Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 12 May 2022[1]

Case C-278/21

AquaPri A/S
v
Miljø- og Fødevareklagenævnet

(Request for a preliminary ruling from the Østre Landsret (High Court of Eastern Denmark))

(Request for a preliminary ruling – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Special areas of conservation – Remedial assessment of the implications for those sites in view of their conservation objectives – Prior assessment of the need for an assessment – Nitrate inputs from an existing fish farm – Account taken of a River Basin Management Plan and the Natura 2000 plan for the site concerned)

I. Introduction

1. Article 6(3) of the Habitats Directive[2] requires a prior assessment of the effects of any plan or project likely to have a significant effect on protected sites. But is such an assessment also necessary where a new authorisation is required under national law for the continued operation of a previously authorised installation and the original authorisation was granted in breach of the assessment obligation? This question lies at the heart of the present request for a preliminary ruling.

2. In the event that such an assessment is necessary, the referring court also wishes to know what relevance a River Basin Management Plan and the Natura 2000 plan have for the site concerned.

[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), as amended by Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 193) ('the Habitats Directive').

II. Legal framework

A. European Union law

1. Habitats Directive

3. The authorisation of plans and projects likely to have a significant effect on a site protected under the Habitats Directive or the Birds Directive[3] is subject to the following rules in Article 6(2) and (3) of the Habitats Directive:

'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.'

2. EIA Directive

4. Article 1(2)(a) of the EIA Directive[4] defines 'project' as follows:

'– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

B. Danish law

5. Paragraph 33 of the Miljøbeskyttelseslov (Law on environmental protection) provides that certain undertakings or installations require authorisation. According to the request for a preliminary ruling, this applies inter alia to fish farms, and existing fish farms which had not been authorised under that provision were to submit, pursuant to a transitional rule,[5] a corresponding application for authorisation by 15 March 2014.

[3] 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), as amended by Directive 2013/17 ('the Birds Directive').

[4] 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), as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1) ('the EIA Directive').

[5] Paragraph 19 of the request for a preliminary ruling refers to Paragraph 70(2) and point I 205 of Annex 2 to Bekendtgørelse nr. 1458 af 12. december 2017 om godkendelse af listevirksomhed (godkendelsesbekendtgørelsen) (Decree No 1458 of 12 December 2017 on the authorisation of listed undertakings). It is possible that this obligation was originally introduced by the second sentence of Paragraph 3(3) of the Bekendtgørelse om ændring af bekendtgørelse om godkendelse af listevirksomhed (BEK nr. 143 af 01/03/2006).

6. Paragraph 6(1) and (2) of the Habitats Decree [6] transposes Article 6(3) of the Habitats Directive:

'Paragraph 6. Before a decision is taken pursuant to Paragraph 7, an assessment shall be carried out of whether the project is likely, either individually or in combination with other plans or projects, to have a significant effect on a Natura 2000 site. The assessment requirement applies to any project not directly connected with or necessary to the management of the Natura 2000 site.

(2) Where the authority considers that the project is likely to have a significant effect on a Natura 2000 site, a detailed impact assessment of the effects of the project on the Natura 2000 site shall be carried out having regard to the conservation objective for the site concerned. If the impact assessment shows that the project would adversely affect the international nature protection area, no authorisation, derogation or agreement may be granted for the application.'

7. Paragraph 7(7)(6) of the Habitats Decree provides in particular that Paragraph 6(1) and (2) is applicable to authorisations under Paragraph 33 of the Law on environmental protection.

'7. The following cases under the Law on environmental protection shall come under Paragraph 6:

…

(6) Approval of undertakings etc. pursuant to Paragraph 33(1), Paragraph 38 and Paragraph 39 of the Law on environmental protection.'

8. The State Natura 2000 plan for 2016 to 2021 states with regard to Natura 2000 site No 173, which is closest to Onsevig fish farm, that the plan focuses on area-related actions and does not contain action requirements for water quality, which is guaranteed by water planning; it also lays down no specific requirements on the reduction of nitrogen deposition, which is also governed by different legislation.

