



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 June 2017¹

Case C-281/16

**Vereniging Hoekschewaards Landschap,
Other party:
Staatssecretaris van Economische Zaken**

(Request for a preliminary ruling from the Raad van State (Council of State, Netherlands))

(Environmental law — Directive 92/43/EEC — Conservation of natural habitats and of wild fauna and flora — List of sites of Community importance for the Atlantic biogeographical region — Validity of placing the Haringvliet site on the list of sites of Community importance without including the Leenheerenpolder — Reduction of the area of the site — Potential areas for restoration)

I. Introduction

1. Can a Member State reduce the size of an area of conservation under the Habitats Directive² if it changes its strategy for the restoration of conservation-worthy habitat types and no longer needs the areas concerned? This question forms the basis for the present request for a preliminary ruling from the Netherlands Raad van State (Council of State).
2. Specifically, the Court must examine the validity of a Commission Implementing Decision by which the Commission *inter alia* decided, on the basis of a proposal by the Netherlands, to reduce the size of the Netherlands site of Community importance (SCI) in question. The Commission based that decision on the ground that in the initial proposal for the areas concerned to form part of the SCI the Netherlands had made a ‘scientific error’. It must therefore be considered whether this reasoning is sound.
3. In addition, however, the Court should also address whether in the Implementing Decision the Commission complied with its obligation to state reasons under Article 296 TFEU, whether the Implementing Decision is actually sufficiently clear to satisfy the principle of legal certainty and — more generally — the conditions for reducing the size of a site as a result of changes in the strategy for the restoration of habitat types.

¹ Original language: German.

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).

II. Legislative framework

4. Article 2(2) of the Habitats Directive lays down the overall objective:

‘Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.’

5. Natura 2000, the network of European areas of conservation, is defined in Article 3(1) of the Habitats Directive:

‘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.

...’

6. Article 3(2) of the Habitats Directive sets out the Member States’ obligation to participate in Natura 2000:

‘Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.’

7. Article 4 of the Habitats Directive contains specific rules on the designation of sites:

‘1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. ... Where appropriate, Member States shall propose adaptation of the list in the light of the results of the surveillance referred to in Article 11.

...

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the nine biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States’ lists ...

3. ...

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.’

8. On the basis of the Habitats Directive, by Decision 2004/813/EC,³ the Commission drew up an initial list of SCIs for the Atlantic biogeographical region. The list included the ‘Haringvliet’ site (Natura 2000 code NL1000015) with an area of 11 107 hectares.

9. The ‘Haringvliet’ SCI is protected for the habitat types set out in Annex I of the Habitats Directive, namely ‘Rivers with muddy banks with *Chenopodium rubri p.p.* and *Bidention p.p.* vegetation’ (Natura 2000 code 3270) and ‘Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels’ (Natura 2000 code 6430), for the Allis shad (*Alosa alosa*) and Twait shad (*Alosa fallax*) fish species and for the Root vole (*Microtus oeconomus arenicola*) priority species.

10. The list of SCIs for the Atlantic biogeographical region has been updated ten times since then.⁴ The present request for a preliminary ruling concerns the eighth update by Implementing Decision (EU) 2015/72,⁵ in which the ‘Haringvliet’ site appears with an area of only 10 988 hectares.

11. Recital 4 of Implementing Decision (EU) 2015/72 addresses changes in site-related information:

‘... Member States have also submitted changes in the site-related information contained in the list of sites of Community importance for the Atlantic biogeographical region.’

12. Recital 6 of that Implementing Decision refers to the improvement of knowledge:

‘Knowledge of the existence and distribution of the natural habitat types and species is constantly evolving as a result of the surveillance in accordance with Article 11 of Directive 92/43/EEC. Therefore, the evaluation and selection of sites at EU level was done using the best available information at present.’

13. These recitals also appear, for example, in the tenth update.

III. Facts and request for a preliminary ruling

14. The Haringvliet, which is located in the Dutch province of South Holland, is a sea inlet closed off by a dam between the islands of Voorne-Putten and the Hoeksche Waard in the north and the island of Goeree-Overflakkee in the south. The Haringvliet only remains connected to the North Sea by the Spui, the Oude Maas and the Nieuwe Waterweg. The Leenheerenpolder is situated between the village of Goudswaard on the Hoeksche Waard and the Spui, an arm of the Haringvliet. The polder has a surface area of approximately 110 hectares.

