the ‘Kaliakra’ area, which is important for the conservation of birds but which has not been designated as a special protection area, although it should have been so designated, does not lead to the deterioration of the habitats of the bird species in need of protection and the disturbance of those species, Bulgaria has failed to fulfil its obligations under the first sentence of Article 4(4) of the Birds Directive.

<sup>78</sup> — See points 96 and 97 above.

<sup>79</sup> — Judgments in *Commission v Spain* (C-355/90, Santoña marshes, EU:C:1993:331, paragraph 15) and *Commission v Spain* (C-186/06, EU:C:2007:813, paragraph 36).

### 3. The consequences of any adverse judgment

130. It should also be noted that, on the basis of the information available, it is not possible to give a definitive decision on whether further operation of the projects under examination must be prohibited. After all, it is not inconceivable that a closer examination will show that the projects do not adversely affect the site as such or can be justified under Article 6(4) of the Habitats Directive.<sup>80</sup>

131. The first step in implementing a judgment finding against the defendant in these respects, and, at the same time, the first appropriate step in preventing adverse effects on the SPAs concerned, would therefore be a scientific assessment of the impact of the projects. If, following such an assessment, it is still not possible to rule out all reasonable scientific doubts as to the absence of adverse effects on the site as such,<sup>81</sup> it may then be necessary to examine whether there is justification under Article 6(4) of the Habitats Directive.

132. The Court has already established the possibility of justification in relation to Article 6(2) of the Habitats Directive.<sup>82</sup> A failure to fulfil obligations under the first sentence of Article 4(4) of the Birds Directive, on the other hand, is, in principle, justifiable only within much narrower limits.<sup>83</sup> However, Article 6(4) of the Habitats Directive is, in principle, capable of justifying the future operation of the wind turbines, since the sites concerned are now also part of the 'Kaliakra' SPA and the provisions of Article 6(2) to (4) of the Habitats Directive are therefore applicable too.

133. In accordance with Article 6(4) of the Habitats Directive, Member State are to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected 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.

134. Apart from the interest in the use of wind energy or in preserving jobs, legal certainty and the protection of legitimate expectations would be the primary factors to be taken into account when identifying the public interest in this context, in so far as these projects are based on authorisations that were granted before the Birds Directive and the Habitats Directive became applicable. Provided that all reasonable steps are taken to reduce adverse effects, legal certainty and legitimate expectation should in most cases prevail over the interest in the protection of the natural assets in question.

135. The conditions for such a justification are not satisfied, however, because Bulgaria has not yet identified the extent of the adverse effects on the site of operating the installations in question. For that reason, it is not possible either to weigh up the interest in the continued operation of the projects against the adverse effects that this will have on the site or to assess any alternatives, such as moving the wind-turbine installations to other sites or imposing restrictions on their operation, particularly at sensitive times. Moreover, it is still unclear what measures are needed to ensure the coherence of Natura 2000.<sup>84</sup>

136. Should the Court endorse my proposal, it would thus be necessary first of all to examine the disturbance caused by the operation of the projects and then, if appropriate, to consider whether there is any justification for it.

80 — See point 87 above.

81 — See judgments in *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 59); *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 156); and *Nomarchiaki Aftodioikisi Aitolokarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 113).

82 — Judgment in *Commission v Spain* (C-404/09, EU:C:2011:768, paragraphs 156 and 192).

83 — Judgments in *Commission v Germany* (C-57/89, Leybucht, EU:C:1991:89, paragraphs 21 and 22); *Commission v Spain* (C-355/90, Santoña marshes, EU:C:1993:331, paragraph 19); *Royal Society for the Protection of Birds* (C-44/95, Lappel Bank, EU:C:1996:297, paragraph 37); and *Commission v Spain* (C-186/06, EU:C:2007:813, paragraph 37).

84 — See judgment in *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 157).

*C – The environmental impact assessment (EIA) (head of claim at D)*

137. Finally, by its head of claim at D, the Commission complains that the cumulative effects of the ‘Windtech’ OOD, ‘Brestiom’ OOD, ‘Eco Energy’ OOD and ‘Longman Investment’ OOD projects in those parts of the ‘Kaliakra’ IBA that were not initially protected have not been assessed in the appropriate manner. Bulgaria, it submits, has thus failed to fulfil its obligations under Article 2(1), in conjunction with Article 4(2) and (3) of and point 1(b) of Annex III to the EIA Directive.

138. In its original version, this head of claim concerned the preliminary assessment of five projects, with a view to ascertaining whether an environmental impact assessment was necessary, and the actual environmental impact assessment of a sixth project. Having been limited by the Commission in the reply, that claim is now concerned only with the preliminary assessment of four projects.

1. The temporal applicability of the EIA Directive

139. The Commission seeks a declaration that there has been a failure to fulfil obligations under the EIA Directive in its 2011 version. However, the Bulgarian authorities had already taken the decisions at issue in 2007. Nonetheless, the later version of that directive may be applied because it is identical in all relevant respects to the version applicable in 2007.<sup>85</sup>

2. The projects

140. All the projects which are the subject of the complaint involve that part of the ‘Kaliakra’ IBA that was not originally designated as an SPA. None of them was subjected to an environmental impact assessment because the competent authority decided that this was not necessary.