9. The River Basin Management Plan 2015-2021 for the river basin district of Sjælland (Zealand, Denmark), which was adopted in accordance with a prior impact assessment pursuant to Article 6(3) of the Habitats Directive and covers inter alia marine Natura 2000 sites Nos 173, 170 and 162, states, with reference to the political agreement of 22 November 2015, the 'Food and Agriculture Package', that emissions of 43 tonnes of nitrogen are set aside to ensure that existing fish farms covered by the river basin management plans can make full use of their present discharge authorisations.

III. Facts and request for a preliminary ruling

10. There are a total of 19 fish farms in Danish waters, some of which are situated inside or close to a Natura 2000 site. Legal actions have been brought in relation to seven of these fish farms. Primarily rainbow trout are produced on the farms. The fish farms discharge inter alia nitrogen and phosphorus, which are likely to affect nearby Natura 2000 sites.

[6] Bekendtgørelse nr. 188 af 26. februar 2016 om udpegning og administration af internationale naturbeskyttelsesområder (habitatbekendtgørelsen) (Decree No 188 of 26 February 2016 on the designation and administration of international nature protection areas) ('the Habitats Decree').

11. One of the fish farms at issue is Onsevig fish farm. It is owned by AquaPri A/S, which is represented in this case by Dansk Akvakultur, a trade association for Denmark's fish farming industry. It lies in Småland's bay approximately 1.7 km north of Natura 2000 site No 173, approximately 10.5 km south of Natura 2000 site No 170, and approximately 12.4 km south of Natura 2000 site No 162. The basis of the designation for the closest Natura 2000 site, site No 173, includes the natural habitats Sandbanks (1110), Mudflats (1140), Bays (1160), Reefs (1170) and the priority natural habitat Lagoons (1150). Various bird protection areas (Nos 82, 83, 85 and 86) were designated in the same area on the basis of a large number of breeding and/or resting birds.

12. On 15 February 1999, the competent local environmental authority, Storstrøms Amt (Storstrøm County, Denmark), granted authorisation to move the fish farm to its current location.

13. On 27 October 2006, Storstrøm County granted a revised authorisation for the fish farm which allowed it to increase its discharge of nitrogen by 0.87 tonnes, from 15.6 tonnes to 16.47 tonnes, and to use and discharge copper and three types of antibiotics. Storstrøm County had carried out an environmental impact assessment screening and, on that basis, took the view that the increased discharge of nitrogen would not have significant environmental impacts on nearby Natura 2000 site No 173 and that the project therefore did not require an environmental impact assessment. Storstrøm County did not refer to the rules on international nature protection areas.

14. The decision was appealed before the appeal board at that time, namely the Naturklagenævnet (Nature Protection Board of Appeal, Denmark), with reference to the impact on a Natura 2000 site. Storstrøm County's decision was upheld by the Nature Protection Board of Appeal, which found that the defects which characterised the environmental impact assessment screening decision were not so significant that they could render the decision invalid.

15. According to the decision of Storstrøm County of 27 October 2006 thus upheld, an application for environmental authorisation was to be submitted to the supervisory authority by 15 March 2014 at the latest.

16. AquaPri therefore applied for environmental authorisation for Onsevig fish farm, which was granted by the Miljøstyrelse (Danish Environmental Protection Agency, Denmark) on 16 December 2014. According to the environmental technical assessment in the decision, the Danish Environmental Protection Agency considered that the fish farm was not likely, either individually or in combination with other plans or projects, to have a significant effect on Natura 2000 site No 173. In reaching that decision, the environmental authority referred, inter alia, to Storstrøm County's authorisation of 27 October 2006 and the fact that no information was subsequently submitted to show that the fish farm had an impact within the Natura 2000 site.

17. A nature conservation organisation lodged an appeal against the environmental authorisation of 16 December 2014 with the Miljø- OG Fødevareklagenævn (Environment and Food Board of Appeals, Denmark) ('the Board of Appeal'), which annulled the authorisation by decision of 13 March 2018. In its decision, the Board of Appeal found that the environmental authorisation for Onsevig fish farm allowing continued operation of the fish farm in a situation where no habitat assessment of the overall activity has been carried out previously must be subject to a prior habitat assessment. In support of that finding, it noted that no habitat assessment of the overall activity from all the fish farms in the area had been carried out previously in accordance with the Danish rules implementing Article 6(3) of the Habitats Directive. In this case, the Board

of Appeal found that the nutrient load emanating from the fish farm, in combination with other plans and projects, was likely to have a significant effect on Natura 2000 sites Nos 173, 170 and 162 and that, therefore, the risk of adversely affecting the basis for the site's designation could not be ruled out a priori.

