



Reports of Cases

OPINION OF ADVOCATE GENERAL

ĆAPETA

delivered on 20 April 2023¹

Case C-116/22

European Commission

v

Federal Republic of Germany

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Article 4(4) – Special areas of conservation – Obligation to set conservation objectives)

I. Introduction

1. ‘What we do between 2020 and 2030, ... it will be the decisive decade for humanity’s future on Earth. The future’s not determined, the future is in our hands’.²

2. The European Union participates in steering the future through, in part, the Habitats Directive.³

3. This case is one in the series of cases through which the European Commission is enforcing that instrument. It has brought infringement proceedings against the Federal Republic of Germany pursuant to Article 258 TFEU for failing to fulfil its obligations under Articles 4(4) and 6(1) of the Habitats Directive.

4. Indeed, this is the fourth infringement action in this area which has been brought before the Court of Justice, following the judgments of 5 September 2019, *Commission v Portugal (Designation and protection of special areas of conservation)*,⁴ and of 17 December 2020, *Commission v Greece*,⁵ along with the pending Case C-444/21, *Commission v Ireland (Protection*

¹ Original language: English.

² Clay, J. (dir.), *Breaking Boundaries: The Science of Our Planet*, Netflix Original Documentary (narrated by D. Attenborough and J. Rockström), 2021.

³ 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 most recently by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193) (‘the Habitats Directive’).

⁴ C-290/18, not published, EU:C:2019:669.

⁵ C-849/19, not published, EU:C:2020:1047.

of special areas of conservation), in which I have recently delivered my Opinion.⁶ Moreover, there is another action of a similar type pending before the Court,⁷ and infringement procedures against several other Member States are ongoing.⁸

5. After briefly describing the course of these infringement proceedings against Germany (II), I will first discuss the Habitats Directive and Articles 4(4) and 6(1) thereof (III). I will then analyse, as requested by the Court, the second complaint alleged by the Commission in this case relating to the infringement of Article 4(4) of the Habitats Directive with respect to the requirements for conservation objectives (IV).

II. The course of this case: the pre-litigation procedure and the procedure before the Court

6. This case concerns Germany's implementation of its obligations under Articles 4(4) and 6(1) of the Habitats Directive in the Alpine, Atlantic and Continental biogeographical regions.⁹

7. With respect to each of those regions, the Commission adopted a list of sites of Community importance ('SCIs') within the German territory by decisions taken in 2003 and 2004.¹⁰ The Commission subsequently updated those lists, in particular, by decisions taken in 2007 and 2008.¹¹ The present case is concerned with the total of 4 606 sites listed in those Commission decisions.

8. Following inquiries through an EU pilot procedure, on 27 February 2015 the Commission sent Germany a letter of formal notice, in accordance with Article 258 TFEU, in which it set out its view that that Member State had failed to designate a number of SCIs as special areas of conservation ('SACs') and to establish the necessary conservation measures in breach of its obligations under Articles 4(4) and 6(1) of the Habitats Directive.

9. On 24 June 2015, Germany replied to the letter of formal notice, indicating its progress on the designation of SACs and the adoption of conservation measures. Further to this, on 14 January 2016, 7 April 2016, 25 July 2016, 23 December 2016, 27 July 2017, 22 December 2017 and 3 August 2018, Germany sent the Commission seven updates on the designation of SACs and the adoption of conservation measures.

⁶ C-444/21, EU:C:2023:90.

⁷ See Case C-85/22, *Commission v Bulgaria*, pending.

⁸ The Commission indicated in its application in the present case that there are infringement procedures of the same type involving Belgium, Spain, Italy, Cyprus, Latvia, Lithuania, Poland, Romania and Slovakia.

⁹ The regions mentioned are part of the Natura 2000 network. See further points 21 to 23 of this Opinion.

¹⁰ Commission Decision 2004/69/EC of 22 December 2003 adopting, pursuant to [the Habitats Directive], the list of sites of Community importance for the Alpine biogeographical region (OJ 2004 L 14, p. 21); Commission Decision 2004/813/EC of 7 December 2004 adopting, pursuant to [the Habitats Directive], the list of sites of Community importance for the Atlantic biogeographical region (OJ 2004 L 387, p. 1); Commission Decision 2004/798/EC of 7 December 2004 adopting, pursuant to [the Habitats Directive], the list of sites of Community importance for the Continental biogeographical region (OJ 2004 L 382, p. 1). The six-year deadline for the purposes of designating those sites as special areas of conservation under Article 4(4) of the Habitats Directive expired on 22 December 2009 for the Alpine biogeographical region and on 7 December 2010 for the Atlantic and Continental biogeographical regions.

