



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 24 September 2015¹

Case C-399/14

Grüne Liga Sachsen e.V. and Others
v
Freistaat Sachsen

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany))

(Habitats Directive — Special areas of conservation — Site included on the list of sites of Community importance after a construction project was authorised within the site but before work began — Whether necessary to review the initial assessment of the project — Rules governing such review — Consequences of completing the project, pursuant to definitive planning approval, before a final decision could be reached as to the validity of the assessment and review)

1. The Habitats Directive² is intended to contribute to ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States. To that end, it lays down a number of requirements relating to the identification and conservation of natural habitats.
2. In particular, a list of ‘sites of Community importance’ is to be maintained by the European Commission, on the basis of proposals from the Member States. Once a site has been included in that list, it is to be treated as a ‘special area of conservation’. Within such areas, Member States must take appropriate steps to avoid deterioration of natural habitats. They must also carry out an appropriate assessment of any plan or project unrelated to the management of the site but likely to have a significant effect on it. National authorities may normally agree to the plan or project only if it will not adversely affect the integrity of the site concerned. However, if, in spite of a negative assessment and in the absence of alternative solutions, a plan or project must be carried out for imperative reasons of overriding public interest, the Member State concerned must take all necessary compensatory measures.
3. The present request for a preliminary ruling by the German Bundesverwaltungsgericht (Federal Administrative Court) concerns the construction of a bridge over the river Elbe, planned and approved at a time when the area on either side of the river was not classified as a site of Community importance but commenced and completed once the site had been included in the Commission’s list.
4. The national authorities had carried out a preliminary assessment of the project at the first stage of planning approval, with a subsequent review following inclusion in the Commission’s list. However, a nature conservation association continues to challenge the validity of the planning approval on the ground, inter alia, that the assessments were not fully compliant with the requirements of the Habitats Directive, which should have been observed in full following listing by the Commission.

¹ — Original language: English.

² — 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).

5. The Bundesverwaltungsgericht seeks guidance on the application of those requirements in such circumstances.

The Habitats Directive

6. Article 3(1) of the Habitats Directive provides, in particular:

‘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.’

7. Article 4(1) requires each Member State to propose a list of sites indicating the natural habitat type and the native species hosted by the habitat. Paragraphs 2 and 3 lay down the procedure whereby, on the basis of Member States’ lists, a list of sites of Community importance is to be adopted by the Commission within six years of notification of the directive, indicating those which host one or more priority natural habitat types or priority species. Paragraphs 4 and 5 provide:

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

5. As soon as a site is placed on the list [of sites of Community importance] it shall be subject to Article 6(2), (3) and (4).’

8. Article 6 reads as follows:

‘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.’

9. Annexes I and II to the Habitats Directive are entitled, respectively, ‘Natural habitat types of Community interest whose conservation requires the designation of special areas of conservation’ and ‘Animal and plant species of Community interest whose conservation requires the designation of special areas of conservation’. In each, certain habitat types and certain species are indicated to have priority status.

Transposition of the Habitats Directive in the Freistaat Sachsen (Free State of Saxony)

10. Paragraph 22b of the Sächsisches Naturschutzgesetz (Nature Protection Law of the Freistaat Sachsen; ‘the SächsNatschG’) 1994 transposes, essentially, Article 6(3) and (4) of the Habitats Directive.

11. Subparagraph 1 of that provision requires an impact assessment to be carried out prior to implementation of any project in a site of Community importance, and subparagraph 2 prohibits implementation if the impact assessment reveals a risk of serious harm. That prohibition may be waived, pursuant to subparagraph 3, only if the project is necessary for imperative reasons of overriding public interest *and* the desired result cannot be achieved by means involving a lesser degree of harm. If the site hosts priority habitats or species, only reasons based on human health, public security (including national defence and civil protection) or significant positive environmental effects may in principle be relied on (subparagraph 4). If the prohibition is waived, all measures necessary to ensure the coherence of the Natura 2000 network must be taken (subparagraph 5).