141. The respective preliminary-assessment procedures were initiated in the second half of 2007 and concluded with decisions of 24 September 2007 (‘Eco Energy’ OOD for the erection of a wind-turbine installation), 11 December 2007 (‘Longman Investment’ OOD for the erection of a wind-turbine installation) and 28 December 2007 (‘Windtech’ OOD for the erection of four wind-turbine installations and ‘Brestiom’ OOD for the erection of six wind-turbine installations).

142. Only the ‘Longman Investment’ OOD project was actually carried out and has been in operation since 16 June 2008.

143. The other three projects, by contrast, were never granted building authorisations and, according to the information supplied by Bulgaria, the aforementioned decisions are no longer operative because they were not implemented.

144. It is therefore necessary to consider whether any failure to fulfil obligations would be the proper subject of the present proceedings (see section (a) below) or whether a failure to fulfil obligations under the EIA Directive may exist at all in the case of the projects that were not carried out (see section (b) below). It will then be necessary to examine whether the cumulative effects of the projects were taken adequately into account.

<sup>85</sup> — Judgment in *Gruber* (C-570/13, EU:C:2015:231, paragraphs 26 to 28).

a) Invalid decisions as the subject matter of the present proceedings for failure to fulfil obligations

145. It might be assumed at first sight that the present dispute has disposed of itself so far as concerns the decisions that are now inoperative. What matters for the purposes of the proceedings for failure to fulfil obligations, however, is the situation that obtained on the expiry of the period laid down by the Commission in the supplementary reasoned opinion of 22 June 2012, that is to say, on 22 August 2012.<sup>86</sup>

146. At that point in time, the decisions concerning the need for an environmental impact assessment were still effective. So far as it is possible to tell, their ineffectiveness is based on the fact that, in 2012, a five-year period for the implementation of projects was introduced. It must therefore be assumed that the aforementioned decisions became inoperative no sooner than five years after they had been adopted, that is to say, on 24 September 2012 or 28 December 2012, as the case may be.

b) Whether the EIA Directive is capable of being infringed by projects that have not been carried out

147. Doubts as to whether the EIA Directive can be infringed by projects that have not been implemented might be linked to the fact that, in accordance with Article 2(1), Member States must 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.

148. So far as it is possible to tell, however, the decision that an environmental impact assessment is not necessary does not amount to the granting of consent for a project. According to the uncontested information supplied by Bulgaria, the latter is also subject, at least, to the granting of building consent, which — unlike in the case of the ‘Longman Investment’ OOD project, which was implemented — was never issued for the other three projects. Bulgaria cannot therefore be accused of having authorised those projects without carrying out the necessary examinations.

149. Nonetheless, the decision on the need for an environmental impact assessment must be taken in accordance with the EIA Directive, that is to say, in accordance with Article 4(2) and (3) and Annex III. Those provisions at least are capable of being infringed even if the project never receives all the necessary consents. In the case of the ‘Longman Investment’ OOD project, Article 2(1) of the EIA Directive may also have been infringed.

3. Taking account of cumulative effects in the preliminary assessment

150. So far as the preliminary assessment of the need for an environmental impact assessment is concerned, it must be recalled that, in accordance with the first subparagraph of Article 4(2) of the EIA Directive, Member States are required to determine, through a case-by-case examination or through thresholds or criteria set by them, whether projects listed in Annex II to that directive are to be made subject to an environmental impact assessment.

151. Those projects include the installations for the harnessing of wind power for energy production (wind farms) listed in point 3(i) of that annex.

<sup>86</sup> — See, for example, the judgment in *Commission v France* (C-241/08, EU:C:2010:114, paragraph 59).



152. As regards the setting of thresholds or criteria, Article 4(2)(b) of the EIA Directive confers a measure of discretion on the Member States. However, that discretion is limited by the obligation, laid down in Article 2(1) of that directive, that projects likely, by virtue, inter alia, of their nature, size and location, to have significant effects on the environment must be made subject to an assessment with regard to their effects.<sup>87</sup>

153. Thus, the criteria and thresholds mentioned in Article 4(2)(b) of the EIA Directive are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement that an environmental impact assessment be carried out.<sup>88</sup>

154. It follows that, when they receive a request for development consent for a project falling under Annex II to the EIA Directive, the competent national authorities must carry out a specific evaluation as to whether, taking account of the criteria set out in Annex III to that directive, an environmental impact assessment should be carried out.<sup>89</sup>

155. It follows from point 1 of Annex III to the EIA Directive that the characteristics of a project must be assessed, in particular, in relation to its cumulative effects with other projects. Failure to take account of the cumulative effect of one project with other projects may mean that it escapes the obligation to have an environmental impact assessment carried out even though, when taken together with other projects, it is likely to have significant effects on the environment.<sup>90</sup>