¹¹ Commission Decision 2008/218/EC of 25 January 2008 adopting, pursuant to [the Habitats Directive], a first updated list of sites of Community importance for the Alpine biogeographical region (OJ 2008 L 77, p. 106); Commission Decision 2008/23/EC of 12 November 2007 adopting, pursuant to [the Habitats Directive], a first updated list of sites of Community importance for the Atlantic biogeographical region (OJ 2008 L 12, p. 1); Commission Decision 2008/25/EC of 13 November 2007 adopting, pursuant to [the Habitats Directive], a first updated list of sites of Community importance for the Continental biogeographical region (OJ 2008 L 12, p. 383). The six-year deadline under Article 4(4) of the Habitats Directive for those additional sites was 25 January 2014 for the Alpine biogeographical region, 12 November 2013 for the Atlantic biogeographical region and 13 November 2013 for the Continental biogeographical region. Thus, taking the first of those decisions, the six-year deadline under Article 4(4) of the Habitats Directive for the additional sites expired on 25 January 2014 at the latest.

10. Importantly for the present Opinion, on 26 January 2019, the Commission sent Germany an additional letter of formal notice, in which it claimed that, by failing to establish, in a general and persistent manner, conservation objectives and conservation measures which were sufficiently detailed and specific to the sites concerned, that Member State was in breach of its obligations under Articles 4(4) and 6 of the Habitats Directive.

11. On 26 April 2019 and 11 June 2019, Germany replied to the additional letter of formal notice, indicating its progress on the designation of SACs and the adoption of conservation measures. It disputed the Commission's view regarding the obligations of the Habitats Directive in relation to conservation objectives and conservation measures.

12. On 13 February 2020, the Commission addressed a reasoned opinion to Germany, considering that the alleged infringements of Articles 4(4) and 6(1) of the Habitats Directive continued to exist. At the request of that Member State, the Commission, by letter of 12 March 2020, extended the deadline for replying to the reasoned opinion until 13 June 2020.

13. On 12 June 2020, Germany responded to the reasoned opinion. In particular, it set out its progress for completion of the designation of SACs and the adoption of conservation measures. It maintained its disagreement with the Commission's view regarding the requirements of the Habitats Directive for conservation objectives and conservation measures.

14. By its application lodged on 18 February 2022, the Commission, considering that, by 13 June 2020, Germany had still not fulfilled its obligations under Articles 4(4) and 6(1) of the Habitats Directive, brought the present action before the Court under Article 258 TFEU.

15. By its first complaint, the Commission asks the Court to declare that Germany has infringed Article 4(4) of the Habitats Directive by failing to designate a number of sites on its territory as SACs (88 out of the 4 606 SCIs).

16. By its second complaint, the Commission asks the Court to declare that Germany has infringed Article 4(4) of the Habitats Directive, first, by failing to set any conservation objectives for 88 out of the 4 606 SCIs and, second, by setting, in a general and persistent manner, insufficiently specific conservation objectives in the designated SACs.

17. By its third complaint, the Commission asks the Court to declare that Germany has infringed Article 6(1) of the Habitats Directive, first, by failing to establish any conservation measures for 737 out of the 4 606 SCIs and, second, by establishing, in a general and persistent manner, conservation measures which do not satisfy the requirements of that provision.

18. In its defence lodged on 23 May 2022, Germany requests that the Court dismiss the present action in its entirety as unfounded.

19. The Commission and Germany also lodged a reply and a rejoinder on 4 July 2022 and 16 August 2022 respectively.

20. Pursuant to Article 76(2) of the Rules of Procedure of the Court of Justice, no hearing was held.

III. The Habitats Directive and Articles 4(4) and 6(1) thereof

A. *Natura 2000 and the three biogeographical regions at issue*

21. To recall,¹² the SACs established under the Habitats Directive,¹³ along with the special protection areas ('SPAs') established under the Birds Directive,¹⁴ constitute Natura 2000,¹⁵ a coherent European ecological network aimed at the long-term survival of the European Union's most valuable and threatened habitats and species.