12. The authorities of the Freistaat Sachsen are in addition required (by ministerial orders issued in 2003) to comply with the Arbeitshilfe zur Anwendung der Vorschriften zum Aufbau und Schutz des Europäischen ökologischen Netzes Natura 2000 (Guide to the application of the provisions relating to the creation and protection of the Natura 2000 European ecological network). In accordance with Chapter 3.3 of that guide, the same standards as apply to listed sites of Community importance (including Paragraph 22b(3) to (5) of the SächsNatschG) must be applied to sites ‘potentially’ concerned by the Habitats Directive (including sites notified to the Commission but not yet listed by it).

Facts, procedure and questions referred

13. The Bundesverwaltungsgericht explains that Grüne Liga Sachsen is a nature conservation association which is challenging planning approval given on 25 February 2004 for the construction of the ‘Waldschlößchenbrücke’ bridge which crosses the river Elbe and the meadows along its banks where it flows through Dresden, in Saxony.

14. The planning approval was based on an assessment completed in January 2003, investigating possible effects of the construction project on the protection and conservation objectives of the 'Elbtal zwischen Schöna und Mühlberg' (Elbe valley between Schöna and Mühlberg) conservation area, including the meadows mentioned, which at that time was classified nationally but had not yet been listed by the Commission. If a risk of significant detriment were to be found, an assessment under Article 6 of the Habitats Directive would follow. The expert's report found that the project did not significantly or permanently affect the conservation objectives of the area.

15. Grüne Liga Sachsen lodged an application challenging the planning approval in April 2004. Under national procedural law, that application did not have suspensive effect. Grüne Liga Sachsen therefore also applied for an interim order to defer the start of construction work.

16. In December 2004 the Commission included the area in the list of sites of Community importance, following notification by Germany in (according to the order for reference) March 2003.

17. Grüne Liga Sachsen's application for an order to defer the start of construction work was rejected by the Sächsisches Oberverwaltungsgericht (Higher Administrative Court of Saxony) at second and last instance on 12 November 2007. Work started on the bridge later that year.

18. Following further expert reports, the competent authority took a decision on 14 October 2008 to carry out a limited re-evaluation of the detriment related to the construction project, by reference to the date of the planning approval. The project was again approved by way of exception, subject to specific measures.

19. Following an amendment to the plans in September 2010, Grüne Liga Sachsen again applied for a suspensive measure, again rejected by the Sächsisches Oberverwaltungsgericht at second and last instance in October 2010.

20. Grüne Liga Sachsen's main application and appeal thereon were also unsuccessful. A final appeal on a point of law is now before the Bundesverwaltungsgericht, which considers that both the 2003 assessment and the 2008 review fell short of the standards required by the Habitats Directive. The 2003 assessment, having concluded that there would be no significant or long-term negative effects, did not then proceed to any more detailed analysis. The 2008 review, while it did conclude that there were significant negative effects (which could be addressed by compensatory measures within the meaning of Article 6(4) of the Habitats Directive), looked only at two habitat types and one species.

21. In order to determine more precisely the requirements of the Habitats Directive, the Bundesverwaltungsgericht therefore seeks a preliminary ruling on the following questions.

'(1) Is Article 6(2) of [the Habitats Directive] to be interpreted as meaning that a construction project for a bridge which does not directly serve the management of the site and which was authorised before that site was included in the list of sites of Community importance must be the subject of a review of its implications before it is carried out, if the site was included in that list after authorisation was granted but before work began and only a risk assessment/preliminary assessment was undertaken before the authorisation was granted?

(2) If Question 1 is answered in the affirmative:

When undertaking a subsequent review, must the national authority observe the provisions of Article 6(3) and (4) of the Habitats Directive where it wanted to use those provisions as a precautionary basis for the risk assessment/preliminary assessment preceding the grant of the authorisation?

(3) If Question 1 is answered in the affirmative and Question 2 in the negative:

What requirements should be applied under Article 6(2) of the Habitats Directive to a subsequent review of an authorisation granted for a project and to what date should the review relate?