18. The action brought by AquaPri against that decision of 13 March 2018 is now being heard before the Østre Landsret (High Court of Eastern Denmark, Denmark). The Østre Landsret has referred the following questions to the Court of Justice:

'(1) Is [the first sentence of] Article 6(3) of [the Habitats Directive] to be interpreted as being applicable to a situation such as that in the present case in which an authorisation is sought to continue operation of an existing fish farm, where the activity of the fish farm and the discharge of nitrogen and other nutrients remains unchanged in relation to the activity and discharge authorised in 2006, but where no assessment was made of the overall activity and the cumulative effects of all the fish farms in the area in connection with the previous authorisation of the fish farm, in so far as the relevant authorities assessed only the overall additional discharge of nitrogen etc. from the fish farm concerned?

(2) Is it relevant, for the purpose of answering Question 1, that the national River Basin Management Plan 2015-2021 takes account of the presence of the fish farms in the area in so far as it sets aside a specific amount of nitrogen to ensure that the existing fish farms in the area can make use of their present discharge authorisations and that the actual discharge from the fish farms remains within the set limits?

(3) If, in a situation such as that in the present case, an assessment must be carried out pursuant to [the first sentence of] Article 6(3) of the Habitats Directive, is the relevant authority required, in connection with that assessment, to take into account the limits on the discharge of nitrogen set aside in the River Basin Management Plan 2015-2021 and any other relevant information and assessments which might arise from the River Basin Management Plan or the Natura 2000 plan for the area?'

19. AquaPri A/S, the Board of Appeal and the European Commission submitted written observations and presented oral argument at the hearing on 24 March 2022.

IV. Assessment

20. This case focuses on the extent to which Article 6(3) of the Habitats Directive regarding the assessment of the implications for the site is applicable in connection with the authorisation for the unchanged continued operation of an installation (see under A below). In the event that that provision is applicable, the referring court also wishes to know what relevance a River Basin Management Plan and the Natura 2000 plan for the protected site concerned have in this respect. Questions are asked, first, regarding the relevance of the stipulations for nitrogen emissions laid down in the River Basin Management Plan for the prior assessment of the need for an assessment of the implications for the site (see under B below) and, second, regarding the relevance of both documents for the actual assessment of the implications for the site (see under C below).

A. Question 1 – assessment of the implications for the site in the case of a new authorisation for a project

21. The first question seeks to clarify whether, in the case of a renewed authorisation of a project, Article 6(3) of the Habitats Directive requires an appropriate assessment of its implications for the site concerned in view of the site's conservation objectives if the effects of the project remain unchanged but those effects were not thoroughly investigated in the context of the previous authorisation and the cumulative effects with other plans and projects were also not taken into account.

22. This question is asked with specific reference to a fish farm operated in the sea close to the Danish island of Småland, which was granted an authorisation to increase nitrogen emissions in 2006, without account being taken of the previously authorised nitrogen emissions from the fish farm or nitrogen deposition from other sources. It is common ground between the parties that the assessment in 2006 did not meet the requirements of Article 6(3) of the Habitats Directive, under which the cumulative effects of the project in question must be taken into account. However, the lawfulness of the final decision from 2006 is not at issue in these proceedings.

23. In answering the first question, I will first explain that Article 6(3) of the Habitats Directive does not establish an obligation to carry out a (new) assessment of the implications for the site if a previous authorisation did not satisfy the requirements laid down in that provision (second part of the first question, see under *1* below). However, I will then show that a renewed authorisation for a project, as provided for in national law, also requires a new assessment of the implications for the site (first part of the first question, see under *2* below).

1. Consequences of past errors in connection with the authorisation of a project

24. Under the first sentence of Article 6(3) of the Habitats Directive, any plan or project likely to have a significant effect on a special area of conservation within the meaning of the directive, either individually or in combination with other plans or projects, is subject to appropriate[7] assessment of its implications for the site in view of the site's conservation objectives.