22. The Alpine, Atlantic and Continental regions at issue in this case are part of Natura 2000, which is divided into five marine regions and nine terrestrial biogeographical regions.¹⁶

23. The Alpine biogeographical region, referred to as 'the rooftop of Europe', includes five of the longest and highest mountain ranges and has a very rich biodiversity, with almost two thirds of the plants on the European continent present there.¹⁷ The Atlantic biogeographical region, known as 'Europe's western fringe', encompasses two of the most productive seas in the world (the North Sea and the Atlantic Ocean) and over half of the European Union's coastline, which is also rich in habitats and species.¹⁸ The Continental biogeographical region, called 'the heartland of Europe', covers over one quarter of the European Union and has a high degree of biodiversity, known particularly for harbouring many rare animal and plant species.¹⁹

B. *The system of the Habitats Directive revisited*

24. As I explained in more detail in my Opinion in *Commission v Ireland (Protection of special areas of conservation)*,²⁰ Member States contribute to Natura 2000 according to the representation in their territories of the relevant habitat types and species listed in the annexes of the Habitats Directive, which they designate as SACs.

25. In a nutshell, the Habitats Directive envisages that SACs are established in stages, starting with the input by the Member States, on the basis of which the Commission establishes the list of SCIs by means of a binding act. Upon that binding act coming into force, Member States have six years to formally designate those SCIs as SACs and to establish the necessary conservation measures.

¹² See my Opinion in *Commission v Ireland (Protection of special areas of conservation)* (C-444/21, EU:C:2023:90, points 25 to 28).

¹³ See Article 3(1) and the sixth and seventh recitals of the Habitats Directive.

¹⁴ 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), which repealed Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) ('the Birds Directive').

¹⁵ As a curiosity, in the decision-making process, the Parliament put forward an amendment to call it 'Natura Semper', which failed. See, in that regard, European Parliament's opinion at first reading of the proposal for a Council directive on the protection of natural and semi-natural habitats and of wild fauna and flora, Amendment No 13 (OJ 1990 C 324, p. 26).

¹⁶ See, for example, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 'The state of nature in the European Union. Report on the status and trends in 2013 – 2018 of species and habitat types protected by the Birds and Habitats Directives', COM(2020) 635 final, Brussels, 15 October 2020 ('the Commission Report'), p. 1.

¹⁷ See, for example, Commission, *Natura 2000 in the Alpine Region*, Office for Official Publications of the European Communities, Luxembourg, 2005; European Environment Agency, 'Biogeographical regions in Europe: The Alpine region – mountains of Europe', 2008, available at: https://www.eea.europa.eu/publications/report_2002_0524_154909/biogeographical-regions-in-europe.

¹⁸ See, for example, Commission, *Natura 2000 in the Atlantic Region*, Office for Official Publications of the European Communities, Luxembourg, 2009.

¹⁹ See, for example, Commission, *Natura 2000 in the Continental Region*, Office for Official Publications of the European Communities, Luxembourg, 2005.

²⁰ See C-444/21, EU:C:2023:90, points 29 to 53.

26. Article 4(4) of the Habitats Directive requires Member States to designate SACs. It reads as follows:

‘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.’

27. At the same time as an SAC is designated, a Member State needs to also put in place the necessary conservation measures. That is provided for by Article 6(1) of the Habitats Directive, which reads as follows:

‘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.’

28. Even though the Habitats Directive sets out the obligations for Member States in two separate provisions, the designation of SACs and the establishment of the necessary conservation measures represent an indivisible whole if the objectives of the Natura 2000 are to be achieved. To recall, the objective of the Habitats Directive is to produce real results in the designated parts of nature.²¹

29. In relation to sites in the German territory relevant to this case, the deadline to fulfil the obligations under both Article 4(4) and Article 6(1) of the Habitats Directive expired at the latest in 2014 (see footnote 11 to this Opinion).

30. Neither Article 4(4) nor Article 6(1) of the Habitats Directive expressly mentions the setting of conservation objectives. The requirement to set conservation objectives was, however, found by the Court to be a mandatory and necessary step between the designation of SACs as required by Article 4(4) of the Habitats Directive and the implementation of conservation measures as required by Article 6(1) thereof.²²

31. In reality, the conservation objectives for which a particular site was selected to be protected as an SAC already existed prior to its formal designation, at least to a certain degree. This seems to be recognised in the case-law relating to Article 6(3) of the Habitats Directive.²³ That provision, which is the only one which expressly mentions conservation objectives,²⁴ aims at safeguarding the possibility to achieve the objectives of the future SAC from the moment of its placement on the list of SCIs, by demanding prior authorisation for any project which may endanger those objectives. Therefore, as pointed out by Advocate General Kokott, ‘when sites are placed on the Community list, specific conservation objectives are not yet expressly established, but they are evident from all the habitats and species for which the site has been protected ...’.²⁵

²¹ See my Opinion in *Commission v Ireland (Protection of special areas of conservation)* (C-444/21, EU:C:2023:90, point 9).