(4) In the context of supplementary proceedings seeking to remedy an error found in a subsequent review under Article 6(2) of the Habitats Directive or in an impact assessment under Article 6(3) of the Habitats Directive, is account to be taken, by appropriate amendments to the review requirements, of the fact that the structure was permitted to be constructed and put into service because the planning decision was immediately enforceable and proceedings for interim measures had been dismissed with final effect? In any event, does that apply to an alternative subsequent review which is necessary in the context of a decision under Article 6(4) of the Habitats Directive?

22. Written observations have been submitted by Grüne Liga Sachsen, by the Freistaat Sachsen (respondent in the main proceedings), by the Czech Republic and by the Commission, all of whom made oral submissions at the hearing on 17 June 2015.

Additional background in the submissions of the parties

23. In their written observations, Grüne Liga Sachsen and the Freistaat Sachsen both elaborated on the factual background to the request for a preliminary ruling. Whilst this Court is not competent to express any view on the facts, it may be helpful to have a fuller view of the context.

24. First, Grüne Liga Sachsen claims that the site was notified to the Commission in June 2002, not March 2003 as stated by the Bundesverwaltungsgericht.

25. From what was said by the Commission at the hearing, Grüne Liga Sachsen appears to be correct in that regard. The Commission informed the Court that it had received a ‘first compilation’ in March 2002 (which may explain the possible confusion with March 2003) and a formal proposal from Germany in June 2002. It is in any event common ground that the site was included on the Commission’s list of sites of Community importance in December 2004. Moreover, the point appears to be without relevance to the issues raised since, in either hypothesis, the bridge project was approved (in February 2004) after notification and before listing by the Commission.

26. As regards the nature of the site and the effects of the construction of the bridge, Grüne Liga Sachsen explains that the meadows in question are of the ‘lowland hay meadows’ habitat type, hosting several species of bird and insect, and that the site’s conservation objectives are threatened by loss of surface area, by the fact that it is divided by the bridge and by the fact that work on the bridge interfered with the habitats of certain species of fish.

27. For its part, the Freistaat Sachsen lists avoidance and compensatory measures taken to alleviate the effects of the bridge: speed limits at certain times, bushes to guide bat flight, re-establishment and development of areas other than lowland hay meadow and development of ‘rivers with muddy banks’ habitats. It explains that the bridge was needed to relieve traffic congestion and improve links between districts either side of the river, and that the conservation objectives of the site in question (which extends in all over 180 km of riverbanks, including urban stretches such as those in Dresden, where the river is crossed by 8 other bridges) concern 14 habitat types and 19 species listed

respectively in Annexes I and II to the Habitats Directive.³

28. Both Grüne Liga Sachsen and the Freistaat Sachsen agree that, in its assessment prior to the granting of planning approval, the competent authority did take as its basis the national legislation transposing Article 6(3) and (4) of the Habitats Directive, even though the site was not yet listed as a site of Community importance. It was concluded at that stage that the project would have no significant effects within the meaning of Article 6(3). The 2008 decision to carry out a review followed further reports reaching a different view, and was intended to meet the requirements of Article 6(4). However, as was made clear at the hearing, Grüne Liga Sachsen considers (and the referring court has taken as its premiss) that the initial assessment and the 2008 review were not fully compliant with those provisions, whereas the Freistaat Sachsen takes the view that they were compliant in all respects.

Assessment

Structure, applicability and scope of Articles 4 and 6 of the Habitats Directive

29. Article 4(1) of the Habitats Directive requires Member States to submit a list of sites to the Commission within three years from notification of that directive. Germany delayed in doing so,⁴ but that is in my view of no relevance to the issue raised here, except to the extent that the German authorities cannot derive any benefit from their failure to comply promptly with their obligations. Under Article 4(2) and (3), the Commission must draw up a list of sites of Community importance in each Member State within six years from notification of the directive. Article 4(4) then requires the Member States to designate such sites as special areas of conservation within a further six years at most. Article 6(1), under which Member States must establish conservation measures for those areas, applies therefore from the date of the latter designation. However, pursuant to Article 4(5), Article 6(2), (3) and (4) apply as soon as — but not before⁵ — the site has been included in the list of sites of Community importance.