15. At the time of the proposal to place the ‘Haringvliet’ site on the list of SCIs, the competent Netherlands authorities were of the view that there were no habitat types or species in the Leenheerenpolder on the basis of which the Haringvliet had to be classified as an SCI, but that that polder was suitable to be developed in order to restore various conservation-worthy habitat types and species. Since it follows from the foregoing that the Leenheerenpolder formed part of the proposed site not because of actually occurring habitats and species, but rather because of the possibilities that the polder offered for restoring nature on the ‘Haringvliet’ site, the polder contributed to the realisation of the third subcriterion for identifying the conservation status of habitat types and species, namely restoration possibilities.

³ Decision of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region (OJ 2004 L 387, p. 1).

⁴ Most recently by Commission Implementing Decision (EU) 2016/2335 of 9 December 2016 adopting a tenth update of the list of sites of Community importance for the Atlantic biogeographical region (OJ 2016 L 353, p. 533).

⁵ Implementing Decision of 3 December 2014 adopting an eighth update of the list of sites of Community importance for the Atlantic biogeographical region (OJ 2015 L 18, p. 385).

16. By decision of 4 July 2013, the Netherlands State designated the ‘Haringvliet’ site as an area of conservation under the Habitats Directive. The Raad van State annulled that decision by judgment of 1 October 2014⁶ in so far as the Leenheerenpolder was not included in that site. It ruled that the Leenheerenpolder forms part of the ‘Haringvliet’ site as placed on the SCI list. There had therefore not been compliance with the obligation under Article 4(4) of the Habitats Directive to designate that polder as part of the Habitats Directive site.

17. Thereupon, by letter of 30 September 2014, the Netherlands authorities submitted information to the Commission in support of a reduction in the size of the site. In that letter they pointed out that at present the Leenheerenpolder has no ecological assets and that the plans to develop the ecological assets there had been abandoned. Furthermore, it was stated that developments elsewhere on the site, which had already partly taken place, were sufficient to achieve the objectives for the ‘Haringvliet’ Natura 2000 site. The intention to depolder the Leenheerenpolder had been abandoned for political, social and budgetary reasons. At the same time it was stated that the Netherlands authorities would now regard the assumption that the areas could become important for conservation and restoration of habitat types as a scientific error.

18. The Commission also explained in a letter to the Netherlands authorities of 24 October 2014 that it considered, on the basis of the letter of 30 September 2014, that the initial proposal to make the Leenheerenpolder part of the ‘Haringvliet’ site was to be regarded as a scientific error.

19. The Commission subsequently adopted the contested Implementing Decision (EU) 2015/72 of 3 December 2014 adopting an eighth update of the list of sites of Community importance for the Atlantic biogeographical region. The ‘Haringvliet’ site still appears on that list but the Leenheerenpolder is no longer included in that site.

20. By decision of 28 April 2015, the competent Netherlands authorities then designated the ‘Haringvliet’ site as an area of conservation under the Habitats Directive. The Leenheerenpolder once again did not form part of it. The Vereniging Hoekschevaards Landschap is challenging this designation before the Raad van State.

21. The Raad van State considers that the designation of the site puts the Implementing Decision into effect but has doubts whether the Commission was right to accept the reduction of the size of the ‘Haringvliet’ site so as to exclude the Leenheerenpolder. It therefore refers the following question to the Court for a preliminary ruling:

‘Is Implementing Decision 2015/72, in so far as the “Haringvliet” site (NL1000015) was thereby placed on the list of sites of Community importance for the Atlantic biogeographical region without the inclusion of the Leenheerenpolder, valid?’

22. Before the Court the Vereniging Hoekschevaards Landschap, the Kingdom of the Netherlands and the European Commission submitted written observations and presented oral argument at the hearing on 11 May 2017.

IV. Legal assessment

23. In order to examine the validity of the Implementing Decision, in so far as in it the Commission decides to reduce the size of the ‘Haringvliet’ SCI so as to exclude the Leenheerenpolder, it is first necessary to describe the procedure and the conditions for reducing the size of a site (see under A), before consideration can be given to the reasons on which the Commission relies (see under B). In

⁶ ECLI:NL:RVS:2014:3543.

addition, I consider that a few remarks should be made regarding the form of the Commission decision (see under C). In order to end the dispute in the main proceedings, it is necessary, lastly, to explain the conditions under which a site such as the Leenheerenpolder may be removed from an SCI (see under D).