25. The fact that the project is not situated in the Natura 2000 areas concerned, but outside those zones, in no way precludes the requirements laid down in Article 6(3) of the Habitats Directive from applying.[8]

26. That assessment is intended to prepare the authorisation of the project. Under the second sentence of Article 6(3) of the Habitats Directive, the competent national authorities are to agree to the plan or project, in the light of the conclusions of the assessment of the implications for the site and subject to the provisions of Article 6(4), only after having ascertained that it will not adversely affect the integrity of the site concerned.

[7] According to the tenth recital of the Habitats Directive and, of the original language versions of the Habitats Directive, as well as the Spanish, Greek, English, French, Dutch and Portuguese versions.

[8] Judgments of 10 January 2006, *Commission* v *Germany* (C-98/03, EU:C:2006:3, paragraphs 44 and 51); of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 136); and of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:680, paragraph 26).

27. Article 6(3) of the Habitats Directive thus establishes an assessment procedure intended to ensure, by means of a *prior* examination, that a plan or project likely to have a significant effect on the site concerned is authorised only to the extent that it will not adversely affect the integrity of that site. [9]

28. On the other hand, Article 6(3) of the Habitats Directive does not require an already finally authorised project to be made subject to that assessment *again* if the original assessment was defective. [10] Consequently, the unchanged continuation of an activity does not, as a rule, require a new assessment. [11]

29. This does not mean, however, that such errors and possible adverse effects on protected sites should be accepted. If an already authorised project subsequently proves likely to adversely affect the integrity of a protected site because it gives rise to deterioration or significant disturbances, application of the prohibition of deterioration under Article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive. [12] An activity complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives. The very existence of a probability or risk that an activity on a protected site might cause significant disturbances is capable of constituting an infringement of that provision. [13]

30. AquaPri is therefore right to point out that an obligation to review its authorisation cannot be inferred directly from Article 6(3) of the Habitats Directive, but from Article 6(2). Depending on how national law ensures the application of that provision, the principles of legal certainty and protection of legitimate expectations in the continued existence of the previously granted authorisation could be relevant, in particular in connection with the derogation laid down in Article 6(4). [14] These elements could also therefore give rise to claims for compensation which AquaPri expects in the case of a new assessment of the implications for the site.

31. The contested decision of the Board of Appeal does not, however, seek to apply Article 6(2) of the Habitats Directive, but Article 6(3). It must be stated in this respect that that provision does not require a new assessment of the implications for the site if the effects of an activity were not thoroughly investigated in the context of a previous final authorisation and the cumulative effects with other plans and projects were also not taken into account.

9 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 34); of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 117); and of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:680, paragraph 25).

10 See, to that effect, judgment of 20 October 2005, *Commission* v *United Kingdom* (C-6/04, EU:C:2005:626, paragraph 58).

11 See, to that effect, judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraphs 78 to 83).

12 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 37), and of 14 January 2010, *Stadt Papenburg* (C-226/08, EU:C:2010:10, paragraph 49).

13 Judgments of 14 January 2016, *Grüne Liga Sachsen and Others* (C-399/14, EU:C:2016:10, paragraphs 41 and 42); of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraph 85); and of 24 June 2021, *Commission* v *Spain* (Deterioration of the Doñana natural area) (C-559/19, EU:C:2021:512, paragraphs 153 and 155).

14 Judgment of 10 November 2016, *Commission* v *Greece* (C-504/14, EU:C:2016:847, paragraph 41), and my Opinions in *Commission* v *Bulgaria* (C-141/14, EU:C:2015:528, point 86) and *Commission* v *Greece* (C-504/14, EU:C:2016:105, point 40)

2. New authorisation under Danish law

32. However, does it also follow that, in the case of a new authorisation for such a project required under national law, Article 6(3) of the Habitats Directive does not require an appropriate assessment of its implications for the site concerned in view of the site's conservation objectives if the effects of the project remain unchanged? This is the subject of the first part of the first question.

33. As has just been stated, in the case of the unchanged continuation of an activity, Article 6(3) of the Habitats Directive does not require a new assessment of the implications for the site or therefore a new authorisation of that activity.

34. If, however, a Member State provides for a new authorisation in its own law, that authorisation in accordance with the second sentence of Article 6(3) of the Habitats Directive may constitute agreement by the competent national authorities to that project. Such agreement may be granted by those authorities only after having ascertained, in the light of the conclusions of the assessment of the implications for the site, that it will not adversely affect the integrity of the site concerned.