30. In the present case, therefore, Article 6(2), (3) and (4) of the Habitats Directive applied to the site in question as from December 2004, when it was included in the Commission's list, and Article 6(1) as from the date when it was later designated as a special area of conservation.

31. In that regard, the Court has considered that, where a project is authorised before the site is listed by the Commission, no subsequent obligation is imposed directly by Article 6(3) and (4) of the Habitats Directive following listing.⁶ Consequently, in the present case, Article 6(3) did not create any obligation to carry out an assessment when the site was listed by the Commission in December 2004, as the project had already been approved in February of that year.

3 — From information on the European Environment Agency's website (<http://eunis.eea.europa.eu/sites/DE4545301>), it appears that two of the habitat types and two of the species are among those listed as having priority status in the annexes to the Habitats Directive. It seems however unlikely that the two priority habitat types ('Tilio-Acerion forests of slopes, screes and ravines', and 'Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*') are present in the vicinity of the contested bridge over the Elbe within the City of Dresden. On the other hand, the two priority species (the Jersey Tiger moth and the hermit beetle) may well range widely over the whole site, as was confirmed by the Commission at the hearing, at least with regard to the Jersey Tiger.

4 — See judgment in *Commission v Germany*, C-71/99, EU:C:2001:433.

5 — Judgment in *Dragaggi and Others*, C-117/03, EU:C:2005:16, paragraphs 23 to 25. It may be noted however that there appears to be an inconsistency between Articles 4 and 6 of the Habitats Directive, in that Article 6(2) explicitly concerns special areas of conservation, whereas Article 4(5) makes that provision applicable as soon as a site has been included in the list of sites of Community importance, which may precede designation as a special area of conservation by up to six years.

6 — Judgments in *Commission v Austria*, C-209/04, EU:C:2006:195, paragraphs 56 and 57 and the case-law cited, and *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraphs 48 and 49.

32. Nor, moreover, does such listing give rise to any obligation to review whether existing planning permits affect the sites concerned.⁷

33. However, where an area has been notified under the Habitats Directive but the Commission has not yet decided on its inclusion in the list, the Member State in question may not authorise interventions which risk seriously compromising the ecological characteristics of that area.⁸ In the present case, approval for the bridge project was given after notification and was therefore subject to that constraint.

34. Furthermore, once a site is included in the Commission's list of sites of Community importance, implementation of a project authorised before that inclusion is covered by Article 6(2) of the Habitats Directive, which establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives.⁹ And the Court has also stated that 'an obligation to carry out a subsequent review may be based on Article 6(2) of the Habitats Directive'¹⁰ — although, as the Commission points out, it has not yet specified in what circumstances such an obligation would arise.

35. Finally, 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).¹¹

36. Consequently, the situation in the main proceedings appears to be as follows.

37. First, the relevant authorities were precluded from granting approval for the bridge project in February 2004 if there was any risk of seriously compromising the ecological characteristics of the site.

38. Second, as from December 2004, Article 6(2) of the Habitats Directive applied, and the authorities were therefore required to 'take appropriate steps to avoid ... the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive'. That requirement might, in certain circumstances (which will have to be elucidated by the Court in its ruling in this case), involve an obligation to carry out a review of the approval already granted.

39. Third, Article 6(3) of the Habitats Directive does not itself directly impose any obligation with regard to the conduct or review of the procedure leading to the approval for the bridge project in February 2004; and Article 6(4), which merely derogates from the second sentence of Article 6(3), can similarly be of no direct relevance. However, the provisions of Article 6(3) — and thus, possibly, those of Article 6(4) — may be of relevance when determining the requirements of Article 6(2), since the level of protection ensured by Article 6(2) and (3) is the same.

7 — Judgment in *Commission v United Kingdom*, C-6/04, EU:C:2005:626, paragraphs 57 to 59.

8 — Judgments in *Dragaggi and Others*, C-117/03, EU:C:2005:16, paragraphs 26 and 27, *Bund Naturschutz in Bayern and Others*, C-244/05, EU:C:2006:579, paragraphs 44, 47 and 51, and *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 49.

9 — Judgment in *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 49 and the case-law cited.