A. Procedure and legal basis for a reduction of the size of a site

24. The Court has already ruled that, in the absence of specific provisions, the declassification of a site on the list of SCIs must be carried out following the same procedure as that for entry in that list.⁷ This procedure must also apply to the reduction of the size of an SCI.

25. Accordingly, a proposal must first be made by the Member State concerned pursuant to Article 4(1) of the Habitats Directive, on which the Commission then takes a decision pursuant to Article 4(2).

26. In that regard, it must be noted that, although it follows from the rules governing the procedure for identifying sites which could be included on the list of SCIs, set out in Article 4(1) of the Habitats Directive, that Member States have a margin of discretion when making their site proposals, the fact nonetheless remains that they must do so in compliance with the criteria laid down by the directive.⁸

27. This meant for the initial drafting of the list of SCIs that the Commission had to have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora.⁹ Only in that way, moreover, is it possible to realise the objective, in the first subparagraph of Article 3(1) of the Habitats Directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i) of the directive, read in conjunction with Article 2(1) thereof, that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the TFEU applies.¹⁰

28. This case-law must also be relevant to the reduction of the size of SCIs. As the inclusion of an area in the list gives rise to the presumption that it is relevant in its entirety from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora, a proposal by a Member State to remove certain sites from the list or to reduce their size requires proof that the areas in question do *not* have a relevant ecological interest at national level. In addition, the Commission may accept and implement the proposal only if it concludes that those areas are also not necessary from the perspective of the entire European Union.

⁷ Judgment of 3 April 2014, *Cascina Tre Pini* (C-301/12, EU:C:2014:214, paragraph 26).

⁸ Judgments of 11 September 2001, *Commission v Ireland* (C-67/99, EU:C:2001:432, paragraph 33); *Commission v Germany* (C-71/99, EU:C:2001:433, paragraph 26); and *Commission v France* (C-220/99, EU:C:2001:434, paragraph 30); and of 3 April 2014, *Cascina Tre Pini* (C-301/12, EU:C:2014:214, paragraph 27).

⁹ Judgments of 7 November 2000, *First Corporate Shipping* (C-371/98, EU:C:2000:600, paragraph 22); and of 11 September 2001, *Commission v Ireland* (C-67/99, EU:C:2001:432, paragraph 34); *Commission v Germany* (C-71/99, EU:C:2001:433, paragraph 27); and *Commission v France* (C-220/99, EU:C:2001:434, paragraph 31).

¹⁰ Judgments of 7 November 2000, *First Corporate Shipping* (C-371/98, EU:C:2000:600, paragraph 23); and of 11 September 2001, *Commission v Ireland* (C-67/99, EU:C:2001:432, paragraph 35); *Commission v Germany* (C-71/99, EU:C:2001:433, paragraph 28); and *Commission v France* (C-220/99, EU:C:2001:434, paragraph 32).

B. Substantive examination of the Commission decision to reduce the size of the site

29. In correspondence with the Netherlands authorities, the Commission states as the reason for its decision to reduce the area of the 'Haringvliet' SCI so as to exclude the Leenheerenpolder a scientific error made by the Netherlands in the initial SCI proposal. However, that reason is not convincing.

1. The scientific error

30. In the Commission's view, the possibility of reducing the size of an SCI on account of a scientific error or of removing it entirely from the list of SCIs follows from a judgment of the Court regarding a bird site in the French region of Poitou. In that case, the Court accepted the Member State's argument that certain areas had been mistakenly designated. The Member State showed that immediately before the site was notified to the Commission a positive decision on a road construction project in the areas in question had been taken on the basis of an environmental impact assessment.¹¹

31. The Commission infers from this that the protected status of areas may also be lifted if the initial decision on protection was based on the assumption that the areas host habitat types or habitats of species which are eligible for protection under the Habitats Directive but which actually neither occurred nor have developed there in the meantime.¹²

32. On closer examination, however, the judgment concerning the bird site in Poitou does not support these conclusions drawn by the Commission. In that case the Member State did not make an error in the identification of the site, but an error in communication with the Commission, comparable with a clerical error by which an expression of will is distorted. In so far as an error occurred, it lay with the Commission, which was misled as to the Member State's intentions as a result of the cartographical error.