(a) Authorisation of a project?

35. Agreement for the purposes of the second sentence of Article 6(3) of the Habitats Directive must nevertheless relate to a project.

36. While the Habitats Directive does not define the concept of 'project', the Court has ruled that the definition of 'project' in Article 1(2)(a) of the EIA Directive is relevant to defining the same concept as provided for in the Habitats Directive.[15] Under that provision, the execution of construction works or of other installations or schemes and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources are to be regarded as projects.

37. Since the fish farm is intended to continue to operate unchanged, the authorisation does not concern the execution of the installation. It cannot be ruled out, however, that future additional nitrogen deposition in protected sites that is associated with the unchanged continued operation of the fish farm is to be regarded as another intervention in the natural surroundings within the meaning of the definition of 'project' under the EIA Directive.[16]

38. However, even if the future additional nitrogen deposition was not regarded as an intervention within the meaning of the EIA Directive, the existence of a project within the meaning of the Habitats Directive is not ruled out as the concept of 'project' under the EIA

[15] Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 26); of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraph 60); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 122).

[16] See judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraph 72).

Directive is more restrictive than that under the Habitats Directive.[17] The most important factor for the purposes of the application of the Habitats Directive is whether the activity in question is likely to have a significant effect on a protected site.[18]

39. This cannot be ruled out a priori in the case of activities resulting in additional nitrogen deposition in protected habitats,[19] which would, moreover, also appear to be basis for the contested decision of the Board of Appeal.

40. However, AquaPri relies on the judgment in *Stadt Papenburg*, according to which certain activities, having regard in particular to their regularity or nature or the conditions under which they are carried out, are to be considered to be one and the same operation for the purposes of Article 6(3) of the Habitats Directive, which is exempt from a new assessment procedure under that provision.[20] This line of case-law relates to regular activities which were authorised on a one-off basis for the future under national law. The judgment in *Stadt Papenburg* concerned authorisation for the regular dredging of a river in order to enable navigation by ships with a certain draught.[21]

41. As is also asserted by the Commission and Board of Appeal, that is not the case here, as the authorisation of 27 October 2006 had not permitted the indefinite continued operation of the fish farm. Instead, it highlighted the need for a new authorisation.

(b) Relevance of the authorisation under Paragraph 33 of the Law on environmental protection

42. The answer to the first part of the first question therefore depends on whether the requirement mentioned in the decision of 27 October 2006 to submit an application for authorisation for a polluting activity under Paragraph 33 of the Law on environmental protection to the supervisory authority by 15 March 2014 at the latest amounts to new agreement for the purposes of the second sentence of Article 6(3) of the Habitats Directive. Such new agreement to a project would require an assessment of the implications for the site.[22]

43. In this regard, it must first be made clear that, according to the request for a preliminary ruling, that requirement is not a condition laid down by the authorising authority but merely a reference to an obligation stemming directly from the Danish rules.[23]

17 See judgments of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraphs 63 to 66), and of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:680, paragraph 29).

18 Judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraphs 68 to 70).

19 See, by way of illustration, my Opinion in *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:622, in particular points 61 et seq. and 104 et seq.).

20 Judgments of 14 January 2010, *Stadt Papenburg* (C-226/08, EU:C:2010:10, paragraphs 47 and 48), and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraphs 78 to 80).

21 Judgment of 14 January 2010 (C-226/08, EU:C:2010:10, paragraphs 11, 47 and 48).

22 See, to that effect, judgments of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 130), and of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:680, paragraphs 38 and 39). See also judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 28).

23 See above, footnote 5.

44. The substance of those Danish rules can be authoritatively assessed only by the national courts, as they are a matter of national law. The Court can nevertheless give the referring court guidance on the characteristics which the requirement of a new authorisation must have in order to render Article 6(3) of the Habitats Directive applicable.

45. If the authorisation applied for is a mere formality, as AquaPri claims, it does not constitute agreement within the meaning of Article 6(3) of the Habitats Directive. This would be the case, for example, if the authorisation had to be granted on the basis of the existing authorisations from 1999 and 2006.