10 — Judgment in *Commission v United Kingdom*, C-6/04, EU:C:2005:626, paragraph 58; see also Opinion of Advocate General Kokott in *Commission v United Kingdom*, C-6/04, EU:C:2005:372, point 55.

11 — Judgments in *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 32 and the case-law cited, and *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 19.

Question 1: Need for review of the implications of a project in a site listed after the project was approved but before it is implemented?

40. The referring court wishes to know essentially whether, in the circumstances of the main proceedings, Article 6(2) of the Habitats Directive required the initial assessment of the project to be reviewed after the site had been included in the Commission's list of sites of Community importance and before work began.

41. As regards those circumstances, the referring court states in particular that only a 'risk assessment/preliminary assessment' had been carried out initially — not, apparently an assessment which would have met all the requirements of Article 6(3) if that provision had been applicable at the relevant time. The Freistaat Sachsen considers that the original assessment did meet all those requirements. Any decision on that matter is for the competent national court alone, but I shall consider both hypotheses in order to provide a fuller answer.

42. First, in the hypothesis that the original assessment met all the requirements of Article 6(3) (and, to the extent necessary, Article 6(4)) of the Habitats Directive, and in view of the fact that Article 6(2) and (3) are designed to ensure the same level of protection, there would appear in principle to be nothing in Article 6(2) (which merely requires appropriate steps to be taken to avoid deterioration and disturbance) that would entail a general need to review that assessment on the purely formal ground that the site had since been listed as a site of Community interest.

43. However, it is quite conceivable that the conservation status of a site¹² may evolve between the date of the initial assessment and that on which work begins. In the present case, more than four years elapsed between the two dates. Article 6(2) of the Habitats Directive imposes an ongoing obligation to ensure the same level of protection as Article 6(3), and it would run counter to the objectives of the directive to allow planning approval to stand unchanged only to be implemented after a significant change in the conservation status of the site. Consequently, a change in the circumstances of the site or the details of the project might entail a need for review of the assessment in the light of the changed situation, as an 'appropriate step' required by Article 6(2) in order to avoid deterioration of habitats or disturbance of species. It is for the competent national court, as sole judge of fact, to examine whether such changes have occurred in any particular case.

44. In that regard, I do not think any significance can be attached to the question whether the change may have occurred before or after listing as a site of Community importance: what matters is whether it occurred after the date of the initial assessment and before that on which work began.

45. Such an approach should obviously apply *a fortiori* if such a change occurred and the initial assessment had *not* been fully compliant with Article 6(3) (and (4)) of the Habitats Directive.

46. However, it is also important to consider the situation in which the initial assessment was not fully compliant but *no* change occurred in the circumstances of the site or the details of the project after the date of that assessment, the only (possibly) relevant event being the listing of the site as being of Community interest.

47. In that situation, although the Court has held that Article 6(3) of the Habitats Directive does not impose a review of the initial assessment, it has also envisaged the possibility that such an obligation might flow from Article 6(2), which is designed to ensure the same level of protection.¹³

12 — In accordance with Article 1(e) of the Habitats Directive, the 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.

13 — See point 34 above and the case-law cited.

48. It seems to me that the obligation cannot be absolute. To require a review in all cases would be tantamount to applying Article 6(3) of the Habitats Directive to situations outwith the explicit scope of its temporal application, and would run counter to the Court's case-law cited in points 31 and 32 above.

49. However, it must always be open to a competent national court to order such a review if the original assessment fell so far short of the standard set by Article 6(3) and (4) as to threaten significant deterioration of habitats or disturbance of species since, in the event of such a threat, Article 6(2) requires Member States to take appropriate steps to avoid deterioration and disturbance. The same would be true if the original assessment had not clearly identified what impact the project would be likely to have on habitats and species in the site, leaving the possible existence of such a threat undetermined. In any such circumstances, a review of the original assessment seems likely to be an appropriate step to take, though alternatives should also be envisaged. For example, a very specific threat might be adequately dealt with by a suitable but clearly circumscribed preventive measure, or else the situation might be such that the only appropriate step was to annul the original approval entirely and order a completely fresh assessment procedure.