33. Nevertheless, the Commission's view regarding the consequences of scientific errors is plausible in principle. Areas in which, contrary to original assumptions, protected habitat types or species do not occur cannot make the expected contribution to establishing a favourable conservation status. There is no need, however, to determine the extent to which this view and the specific conditions imposed by the Commission in this connection are ultimately justified.

34. That is because no such error is apparent in the present case.

35. In fact, the Netherlands was aware of the characteristics of the Leenheerenpolder from the very start and nevertheless integrated it into the SCI because it originally planned to develop conservation-worthy habitats under tidal influence in that polder. According to the request for a preliminary ruling, the Leenheerenpolder is pre-eminently suited to such development because, after removal of the summer dyke to the Spui river, it would be exposed to particularly strong tidal dynamics. Such development is still possible but the Netherlands has abandoned this plan for the time being.

¹¹ Judgment of 25 November 1999, *Commission v France (Poitou)* (C-96/98, EU:C:1999:580, paragraph 54).

¹² See the Note to the Members of the Habitats Committee of 21 June 2005, Annex 4 to the Commission's written pleading (available at: <http://www.eea.europa.eu/themes/biodiversity/document-library/natura-2000/reporting-guidelines-for-natura-2000/reference-documents-relevant-for-the/habcomm2005-updating-of-the-natura>).

2. The forecasting error

36. The Commission nevertheless takes the view that the error in the present case resides in the fact that the Netherlands initially assumed that the planned measures in the Leenheerenpolder were necessary for achieving a favourable conservation status for certain habitat types and species. In the light of recent developments, however, it has become apparent that that objective can be attained even without the measures in question.

37. I do not find this argument convincing as the proposal to reduce the size of the site is not based on an error, as even the Netherlands asserted at the hearing.

38. It is true that the Netherlands authorities informed the Commission on 30 September 2014 that they would now regard the assumption that the Leenheerenpolder could become important for the conservation and restoration of habitat types as a scientific error. However, it is not disputed that those areas are still capable of contributing to the restoration of conservation-worthy habitats. The claim of a scientific error seems to stem solely from the fact that the Commission previously, in a letter of 10 September 2014, rejected a reduction of the size of the 'Haringvliet' SCI and asked the Netherlands authorities to explain why the initial inclusion of the Leenheerenpolder in the SCI is now regarded as a scientific error.

39. The actual reason given by the Netherlands authorities is that the plans for restoration measures in the Leenheerenpolder were abandoned in 2011 for political, social and budgetary reasons in the light of the conservation objectives for the 'Haringvliet' special area of conservation. There were sufficient possibilities for the restoration and enlargement of habitats elsewhere on the site. Various measures are then mentioned.

40. This does not constitute an error regarding restoration potential, but a readjustment of development objectives within the 'Haringvliet' SCI. The Commission did not appraise this when it approved the reduction in the size of the site. In particular, it failed to examine whether, with this in mind, the Leenheerenpolder is no longer necessary from the perspective of the entire European Union for the objective of a favourable conservation status.

41. Consequently, the statement of reasons by the Commission does not justify the reduction of the size of the 'Haringvliet' SCI.

3. Interim conclusion

42. The doubts expressed by the Raad van State regarding the Commission's decision to reduce the size of the 'Haringvliet' SCI are therefore well founded. The statement of reasons by the Commission cannot justify its decision to reduce the size of the 'Haringvliet' SCI. As a consequence the Implementing Decision is unlawful and must be annulled in so far as it reduces the size of the SCI.

C. Formal defects in the Implementing Decision

43. In addition, I would like to note that, in so far as the Implementing Decision includes a decision to reduce the size of the 'Haringvliet' SCI, it is also unlawful on other grounds, in particular because it breaches the principle of legal certainty and its reasons are not evident without knowledge of the communication between the Commission and the Netherlands authorities.

1. *The principle of legal certainty*

44. The principle of legal certainty requires that EU rules should enable those concerned to ascertain unequivocally what their rights and obligations are and take steps accordingly.¹³ As the change in the size of an SCI may affect the rights and obligations of land users, and also of interested third parties, in particular environmental associations,¹⁴ it must be sufficiently clear.