46. If, on the other hand, the new authorisation provided for in national law actually determines the continuation of the activity, the new authorisation constitutes agreement within the meaning of Article 6(3) of the Habitats Directive requiring an assessment of the implications for the site because, in that case, it is determined through the new authorisation whether the effects of the activity on the site concerned will persist or cease.

47. Although the request for a preliminary ruling does not contain any information on the function of the retrospective authorisation under Paragraph 33 of the Law on environmental protection, according to the Board of Appeal that authorisation requires a thorough assessment of the conditions for authorisation. It would thus appear to constitute development consent within the meaning of Article 1(2)(c) of the EIA Directive, which must be based on a full consideration of the environmental effects of the project concerned [24] if the project requires such an environmental impact assessment. Prima facie this assessment encompasses the Danish rules transposing Article 6(3) of the Habitats Directive. [25]

48. It therefore appears that the authorisation under Paragraph 33 of the Law on environmental protection is to be regarded as agreement within the meaning of the second sentence of Article 6(3) of the Habitats Directive and thus also requires an assessment of the implications for the site pursuant to the first sentence of Article 6(3).

(c) Legal certainty and protection of legitimate expectations

49. Neither the principle of legal certainty nor the principle of protection of legitimate expectations precludes the above considerations. If national law requires a new authorisation for the continued operation of an installation, the holder of the existing authorisation cannot rely on the expectation that the new authorisation adopts the content of an existing authorisation without any changes.

50. A Member State may therefore preclude the legitimate expectation in the continued existence of an authorisation by expressly providing – as seems, to all appearances, to have been the case here – at the time of the first authorisation for a review at a later date.

51. It should also be noted that, where such rules are applied, claims for compensation made by the holder of the reviewed authorisation, which AquaPri expects in the case of the application of Article 6(2) of the Habitats Directive, could not in any event be based on the principles of legal certainty or the protection of legitimate expectations.

[24] Judgment of 24 February 2022, *Namur-Est Environnement* (C-463/20, EU:C:2022:121, paragraphs 48 and 58).

[25] Paragraph 6(1) and (2) and Paragraph 7(7)(6) of the Danish Habitats Decree.

(d) Answer to the first part of the first question

52. The answer to the first part of the first question is therefore that a new authorisation provided for in national law for an unchanged continued activity is to be regarded as agreement within the meaning of Article 6(3) of the Habitats Directive which requires an assessment of the implications for the site if that authorisation actually determines the continuation of the activity.

B. Question 2 – the River Basin Management Plan 2015-2021 in the prior assessment

53. The second question seeks to clarify the relevance of the stipulations of the Danish River Basin Management Plan 2015-2021 in respect of the permitted nitrogen emissions from fish farms for the prior assessment of whether a full assessment of the implications for the site should be carried out pursuant to the first sentence of Article 6(3) of the Habitats Directive.

54. In answering this question, I will assume that that plan under Danish law may be relevant to the lawfulness of the contested decision in the main proceedings, even though it would seem to have been adopted only after the new authorisation for the fish farm in 2014.

55. Given this assumption, I will begin by explaining the criteria on the basis of which that prior assessment is to be carried out and then examine the relevance of the authorisation from 2006 and of the River Basin Management Plan 2015-2021 in that context.

1. Need for an assessment of the implications for the site

56. Under the first sentence of Article 6(3) of the Habitats Directive, if a plan or project is likely to have a significant effect on a special area of conservation within the meaning of the directive, either individually or in combination with other plans or projects, an appropriate assessment of its implications for the site in view of its conservation objectives is necessary.

57. The assessment obligation thus arises where there is a probability or a risk that a plan or project will have a significant effect on the site.[26] In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by EU policy on the environment, in accordance with Article 191(2) TFEU, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned.[27] The assessment of that risk must be made in the light, in particular, of the characteristics and specific environmental conditions of the site concerned by that plan or project.[28]

[26] Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraphs 41 and 43), and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 119).

[27] Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 44), and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 134).

[28] Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 48); of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 20); and of 12 April 2018, *People Over Wind and Sweetman* (C-323/17, EU:C:2018:244, paragraph 34).

58. If, after this prior assessment, doubts remain as to the existence of significant effects, the full assessment of the implications for the site provided for in the first sentence of Article 6(3) of the Habitats Directive must therefore be carried out. [29]

2. Authorisation from 2006

59. The defects in the prior assessment carried out in connection with the authorisation from 2006 illustrate the application of this criterion.