²² See judgment of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraph 52).

²³ See judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 54).

²⁴ Conservation objectives are also mentioned in the eighth and tenth recitals of the Habitats Directive.

²⁵ Opinion of Advocate General Kokott in *CFE and Terre wallonne* (C-43/18 and C-321/18, EU:C:2019:56, point 76).

32. Given that the conservation objectives reflect the reasons why the particular site is to be designated as an SAC in the first place, the Court's case-law has only logically demanded that those conservation objectives be expressed at the point at which an SAC is formally designated. The expression of conservation objectives is thus part of such formal designation of an SAC. Conservation objectives must accordingly be fixed within the same six-year deadline set out in Article 4(4) of the Habitats Directive.²⁶

33. It is in this light that I will now examine the second complaint put forward by the Commission in the present case.

IV. The second complaint, alleging infringement of Article 4(4) of the Habitats Directive

34. By its second complaint, the Commission alleges that Germany has infringed Article 4(4) of the Habitats Directive because it has failed to set conservation objectives for a number of the 4 606 sites in question.

35. The Commission essentially raises two types of allegation. First, some sites (88 out of the 4 606 sites) have no conservation objectives at all. Second, for many sites, the conservation objectives are not quantified and measurable, they do not distinguish between the maintenance and the restoration of the protected interests present on the site, and they are not binding in relation to third parties. The Commission additionally claims that the second type of infringement is of a general and persistent nature.

36. I will address each of those allegations separately below.

A. The allegation that Germany has not established any conservation objectives for certain sites

37. The Commission alleges that, based on the information provided by Germany in the context of the pre-litigation procedure, there are 88 sites for which there are no conservation objectives at all. It relies on the Court's case-law requiring the setting of conservation objectives for each SAC.

38. In response to that allegation, Germany asserts that, between the date of transmission of the reasoned opinion and 31 March 2022, it set specific conservation objectives for those sites, except for a few sites, which are expected to be removed from the list of sites as part of the next update.

39. As mentioned above (see points 30 and 32 of this Opinion), the setting of conservation objectives is mandatory under Article 4(4) of the Habitats Directive. Member States must set them for sites designated as SACs within the six-year period provided for in that article.

40. As indicated by the Commission, Germany does not contest that it did not set conservation objectives for at least some of the sites in question by the expiry of the period laid down in the reasoned opinion, which was 13 June 2020 (see point 12 of this Opinion).²⁷

²⁶ See judgment of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraph 53).

²⁷ According to settled case-law, the question whether a Member State has failed to fulfil obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes. See, for example, judgments of 11 September 2001, *Commission v Germany* (C-71/99, EU:C:2001:433, paragraph 29), and of 17 December 2020, *Commission v Greece* (C-849/19, not published, EU:C:2020:1047, paragraph 56).

41. In those circumstances, I am of the opinion that the Commission's allegation that a number of sites lack any conservation objectives must be upheld.

B. The allegation that the conservation objectives set by Germany are not sufficiently specific and that that Member State has committed a general and persistent infringement

42. The Commission alleges that, based on the information provided by Germany in the context of the pre-litigation procedure, that Member State has generally and persistently infringed its obligations arising under Article 4(4) of the Habitats Directive by systematically setting conservation objectives which do not comply with the requirements of that provision. First, they are not quantified and measurable. Second, they do not distinguish between the maintenance and the restoration of the protected interests present on the site. Third, they are not binding in relation to third parties.

43. Additionally, the Commission claims not only that some conservation objectives are not sufficiently specific, but also that they are representative of a pattern resulting in a general and persistent infringement committed by Germany.

44. Germany argues that it has not committed any general and persistent infringement of Article 4(4) of the Habitats Directive. It does not dispute that Member States are obliged to set site-specific conservation objectives. However, Germany contests that the Habitats Directive requires that conservation objectives always be quantifiable, and that they need to distinguish between the maintenance and the restoration of the protected interests. Finally, Germany argues that the conservation objectives as set out in its legal framework are binding. Germany considers that the Commission's view has no basis in the provisions of the Habitats Directive or in the case-law of this Court, and that it is liable to run counter to the objectives of that directive.