45. The Implementing Decision in itself does not have this clarity, as it does not contain an express indication or even a coded reference to the fact that the ‘Haringvliet’ SCI was changed. Only from a comparison with the previously applicable version of the list is it apparent that its area is smaller than before. It is not immediately obvious to carry out such a comparison, however, because the updated list contains *all*, that is to say several thousand, SCIs in the Atlantic biogeographical region. No one will check all the listed sites for changes in their size.

46. The Implementing Decision does not therefore have the necessary clarity with regard to the reduction in size of the ‘Haringvliet’ SCI so as to exclude the Leenheerenpolder.

2. *The obligation to state reasons*

47. Furthermore, under the second paragraph of Article 296 TFEU EU legal acts must state the reasons on which they are based. The statement of reasons must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. It is not, however, required to go into every relevant point of fact and law. In addition, the question whether the obligation to provide a statement of reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question.¹⁵ Therefore, regard should be had not only to the recitals, but also to the broader context of the measure in question.¹⁶

48. It is not therefore necessary to state reasons for all changes to SCIs in the Atlantic biogeographical region in the decision in question if it is clear where those reasons can be found. Consequently, an objection could not in principle be raised against the statement of reasons for the initial definition of the Community list because the reasons ultimately had to be apparent from the standard data forms for the individual sites.

49. In the present case, on the other hand, it unfortunately has to be noted that the Implementing Decision does not contain the slightest statement of reasons because the decision to reduce the size of the ‘Haringvliet’ SCI is hardly noticeable in the Implementing Decision. The Implementing Decision thus does not give any cause to address the context and thereby — possibly — find out about the abovementioned correspondence on the reduction in the size of a site.

50. The defective statement of reasons cannot be remedied by the fact that in this case the Netherlands was notified, as the Member State concerned, and a number of persons concerned were apparently informed of the process by the Netherlands authorities, as these incidental developments cannot guarantee that all persons concerned were able to ascertain the reasons.

13 Judgments of 21 June 2007, *ROM-projecten* (C-158/06, EU:C:2007:370, paragraph 25), and of 10 March 2009, *Heinrich* (C-345/06, EU:C:2009:140, paragraph 44).

14 See judgments of 7 December 2000, *Commission v France* (C-374/98, EU:C:2000:670, paragraph 54); of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraphs 66 and 69); and of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, in particular paragraph 44).

15 See, for example, judgments of 19 November 2013, *Commission v Council* (C-63/12, EU:C:2013:752, paragraphs 98 and 99), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 70).

16 See, by way of illustration, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 71).

D. The conditions for reducing the size of an SCI so as to exclude potential areas for restoration measures

51. It does not, however, follow from the above considerations that a reduction in the size of an SCI would be precluded under the circumstances of the present case. It is true that the cases recognised thus far by the Court, namely an error of communication in connection with the identification of the site¹⁷ or its unavoidable deterioration,¹⁸ cannot be invoked in support of this. Nor can the scenario developed by the Commission of a scientific error regarding the characteristics of the site be relevant. Nevertheless, the present — somewhat atypical — case highlights the need to recognise a further possibility for reducing the size of a site.

1. The obligation to protect potential areas for restoration measures

52. The starting point must be the original reason for integrating the Leenheerenpolder in the 'Haringvliet' SCI. This was not the protection of existing conservation-worthy occurrences of habitat types or species, but the potential of that area to develop such occurrences.

(a) The obligation to take restoration measures

53. An obligation to propose such 'potential areas for restoration measures' as SCIs can be inferred at most indirectly from the first sentence of Article 4(1) and Annex III (Stage 1) of the Habitats Directive. Under the first sentence of Article 4(1), Member States are to indicate which habitat types and species to be protected the proposed site hosts. This could be interpreted as meaning that only actually existing occurrences can justify a proposal for a site. Annex III (Stage 1) nevertheless also envisages the possibility, in the assessment of sites, of including a restoration of occurrences. Furthermore, Article 4(4) requires, in connection with the designation of an SCI as a special area of conservation, priorities to be established in the light of the importance of the site for the restoration of habitat types and species in particular.

54. The inclusion of potential restoration areas for restoration measures in the identification of SCIs is consistent with the objective of Article 2(2) and Article 3(1) of the Habitats Directive of restoring natural habitats and species of wild fauna and flora of Community interest at a favourable conservation status. If existing occurrences of habitat types or species are not sufficient to guarantee a favourable conservation status, such occurrences must be restored.