60. In principle, that prior assessment of the fish farm, which continued to operate unchanged, could constitute objective information which excludes the risk of significant effects. [30] The prior assessment concluded that the fish farm had no significant effects on protected sites.

61. While such use of a previous assessment is reasonable, it presupposes that the assessment made a full and accurate appraisal of the factors that were relevant at the time of the subsequent decision. If, however, it transpires at the time of the subsequent authorisation that the previous assessment had omissions, it cannot exclude that the plan or project will have significant effects on the site concerned.

62. In the present case, the first question referred in the request for a preliminary ruling is based on the premiss that the previous prior assessment in 2006 did *not* cover all the activities and the cumulative effects of every fish farm in the area, as the competent authorities assessed only the emissions of nitrogen and other substances from the fish farm in question additionally applied for. Under the first sentence of Article 6(3) of the Habitats Directive, the relevant factor is whether the project is likely to have a significant effect on a protected site in combination with other plans or projects. Consequently, the cumulative effects of all nitrogen sources which pollute the protected sites concerned should have been taken into account.

63. Furthermore, account should have been taken in the context of a new authorisation of the nitrogen sources which had been introduced additionally in the interim.

64. Accordingly, the prior assessment from 2006 is incomplete and cannot exclude that the fish farm in question, together with the other sources of nitrogen deposition, has a significant effect on the sites concerned.

3. River Basin Management Plan 2015-2021

65. The River Basin Management Plan 2015-2021 may actually also constitute objective information which renders unnecessary a separate assessment of the implications for the site in respect of the effects covered by that plan.

[29] Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 44); of 26 May 2011, *Commission* v *Belgium* (C-538/09, EU:C:2011:349, paragraph 41); and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraph 114).

[30] See, to that effect, judgment of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:680, paragraph 54).

66. The Court has recognised specifically with regard to nitrogen deposition from different sources that an overall evaluation of the implications carried out in advance makes it possible to examine the cumulative effects on the sites concerned.[31] However, it is for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive accompanying a programmatic approach and the various arrangements for implementing it.[32]

67. An overall evaluation of this kind must also preclude the effects of the project concerned which it covers having a significant effect on the site in question, such that there is no need for the individual assessment of that project pursuant to the first sentence of Article 6(3) of the Habitats Directive.[33]

68. A document which, like the River Basin Management Plan 2015-2021, stipulates the permitted nitrogen emissions from fish farms, must therefore ensure, from a scientific perspective, that nitrogen deposition in the protected sites resulting from those emissions together with nitrogen deposition from all other sources does not reach a level which adversely affects the sites' conservation objectives.

69. It is not sufficient in this regard to take into account similar sources, such as other fish farms in this case. Instead, the load of each individual protected site from all nitrogen sources must be taken into account, for example from agriculture, from waste water and from transport.[34] Where habitat types are adversely affected by nitrogen, those adverse effects inherently depend on the total load.[35]

70. Furthermore, the Court has ruled that in stipulating permitted nitrogen emissions the effects of future measures to reduce nitrogen deposition in protected sites may not be taken into consideration.[36]

71. According to the request for a preliminary ruling, the River Basin Management Plan 2015-2021 was adopted on the basis of an assessment of the implications for the site under Article 6(3) of the Habitats Directive. Although this suggests that it meets the abovementioned conditions, the referring court should examine further whether it can actually be excluded on the basis of that assessment that the protected sites will be adversely affected by the permitted nitrogen emissions.

72. Doubts arise, moreover, from the fact that the level of permitted nitrogen emissions is reportedly based on a political compromise and was stipulated with the aim of enabling the continued operation of existing fish farms.[37] This gives the impression that the purpose of such stipulation is not to prevent a significant effect on protected sites on a scientific basis.

[31] Judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraph 96).

[32] Judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraph 101).

[33] See above, point 57.

[34] See my Opinion in *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:622, point 49 et seq.).

[35] See my Opinion in *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:622, point 41).

[36] Judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraphs 126 to 130).

[37] Paragraph 12 of the request for a preliminary ruling and pp. 5 and 74 of the River Basin Management Plan.

73. Ultimately, however, it is for the national courts to assess the scientific soundness of the River Basin Management Plan 2015-2021.