45. Thus, the dispute between the parties relating to the claim under this heading is a dispute about the law and not about the facts. Germany does not dispute the facts submitted by the Commission. Rather, it claims that those facts do not represent an infringement of the obligation to set sufficiently clear conservation objectives. In other words, Germany opposes the Commission's understanding of what is required for a conservation objective to be sufficiently specific.

46. In my view, the Commission's understanding that Member States must always state conservation objectives which are quantified and which differentiate between maintenance and restoration targets does not follow from the Habitats Directive. Furthermore, the Commission's position about what the binding effects are of an SAC designation is not tenable. If the Court accepts the interpretation I propose, it should reject the Commission's allegation that Germany has generally and persistently failed to set sufficiently specific conservation objectives that comply with the requirements of Article 4(4) of the Habitats Directive.

1. The allegation that conservation objectives must be quantified

47. The Commission alleges that there are numerous sites which do not contain quantified and measurable elements.²⁸ The Commission asserts that Article 4(4) of the Habitats Directive requires that the conservation objectives must contain elements which indicate in figures what specific contribution the protected site must make to achieve a favourable conservation status at the national level for the habitat or species (such as an increase in the population of certain species by a precise number of new individuals).

48. The Commission understands the Court's case-law requiring that the conservation objectives be sufficiently specific to mean that they must be quantified (a). The Commission also relies on the objectives (b) and the wording (c) of the Habitats Directive, and invokes examples from other Member States which introduced quantified conservation objectives (d).

49. Germany disputes the Commission's allegations. In particular, that Member State argues that specific conservation objectives, quantified or not, must be verifiable. While a purely quantitative approach is possible for certain habitat types and species, it is not appropriate as a general criterion. First, whether or not the preset figure is reached does not reflect the state of the conservation site. Second, such an approach is not suitable for complex or dynamic conservation sites. Third, it does not account for the coherent nature of the Natura 2000 network and the existence of ecological links within that network (e).

50. Contrary to the arguments put forward by the Commission, I am not persuaded that conservation objectives do not comply with Article 4(4) of the Habitats Directive simply because they are not quantified. I will, in turn, deal with the Commission's arguments and those of Germany.

(a) The Commission's arguments based on the Court's case-law

51. In the case-law invoked by the Commission, namely the judgment in *Commission v Greece*,²⁹ the Court has considered that conservation objectives were insufficient because they were too general and imprecise, and did not relate to the main types of habitats and species present on the site. It cannot be implied from that judgment that sufficiently specific means quantified.

52. Thus, the case-law has not yet answered the question whether the requirement that conservation objectives be sufficiently specific means that they always need to be quantified. I propose that the Court adopt the interpretation that to be sufficiently precise, conservation objectives need not always be quantified.

²⁸ In its written submissions before the Court, the Commission refers to two examples: (1) with regard to sites where the habitat type (6510) Lowland hay meadows (*Alopecurus pratensis*, *Sanguisorba officinalis*) is present, the Land of Bavaria sets the following conservation objective: 'Guarantee of a favourable state of conservation by maintaining, or if necessary restoring, a favourable balance of nutrients for this type of habitat and management appropriate for the existing site'; and (2) with regard to the thick-shelled river mussel (*Unio crassus*), the Land of Baden-Württemberg sets, on a particular site, the following conservation objective: 'Maintenance of streams and ditches rich in structures, with a permanent moderate to strong flow, with a sandy to gravelly substrate, well supplied with oxygen – Maintenance of a very good state or chemical and ecological potential of the waters without harmful pollution of fine sediments or nutrients – Maintenance of continuous streams with sufficiently large host fish populations – Maintenance of the species also with a view to appropriate maintenance of watercourses'.

²⁹ See judgment of 17 December 2020 (C-849/19, not published, EU:C:2020:1047, in particular paragraphs 57 to 59).

53. It follows from the case-law that conservation objectives cannot be vague. They must allow for the verification as to whether the measures based on those objectives can achieve the desired conservation status of the site. However, I would agree with Germany that whether sufficient specificity necessitates quantification cannot be prescribed generally, but rather depends on the circumstances of the particular site. Sometimes, the conservation objective needs to be expressed in numbers, but whether this is so can only be determined on a case-by-case basis.³⁰

54. It is for the Commission to demonstrate in the specific case that the protection of the habitat types and species on the particular site requires the setting of conservation objectives which are quantified.