156. This requirement must be construed in the light of point 3 of Annex III to the EIA Directive, under which the likely significant effects of a project must be considered in relation to criteria set out under points 1 and 2 of that annex, having regard in particular to the probability, extent, magnitude, duration and reversibility of the project's impact.<sup>91</sup>

157. It follows that a national authority, in ascertaining whether a project must be made subject to an environmental impact assessment, must examine its potential impact jointly with other projects. Moreover, where nothing is specified, that obligation is not restricted only to projects of the same kind. That preliminary assessment must, rather, consider whether, on account of the effects of other projects, the environmental effects of a project may be greater than they would be in their absence.<sup>92</sup>

158. In the present case, other projects planned on those parts of the 'Kaliakra' IBA that had not yet been designated as an SPA included, at least, the 'AES GEO Energy' OOD wind farm, comprising 52 wind turbines, and three other installations of 'Disib' OOD. At the end of 2007, none of the four projects complained of here could automatically have been said to have no cumulative effects with those projects.

159. Furthermore, the information concerning the 'Kaliakra' IBA indicated that the sites in question were of major importance for migrating birds and the wintering of the red-breasted goose.

160. It was therefore absolutely essential that account be taken of the cumulative effects of the various wind-power projects in the examination of the need for an environmental impact assessment.

87 — Judgments in *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraph 50); *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraph 29); and *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 40).

88 — Judgments in *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraph 30) and *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 41).

89 — Judgments in *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 42) and, to the same effect, *Mellor* (C-75/08, EU:C:2009:279, paragraph 51).

90 — Judgments in *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 43) and, to the same effect, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154, paragraph 36).

91 — Judgment in *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 44).

92 — Judgment in *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 45).



161. It is true that Bulgaria argues that the decisions expressly stated that no cumulative effects were anticipated. However, the mere assertion that there are no cumulative effects does not prove that those effects were adequately examined. Bulgaria does not adduce any evidence of such an examination.

#### 4. Interim conclusion

162. Consequently, by failing to take appropriate account of the cumulative effects of the ‘Windtech’ OOD, ‘Brestiom’ OOD, ‘Eco Energy’ OOD and ‘Longman Investment’ OOD projects with other projects when examining the need for an environmental impact assessment, Bulgaria has failed to fulfil its obligations under Article 4(2) and (3) of, and point 1(b) of Annex III to, the EIA Directive, and, by nonetheless authorising and implementing the ‘Longman Investment’ OOD project, also under Article 2(1) of that directive.

#### V – Costs

163. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since both parties have asked that the other party be ordered to pay the costs and Bulgaria is largely, but far from entirely, the unsuccessful party, I propose that that Member State be ordered to pay three quarters of the costs.

#### VI – Conclusion

164. I therefore propose that the Court rule as follows:

- (1) By having failed to protect in their entirety, as a special protection area, the initially unprotected parts of the ‘Kaliakra’ Important Bird Area to the north of the originally designated ‘Kaliakra’ special protection area on the expiry of the period laid down by the Commission in its reasoned opinion, the Republic of Bulgaria has failed to fulfil its obligations under Article 4(1) and (2) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.
- (2) By failing to take the necessary steps to ensure that the operation of the ‘AES Geo Energy’ OOD, ‘Disib’ OOD and ‘Longman Investment’ OOD wind-power plants in the ‘Kaliakra’ area, which is important for the conservation of birds but which has not been designated as a special protection area, although it should have been so designated, does not lead to the deterioration of the habitats of the bird species in need of protection and the disturbance of those species, the Republic of Bulgaria has failed to fulfil its obligations under the first sentence of Article 4(4) of Directive 2009/147.
- (3) By failing to take the appropriate steps to ensure that the operation of the ‘Kaliakra Wind Power’ AD, ‘EVN Enertrag Kavarna’ OOD and ‘Vertikal — Petkov & Cie’ OOD wind-power plants and the installations of the ‘Thracian Cliffs Golf & Spa Resort’ OOD in the ‘Kaliakra’ and ‘Belite Skali’ special protection areas does not lead to the deterioration of the habitats of the protected bird species and the disturbance of those species, the Republic of Bulgaria has failed to fulfil its obligations under 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.
- (4) By failing to take appropriate account of the cumulative effects of the ‘Windtech’ OOD, ‘Brestiom’ OOD, ‘Eco Energy’ OOD and ‘Longman Investment’ OOD projects with other projects when examining the need for an environmental impact assessment, the Republic of Bulgaria has failed to fulfil its obligations under Article 4(2) and (3) of, and point 1(b) of

Annex III to, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, and, by nonetheless authorising and implementing the ‘Longman Investment’ OOD project, also under Article 2(1) of that directive.

- (5) The action is otherwise dismissed.
- (6) The Republic of Bulgaria is ordered to pay three quarters of the European Commission’s costs and to bear three quarters of its own costs. The Commission is ordered to pay one quarter of Bulgaria’s costs and to bear one quarter of its own costs.