Question 2: Need to observe Article 6(3) and (4) of the Habitats Directive in a subsequent review where those provisions were already used as a basis for the preliminary assessment?

50. The referring court's second question assumes that the circumstances are such that a review of the implications of the project is required pursuant to Article 6(2) of the Habitats Directive. It also postulates that, in conducting the initial assessment, the relevant authority sought to observe the provisions of Article 6(3) and (4). In such circumstances, it asks, is that authority bound by those latter provisions when carrying out its review?

51. In that regard, I agree with the Freistaat Sachsen and the Commission that there can be no ground for ascribing any significance to the authority's aims or intentions when carrying out its initial review.

52. It follows from the answer I propose to Question 1 that only an objective criterion can be used when deciding whether a review is needed: was the initial review fully compliant with Article 6(3) (and, where appropriate, Article 6(4)) of the Habitats Directive or not and, if not, were the shortcomings such as to threaten significant deterioration of habitats or disturbance of species, or to leave undetermined the likelihood of such a threat?

53. However, it also follows from the case-law that any requirements imposed by the Habitats Directive on such a review are those of Article 6(2), and not (at least directly) those of Article 6(3) and (4). To require strict observance of the latter provisions on the basis simply of the intention underlying the initial assessment would appear to run counter to the principle of legal certainty which the Court has stressed in that regard.¹⁴

54. None the less, if such a requirement were imposed on the basis not of the Habitats Directive but of national law or administrative practice,¹⁵ that could not in any way conflict with the provisions of Article 6 of the former, since the level of protection which both Article 6(2) and Article 6(3) are designed to ensure is the same. Grüne Liga Sachsen's argument to the effect that, having once sought to observe the requirements of Article 6(3) and (4) in their initial assessment, the authorities are bound to observe them in a subsequent review cannot therefore be rejected out of hand if it has a basis in national law. All that can be said is that it cannot be derived from the Habitats Directive itself.

¹⁴ — See, for example, judgment in *Commission v Austria*, C-209/04, EU:C:2006:195, paragraph 57 and the case-law cited.

¹⁵ — See points 10 to 12 above. The Court has accepted that a national administration may be bound by a general practice when applying EU law — see judgment in *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 62 and the case-law cited.

55. As far as that directive, as interpreted by the Court, is concerned, the relevant requirements are those of Article 6(2), and they are the subject of Question 3. I would however point out at this stage that, if it were to transpire that the appropriate step to be taken under Article 6(2) was to annul the initial approval and order a completely new procedure, then such new procedure, which by definition would be initiated after the site was included in the list of sites of Community importance, would necessarily need to comply with Article 6(3) and (4) directly.

Question 3: Requirements imposed by Article 6(2) of the Habitats Directive on a subsequent review, and date to which the review should relate?

56. First of all, I note that the Court has clearly stated, with regard to plans and projects which are not covered by Article 6(3) and (4) of the Habitats Directive when they are adopted, that ‘the possibility cannot be excluded that a Member State, by analogy with the procedure in derogation provided for in Article 6(4) of that directive, may, in a procedure under domestic law for assessing the environmental impacts of a plan or project capable of significantly affecting the interests of conserving a site, invoke a reason of public interest and, if the conditions laid down by that provision are essentially satisfied, authorise an activity which, subsequently, is no longer prohibited by Article 6(2). However, in order to be able to verify whether the conditions laid down by Article 6(4) of the Habitats Directive have been met, the impacts of the plan or project must first have been analysed in accordance with Article 6(3) of that directive’.¹⁶

57. The type of situation to which the Court refers in that case-law seems to me to correspond closely to the reassessment carried out in October 2008 in the case in the main proceedings as described by the referring court, inasmuch as that reassessment observed the provisions of Article 6(4) of the Habitats Directive and confirmed the planning approval, by way of derogation, on the basis of compensatory measures to be taken.

58. In those circumstances, it appears to follow necessarily from the Court’s case-law that, while the need for a review or reassessment in October 2008 may have derived directly from Article 6(2) of the Habitats Directive, that procedure had to meet all the requirements of Article 6(3) and (4).