55. The proposed position that conservation objectives need not necessarily be quantified is supported by academic literature. It has been pointed out that one of the main elements of conservation objectives is the ecological importance of the sites, which is measured according to the criteria of Annex III to the Habitats Directive that are both qualitative and quantitative.³¹

(b) The Commission's arguments based on the objectives of the Habitats Directive

56. The Commission defends its position that conservation objectives have to be quantified by relying on Article 1 of the Habitats Directive, which defines a 'favourable conservation status' for the habitat types and species to be achieved.

57. However, this argument is not convincing, given that the elements for assessing what is a favourable conservation status are qualitative as well as quantitative.³²

58. The Commission further argues that the Member States agreed, within the framework of the committee referred to in Article 20 of the Habitats Directive, to set quantified reference values indicating the threshold from which a favourable conservation status of a habitat type or species is achieved for the purposes of their reporting obligations under Article 17 of that directive. The Commission concludes on that basis that conservation objectives must also be quantified under Article 4(4) of the Habitats Directive.

59. The Commission additionally relies on empirical evidence in the German report for the 2013-2018 period under Article 17 of the Habitats Directive demonstrating that around 80% of habitat types and species protected in Germany still have an unfavourable conservation status. It argues that Germany failed to reach a favourable conservation status due to the lack of quantified conservation objectives.

60. Germany first rejects the link established by the Commission between the reference values and the requirements which conservation objectives have to fulfil under Article 4(4) of the Habitats Directive. Such reference values are merely a means to fulfil the reporting obligations

³⁰ In its Note on setting conservation objectives for Natura 2000 sites, 2012, available at: https://ec.europa.eu/environment/nature/natura2000/management/docs/commission_note/commission_note2_EN.pdf, p. 6, the Commission states: 'Conservation objectives for Natura 2000 sites need to be as clear and straightforward as possible and allow to put in place operational conservation measures in practice. They need to be specified in concrete terms and *wherever possible* be quantifiable in numbers and/or size' (emphasis added). It seems, therefore, that the Commission itself does not consider that conservation objectives always have to be expressed in numbers.

³¹ See, to that effect, Stahl, L., 'The concept of "conservation objectives" in the Habitats Directive: a need for a better definition?', in Born, C.-H., Cliquet, A., Schoukens, H., Misonne, D. and Van Hoorick, G. (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?*, Routledge, London, 2015, p. 56, at p. 63.

³² See Article 1(e) and (i) of the Habitats Directive.

set out in Article 17 thereof and do not relate specifically to the situation in the various SACs, but to the entire territory of the Member State concerned. Furthermore, if a report concludes that a favourable conservation status for certain habitats or species has not yet been achieved, it cannot be deduced from this that the conservation objectives set for specific SACs are insufficient. It can only be concluded that those conservation objectives have not been achieved as a whole. Germany refutes that the trends reported, even if unfavourable, are due to the lack of quantified conservation objectives.

61. I agree with Germany. I fail to see the link between non-fulfilled quantitative thresholds agreed for the purposes of reporting and the argument that conservation objectives must be quantified.

(c) *The Commission's arguments based on the wording of the Habitats Directive*

62. The Commission additionally relies on Article 6 of the Habitats Directive.

63. In relation to the arguments based on Article 6(1) of the Habitats Directive, I fail to see how the absence of quantified conservation objectives would conflict with the requirements to establish the necessary conservation measures. Indeed, as I pointed out in my Opinion in *Commission v Ireland (Protection of special areas of conservation)*,³³ conservation measures must correspond to conservation objectives. However, that does not imply that those objectives must always be quantified.

64. The Commission also bases its arguments on Article 6(3) of the Habitats Directive, claiming that only quantitatively determined conservation objectives can serve as a criterion for assessing the effects of a plan or project on the site. Negative effects on the conservation objectives can only be excluded with certainty if they are sufficiently specified by quantitative elements. In order to substantiate this, the Commission offers an example. It explains that an assessment of the effects that a proposed hydropower plant might have on a protected fish species in a protected area can only provide the certainty required by Article 6(3) of the Habitats Directive if the conservation objectives of the area provide figures on the number of specimens of those fish species and their age structure necessary to determine a favourable conservation status.

65. However, in a case resembling such a scenario, the Court made its determination regarding compliance with Article 6(3) of the Habitats Directive without any such quantified conservation objectives.

66. The case I have in mind is *Commission v Germany*.³⁴ In that case, the Commission brought infringement proceedings against Germany on the grounds, inter alia, that it had wrongly assessed certain measures under Article 6(3) of the Habitats Directive. Those measures related to a fish ladder installed near the Moorburg power plant which was intended to compensate for fish killed during the operation of the plant which drew large quantities of water from a nearby river. That river constituted a migratory route for several fish species covered by a number of Natura 2000 areas situated upstream whose conservation objectives covered those species.