(b) The importance of conservation status

55. This does not mean, however, that all potential areas for restoration measures in relation to protected habitat types or species would have to be proposed as SCIs and placed on the Community list.

56. The decisive criterion in ascertaining whether such an area must be used is the conservation status of the habitat types or species concerned. According to the definitions in Article 1(e) and (i) of the Habitats Directive, a favourable conservation status essentially requires that the occurrences in question are at least stable in the long term.

¹⁷ Judgment of 25 November 1999, *Commission v France (Poitou)* (C-96/98, EU:C:1999:580, paragraphs 52 to 55).

¹⁸ Judgment of 3 April 2014, *Cascina Tre Pini* (C-301/12, EU:C:2014:214, paragraphs 27, 30 and 32 to 34).

57. So long as and in so far as conservation status is already favourable, that is to say, the occurrences in question are stable or are even increasing in the long term, there is no obligation to take restoration measures or to include potential areas for restoration measures in site proposals. If, on the other hand, an unfavourable conservation status can be improved only by exploiting certain restoration possibilities, there would be little justification for not taking appropriate measures and including the appropriate areas.

58. The situation will often not be that clear, however. Between scientific uncertainty over the conservation status of habitat types or species, on the one hand, and over the effectiveness of restoration measures, on the other, there is considerable scope for difficult decisions based on forecasts. If there are a number of possibilities for restoration of occurrences, there is probably often also a freedom to choose between these options, which largely falls to the national authorities. It therefore seems rather unlikely that *specific* restoration measures are required in practice. It is also possible in principle to change the strategy for the restoration of habitat types and species over time.

(c) The level at which conservation status is assessed

59. In these proceedings it has been discussed in particular whether a favourable conservation status is to be guaranteed at the level of the European Union, the Member State or the site in question. It is clear from the definitions in Article 1(e) and (i) and Article 2 of the Habitats Directive that the directive aims at a favourable conservation status in the entire European Union. This must ultimately be the main benchmark for the Commission decision.

60. On the other hand, the Member State cannot, as a rule, definitively assess the situation in the entire European Union.¹⁹ It is required to examine above all, in connection with the proposal to reduce the size of a site, whether, at national level, the areas to be excluded have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora. It may nevertheless be reasonable to take into account any evidence which exists at European level, in case it shows that it is not possible in any event to exclude the areas from a European perspective.

61. The conservation status of habitat types and species within certain sites may also be of special interest where it is unfavourable there. In that case, failure to take restoration measures which might improve the conservation status could infringe the prohibition on deterioration laid down in Article 6(2) of the Habitats Directive,²⁰ as there would be reason to fear that the relevant habitat types or species in the site will deteriorate without restoration measures. This cannot be disregarded when assessing a reduction in the size of a site in particular.

62. In respect of individual sites too, however, not all restoration potential necessarily has to be recognised and integrated into the site, even in the case of an unfavourable conservation status, as different restoration measures are generally conceivable, particularly in the case of large sites like the 'Haringvliet' SCI, with the result that Member States and in principle also the Commission have a freedom of choice.

¹⁹ Judgment of 7 November 2000, *First Corporate Shipping* (C-371/98, EU:C:2000:600, paragraph 23).

²⁰ See to that effect judgment of 20 October 2005, *Commission v United Kingdom* (Gibraltar, C-6/04, EU:C:2005:626, paragraph 34).

63. Lastly, it should also be noted that at least in the case of a reduction in the size of a site where certain areas are not important for guaranteeing a favourable conservation status, the political, social and budgetary reasons cited by the Netherlands authorities may not be relevant.²¹ Such reasons could be significant at most if it is necessary to reduce the size of an SCI on the basis of Article 6(4) of the Habitats Directive so that certain plans or projects may be carried out. In that case, however, specific projects or plans would have to be envisaged and all other conditions under that provision would have to be complied with.

2. The standard of review for a reduction in the size of a site

64. For the review by the EU judicature of the decision to reduce the size of an SCI, the discretion available is of central importance.

65. Both the Member State's proposal and the Commission's decision are frequently of considerable factual and scientific complexity.

66. Where the EU institutions are required to take such decisions, they must as a rule be recognised as enjoying a broad discretion.²² This must hold in the present case in particular for the Commission decision.