59. However, that cannot be the case in all circumstances, for reasons comparable to those I have put forward above, in particular at point 48. There may for example be situations in which a review is necessary, pursuant to Article 6(2) of the Habitats Directive, in order simply to verify that the steps which must be taken in accordance with that paragraph do indeed avoid any deterioration of habitats or disturbance of species within the meaning thereof, but a new assessment of the implications of the project for the purposes of Article 6(3) is unnecessary and there is no question of making a derogation on the basis of Article 6(4).

60. The second point to be addressed in the context of this question is that of the date in respect of which the reassessment should be made. In the present case, should the reassessment have considered the conservation status of the site and the implications of the bridge project as they stood and were ascertainable in 2003 or 2004, when the original impact assessment was carried out and the planning approval was granted respectively, or in 2008, when the reassessment was carried out and by which time work had begun on the bridge? Clearly, the date chosen could affect the outcome of the reassessment.

16 — Judgment in *Cascina Tre Pini*, C-301/12, EU:C:2014:214, paragraph 34, citing judgment in *Commission v Spain*, C-404/09, EU:C:2011:768, paragraphs 156 and 157.

61. In my view, the answer flows from the nature of the obligations imposed by Article 6(2) of the Habitats Directive, which is the provision on the basis of which any review or reassessment may become necessary in circumstances such as those of the main proceedings. Those obligations concern ongoing monitoring of the site concerned, and the steps to be taken to avoid deterioration of habitats or disturbance of species can only be those which are appropriate at the time they are taken in the light of that ongoing monitoring.

62. To sum up in slightly different terms: in so far as, in the circumstances of the main proceedings, a review of the initial assessment was required, the need for that review flowed from Article 6(2) of the Habitats Directive and was therefore required to take as its basis the situation as it had developed to that date (2008); but, in so far as the review led to a derogation on the basis of Article 6(4), all the requirements of Article 6(3) had to be observed.

Question 4: Relevance, in the main proceedings, of the fact that the project has been completed because planning approval was final and enforceable?

63. The referring court's fourth question presupposes not only that a review of the initial assessment was necessary following the site's listing as being of Community interest but also that the review actually carried out in 2008 did not itself fully meet the requirements of the Habitats Directive. It wishes to know whether the fact that all possible challenges available under national law had been exhausted before work began and before the review took place, so that planning approval was by then definitive, is to be taken into account at the present stage, when the bridge has been completed and is open to traffic. In particular it wishes to know whether that fact can affect the validity of a derogation pursuant to Article 6(4) of the directive.

64. First of all, it does not seem to me conceivable that the fact that planning approval has become definitive as a matter of national procedural law can in any way be used to curtail the need to comply with Article 6(2) of the Habitats Directive. If that were so, the effectiveness of the directive would be compromised, and different standards would be possible in different Member States, a result completely at odds with the aim of setting up and maintaining a 'coherent European ecological network of special areas of conservation'. The requirements of the directive must apply at all times in the same way in all Member States.

65. Moreover, Article 6(2) of the Habitats Directive lays down ongoing obligations. Even where planning approval has been granted by a procedure which is fully compliant with Article 6(3) and (4), Member States must continue to take appropriate steps to avoid deterioration of habitats and disturbance of species. That must be true *a fortiori* where the procedure was not fully compliant and needs to be rectified. Although the legal certainty inherent in a definitive planning approval is a factor to be reckoned with, it cannot outweigh the need for constant monitoring and ongoing avoidance measures. Rather, depending on the circumstances, it may give rise to a need to compensate those who have placed legitimate expectations in that approval and undertaken the project on that basis.

66. But the issues raised in the context of this question go further. It is not merely that the planning approval had become definitive in the main proceedings but also that the bridge has been built (with consequent deterioration of habitats and disturbance of species, albeit found to be justified for imperative reasons of overriding public interest) and is open to traffic (with possible continuing effects on habitats and species). In that context, the referring court raises the hypothesis that a finding that the original assessment and review were flawed might lead to annulment of the planning approval, with far-reaching consequences, both ecological and economic, if it were concluded that the bridge should be demolished.