³³ See C-444/21, EU:C:2023:90, point 87.

³⁴ See judgment of 26 April 2017 (C-142/16, EU:C:2017:301, in particular paragraphs 6 to 9 and 14).

67. In its judgment, the Court held that the fish ladder was intended to increase migratory fish stocks by allowing those species to reach their breeding areas more quickly and thus was expected to compensate for the fish deaths near the Moorburg power plant, so that the conservation objectives of the Natura 2000 areas upstream of the plant would not be significantly affected. The Court undertook the assessment without relying on any quantified conservation objectives.³⁵

68. Moreover, the case-law contains other examples illustrating that the Court was able to assess whether the obligations under Article 6(3) of the Habitats Directive were fulfilled in the absence of quantified conservation objectives.³⁶

69. Therefore, I am of the opinion that the Commission's line of argument based on Article 6(3) of the Habitats Directive does not support the claim that conservation objectives must always be quantified.

(d) The Commission's arguments based on examples from other Member States

70. Lastly, the Commission argues that its insistence on quantification is not unreasonable because there are Member States that set quantified conservation objectives, citing examples from Belgium, Bulgaria, Lithuania and Romania.³⁷

71. Germany responds to that line of argument by stating that the examples chosen are anecdotal and do not demonstrate a general approach in setting conservation objectives. It also points out that the Member States concerned are among those against which the Commission is pursuing infringement procedures for alleged breach of Articles 4(4) and 6(1) of the Habitats Directive.

72. In my view, one cannot reach a conclusion about the requirements imposed by the Habitats Directive based on the practice of the Member States. Therefore, the Commission's line of argument is irrelevant.

³⁵ Nevertheless, the Court found that the impact assessment carried out by the German authorities did not contain definitive data regarding the effectiveness of the fish ladder and merely stated that its effectiveness could only be confirmed following several years of monitoring. Thus, at the time the authorisation was granted, the fish ladder could not guarantee beyond all reasonable doubt that, together with other measures, the plant would not adversely affect the integrity of the site. It followed that, by authorising the construction of that plant, Germany failed to fulfil its obligations under Article 6(3) of the Habitats Directive. See judgment of 26 April 2017, *Commission v Germany* (C-142/16, EU:C:2017:301, in particular paragraphs 36 to 38 and 45).

³⁶ See, inter alia, judgment of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 45), in which the Court found that 'the conservation objective thus corresponds to maintenance at a favourable conservation status of that site's constitutive characteristics, namely the presence of limestone pavement'. See also, for example, judgments of 13 December 2007, *Commission v Ireland* (C-418/04, EU:C:2007:780, paragraph 259); of 24 November 2011, *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 101); of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 22); and of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 157).

³⁷ In its written submissions before the Court, the Commission invokes the following examples: (1) in Belgium, the Flemish region has set a reference value of an additional 2 150 hectares for the habitat type (1130) Estuaries in order to achieve a favourable conservation status, which is translated into quantified conservation objectives, and, on one site, for the habitat type (9120) Atlantic acidophilous beech forests with *Ilex* and sometimes also *Taxus* in the shrublayer (*Quercion robori-petraeae* or *Ilici-Fagenion*), it is specified that, in addition to the existing 4 hectares of that habitat type, 13 hectares are required; (2) Bulgaria provides for one site that the (priority) habitat type (1530) Pannonic salt steppes and salt marshes must be permanently present on the site in an area of at least 29.51 hectares; (3) Lithuania has set for one site the quantified conservation objective of restoring to a favourable conservation status at least 17.1 hectares for the habitat type (6450) Northern boreal alluvial meadows, and, for the (priority) species the hermit beetle (*Osmoderma eremita*), has set a conservation objective to guarantee it a suitable habitat on the site of at least 0.9 hectares; and (4) Romania has set for one site a conservation objective for the habitat type (3220) Alpine rivers and the herbaceous vegetation along their banks of at least 10 hectares based on the current status of 1 to 2 hectares, and, for the beetle species *Morimus Funereus*, has set a target value of 10 000 to 50 000 individuals, based on 5 000 to 10 000 individuals currently, and estimates that a habitat area of 68 800 hectares (compared to only 13 765 hectares at present) is needed to reach this population size.