74. Depending on the outcome of that assessment, the River Basin Management Plan 2015-2021 may remove all doubt that the nitrogen emissions from the fish farm in question are likely to have a significant effect on the protected sites. Any assessment under the first sentence of Article 6(3) of the Habitats Directive would then be unnecessary, at least in respect of those emissions.

75. If the River Basin Management Plan 2015-2021 cannot remove that doubt, for example on account of defects in its scientific basis, this precludes the possibility of forgoing an individual assessment of projects covered pursuant to the first sentence of Article 6(3) of the Habitats Directive.

76. The answer to the second question is therefore that stipulation of the extent of permitted environmental effects of certain activities in a River Basin Management Plan may be relevant in connection with the prior assessment of the need for an assessment of the implications of those activities for the site under Article 6(3) of the Habitats Directive if such stipulation removes all doubt that the effects of the activities concerned covered by it have a significant effect on the site in question.

C. Question 3 – River Basin Management Plan 2015-2021 and Natura 2000 plan in the assessment of the implications for the site

77. The third question concerns the account taken of the River Basin Management Plan 2015-2021 and the Natura 2000 plan for the protected site concerned in connection with an assessment of the implications, which becomes necessary if it is not possible in the prior assessment to remove all doubt as to significant effects on protected sites.

78. Such an assessment of the implications for the site must contain complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the project likely to have an effect on the protected site concerned. [38]

79. If the River Basin Management Plan 2015-2021 contained such conclusions, it would be highly likely, based on the considerations regarding the second question, that there is no need for an assessment of the implications for the site – at least as regards possible adverse effects caused by nitrogen deposition.

80. If, on the other hand, an assessment of the implications for the site did take place because the River Basin Management Plan 2015-2021 cannot remove all doubt relating to nitrogen deposition, caution would also have to be exercised in taking that plan into account in the context of the assessment of the implications.

81. If the nitrogen emissions from other sources set aside in the River Basin Management Plan 2015-2021 are reliable, they could be used at least for determining the effects of the assessed fish farm in combination with other plans and projects.

[38] Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 44); of 17 April 2018, *Commission* v *Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 114); and of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:680, paragraph 55).

82. It can be inferred from the River Basin Management Plan 2015-2021 that these cumulative effects do not adversely affect the integrity of the site, however, only if it contains complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to adverse effects of the nitrogen emissions on protected sites.

83. This is conceivable only if the doubt which remains in connection with the prior assessment and which justifies the need for a full assessment of the implications for the site cannot be regarded as reasonable scientific doubt, at least in the light of that full assessment.

84. Furthermore, the Natura 2000 plan for the protected site has no relevance for the assessment of the adverse effects on the site caused by nitrogen deposition, as that plan expressly states that it does not contain action requirements for water quality, which is guaranteed by water planning, and lays down no specific requirements on the reduction of nitrogen deposition, which is also governed by different legislation.

85. The answer to the third question is therefore that documents like the River Basin Management Plan 2015-2021 and the Natura 2000 plan for the protected site are relevant for the assessment of the effects of plans or projects on protected sites pursuant to Article 6(3) of the Habitats Directive in so far as they contain precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the project likely to have an effect on the protected site concerned.

V. Conclusion

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

(1) Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended by Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia does not require a new assessment of the implications for the site if the effects of an activity were not thoroughly investigated in the context of a previous final authorisation and the cumulative effects with other plans and projects were also not taken into account.

A new authorisation provided for in national law for an unchanged continued activity is, however, to be regarded as agreement to that activity within the meaning of Article 6(3) of Directive 92/43 which requires an assessment of the implications for the site if that authorisation actually determines the continuation of the activity.

(2) Stipulation of the extent of permitted environmental effects of certain activities in a River Basin Management Plan may be relevant in connection with the prior assessment of the need for an assessment of the implications of those activities for the site under Article 6(3) of Directive 92/43 if such stipulation removes all doubt that the effects of the activities concerned covered by it have a significant effect on the site in question.

(3) Documents like the River Basin Management Plan 2015-2021 and the Natura 2000 plan for the protected site are relevant for the assessment of the effects of plans or projects on protected sites pursuant to Article 6(3) of the Habitats Directive 92/43 in so far as they contain precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the project likely to have an effect on the protected site concerned.