67. If that hypothesis proved correct, it would have to be considered what steps fell to be taken in accordance with the Habitats Directive.

68. Those steps would have to be ‘appropriate’ within the meaning of Article 6(2) of the Habitats Directive. They would have to be determined on the basis of the situation as it stood at the current time. In other words, it would be necessary to take account of the fact that the bridge had been built, and to weigh the environmental consequences of leaving it in place (and in operation) against those of closing it (or limiting its use) or even removing it. The steps would have to be those which, to the greatest extent possible, *avoided* deterioration of habitats or disturbance of species. However, where deterioration or disturbance had already occurred, account would have to be taken also of the requirement under Article 4(4) of the Habitats Directive to establish priorities for the maintenance *or restoration* at a favourable conservation status of habitats or species, and of the management requirements imposed by Article 6(1).

69. It is quite plausible that such a weighing-up of interests and priorities would lead to the view that the bridge should be left in place, subject to appropriate avoidance steps and management measures. But if that were not the case, any proposal for demolition would, in my view, fall to be regarded — just as the original proposal to build the bridge fell to be regarded — as a ‘plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon’ within the meaning of Article 6(3) of the Habitats Directive, and would itself have to be subject to the scrutiny required by that provision before it could be carried out.

70. However, I would agree with the Commission that, in weighing up the various options, the economic cost of, for example, demolishing the bridge and compensating the developer has, in principle, no significance. While the same ‘imperative reasons of overriding public interest’ as were relied upon in the initial assessment may still be adduced to the extent that Article 6(4) of the Habitats Directive comes into play, they cannot be reinforced by the obvious public interest in saving expense (and in any event such an interest would be unlikely to be considered overriding if the second subparagraph of Article 6(4) were to apply, in the case of a priority natural habitat type and/or a priority species). To take that approach would be to favour maintaining environmentally deleterious projects on the mere basis that it was too expensive to remedy a failure to observe correctly the requirements of the directive.

Conclusion

71. In the light of all the foregoing considerations, I am of the view that the Court should answer the questions raised by the Bundesverwaltungsgericht to the following effect:

In circumstances in which a plan or project not directly connected with the management of a Natura 2000 site but likely to have a significant effect thereon has been authorised after the site was notified to the Commission but before it was included in the list of sites of Community importance, on the basis of an impact assessment carried out also between those dates, and work did not start on the project until after the site’s inclusion in the list, the provisions of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora are to be interpreted as follows:

- (1) Where the initial assessment and authorisation procedure was fully compliant with Article 6(3) and (4) of that directive, Article 6(2) does not require a review of that procedure to be carried out as a general rule; however, a change in the circumstances of the site or the details of the project may entail a need for review of the assessment in the light of the changed situation, as an appropriate step to avoid deterioration of habitats or disturbance of species. If the initial procedure was not compliant with Article 6(3) and (4), a review constitutes an appropriate step required by Article 6(2) if the shortcomings in the procedure were such as to threaten significant deterioration of habitats or disturbance of species, or to fail to identify the impact of the project on habitats or species.

- (2) The fact that the authorities carrying out the initial procedure sought to comply with Article 6(3) and (4) of Directive 92/43 does not give rise to an obligation under that directive to comply with the same provisions in a subsequent review of that procedure; however, it is not incompatible with the directive for such an obligation to be derived from national law.
- (3) Where a review of the initial procedure is an appropriate step required by Article 6(2) of Directive 92/43, that review must be based on the situation existing at the time it is carried out. Where it leads to the application, by analogy, of a derogation pursuant to Article 6(4) of that directive, it must also respect all the requirements of Article 6(3).
- (4) Where such a review proves in turn to be defective, after the project is completed, the fact that the authorisation had become definitive and could no longer be challenged under national law is of no relevance when determining the steps to be taken pursuant to Directive 92/43. Those steps must be such as to avoid further deterioration of habitats or disturbance of species within the site pursuant to Article 6(2) of that directive, should aim where appropriate at the restoration of a favourable conservation status, and, if they involve dismantling the completed project, must be subject to an assessment pursuant to Article 6(3). In the latter case, the economic cost of demolition cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4).