67. However, the exercise of that discretion is not excluded from review by the Court. In the context of such a review the EU judicature must verify whether the relevant procedural rules have been complied with, whether the facts admitted by the Commission have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers. In particular, where a party claims that the institution competent in the matter has committed a manifest error of appraisal, the EU judicature must verify whether that institution has examined, carefully and impartially, all the relevant facts of the individual case, facts which support the conclusions reached.²³

68. In the examination of all the relevant circumstances, it should be borne in mind that the proposal by the Member State of potential areas for the restoration of habitats and/or species and the acceptance of the proposal by the Commission give rise to a presumption that those areas and the envisaged restoration measures are necessary for a favourable conservation status of the habitat types and species concerned.

69. Consequently, in the case of a proposal to reduce the size of a site so as to exclude such areas the Member State must refute the presumption of the need for restoration measures. It would not be sufficient in this regard to make a mere assertion, as was contained in the information from the competent Netherlands authorities, on which the Commission relied when it decided to reduce the size of the site. Rather, the Member State would have to show conclusively and on the basis of the best available scientific evidence why it considers that a good conservation status can be guaranteed or will be achieved in future even without those areas and the corresponding measures.

21 Judgment of 7 November 2000, *First Corporate Shipping* (C-371/98, EU:C:2000:600, paragraphs 23 and 24).

22 Judgments of 9 September 2004, *Spain v Commission* (C-304/01, EU:C:2004:495, paragraph 23); of 18 July 2007, *Industrias Químicas del Vallés v Commission* (C-326/05 P, EU:C:2007:443, paragraph 75); of 22 December 2010, *Gowan Comércio Internacional e Serviços* (C-77/09, EU:C:2010:803, paragraph 82); of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga* (C-534/10 P, EU:C:2012:813, paragraph 50); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 68); and of 8 September 2016, *Borealis and Others* (C-180/15, EU:C:2016:647, paragraph 45).

23 Judgments of 18 July 2007, *Industrias Químicas del Vallés v Commission* (C-326/05 P, EU:C:2007:443, paragraphs 76 and 77); of 6 November 2008, *Netherlands v Commission* (C-405/07 P, EU:C:2008:613, paragraphs 55 and 56); and of 9 July 2015, *Germany v Commission* (C-360/14 P, not published, EU:C:2015:457, paragraph 37).

70. In particular, where it has not yet been determined that the conservation status of the habitat types and species in question within the SCI concerned is favourable, the freedom of choice in respect of the protection of potential restoration areas in the SCI may even cease to apply entirely. In this case, on the basis of the prohibition on deterioration laid down in Article 6(2) of the Habitats Directive, the Member State may not yet, as a rule, deny areas which have been integrated into the SCI on account of their restoration potential their ecological interest from the point of view of the objective of conserving natural habitats and wild fauna and flora. It cannot be ruled out that they will still be needed if it transpires that other restoration measures are not sufficient. Therefore, they may not lose their protected status at that time.

71. The Commission may follow a Member State's proposal to reduce the size of a site only if the Member State convinces it, on the basis of sufficient, scientifically substantiated evidence, that, at national level, the areas in question have no interest which is relevant from the point of view of the objective of conserving natural habitats and species and there is also no obstacle, from the perspective of the entire European Union, to reducing the size of the site so as to exclude those areas.

3. Interim conclusion

72. In summary, it must be stated that the Commission may, under Article 4 of the Habitats Directive, on a proposal from the competent Member State, reduce the size of an SCI if the areas concerned form part of the SCI solely in respect of future measures for the restoration of habitat types and/or species and the Member State provides information which permits the Commission to establish that measures in those areas are not necessary for guaranteeing a favourable conservation status for the habitat types and/or species concerned.

V. Conclusion

73. I therefore propose that the Court give the following answer to the request for a preliminary ruling:

- (1) Commission Implementing Decision (EU) 2015/72 of 3 December 2014 adopting an eighth update of the list of sites of Community importance for the Atlantic biogeographical region is invalid in so far as the Leenheerenpolder is no longer included in the 'Haringvliet' site (NL1000015).
- (2) The Commission may, under Article 4 of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, on a proposal from the competent Member State, reduce the size of a site of Community importance if the areas concerned form part of the site solely in respect of future measures for the restoration of habitat types and/or species and the Member State provides information which permits the Commission to establish that measures in those areas are not necessary for guaranteeing a favourable conservation status for the habitat types and/or species concerned.