(e) *Germany's arguments as to why a quantitative approach cannot be generally imposed*

73. According to Germany, while it is possible to carry out a quantitative determination of the conservation objectives for certain habitat types and species, that determination is not appropriate as a general criterion. That Member State offers three reasons why.

74. First, a purely quantitative approach, based on the area of habitat types, cannot reflect the state of these areas. For example, Germany explains that a 10% increase in the area covered by habitat type (6510) Lowland hay meadows, invoked by the Commission, might reveal an improvement in the state of conservation, but at the same time, the condition of the existing areas could be declining. Therefore, the quantified conservation objective would not in itself show whether the favourable status of the site is achieved.

75. Second, a quantitative approach is not suitable for complex habitat types or conservation areas with a dynamic character (where certain elements of the complex habitats or different habitat types within a conservation area are constantly changing in nature and interacting with each other). Quantitative conservation objectives cannot adequately reflect this desired evolution and are not compatible with the state of conservation of the sites as a whole, given that those evolutions and their impact on the state of conservation cannot be calculated, but should be considered qualitatively.

76. Third, quantitative conservation objectives relating to individual SACs might not comply with the coherent nature of the Natura 2000 network and might not take into account the existence of ecological links within that network.

77. In that respect, Germany provides an example. *Oenanthe conioides*, the endemic plant species of the Elbe estuary – which is a highly dynamic complex habitat – is a pioneer plant that colonises open areas depending on the tides. This leads to significant population fluctuations in the natural evolution of the species, without jeopardising its conservation status, such that the failure to achieve the reference values for the sites does not necessarily mean that action should be taken in favour of the species. In addition, the range of this species is covered by a plurality of SACs which are interconnected and whose populations interact. The evolution of the species is dynamic not only within an SAC, but also between the different SACs for which this species is of interest. The quantitative contribution of each SAC to the conservation of the species as a whole is also subject to considerable variation, without the conservation status varying overall. Thus, the contribution of each SAC to the conservation of the species can only be determined in the long term in a qualitative way.

78. I find Germany's arguments convincing. Differences in the habitats and species protected by the Habitats Directive require a flexible approach and case-by-case choice of appropriate conservation objectives suitable for the needs of the particular site. The conservation objectives sometimes need to be quantified, but can sometimes be set only in qualitative terms. Consequently, I propose that the Court reject the Commission's position that conservation objectives for every habitat type and species have to be quantified.

79. In conclusion, I consider that the Commission's allegation that Germany has infringed Article 4(4) of the Habitats Directive by setting conservation objectives which are not quantified to be unfounded because the Habitats Directive does not require that conservation objectives always be quantified.

2. *The allegation that conservation objectives must distinguish between the maintenance and the restoration of the protected interests*

80. The Commission alleges that there are many sites for which the conservation objectives do not distinguish between the maintenance and the restoration of the protected interests present on the site.³⁸

81. In the Commission's view, in order to comply with the Habitats Directive, the conservation objectives must differentiate between whether they aim at the maintenance or at the restoration to a favourable conservation status of habitats and species covered by an SAC.

82. The Commission relies on the Court's case-law implying that conservation objectives must be sufficiently specific, thereby concluding that such specificity makes it necessary to differentiate between maintenance and restoration. It further relies on the wording of the Habitats Directive. In that respect, the Commission emphasises that such a distinction is repeated throughout the Habitats Directive and is crucial for establishing the necessary conservation measures to be carried out on the basis of those objectives under Article 6(1) of the Habitats Directive, and for the assessment of whether a plan or project is likely to have a significant effect on a site under Article 6(3) thereof. Finally, the Commission invokes an example from another Member State.³⁹

83. On the basis of its understanding that conservation objectives need to differentiate clearly between maintenance and restoration, the Commission concludes that conservation objectives which do not make such a distinction, which is systematically the case in Germany, are not in line with the Habitats Directive.

84. Germany disputes the Commission's understanding. While that Member State agrees that clear and unequivocal conservation objectives should be set for each SAC, it submits that whether those objectives are achieved through the maintenance or the restoration of the protected interests depends on the actual state of the SAC. Measures to maintain or restore must be implemented depending on how the actual state of a habitat type or species develops in each case.

85. Germany considers that there is no reason to distinguish between maintenance and restoration when expressing conservation objectives, but rather that a qualitative or quantitative target should be defined, so that the conservation objective aims at the restoration so long as such target is not yet reached and at the maintenance of that target state as soon as it is reached.

86. That Member State further argues that if, in the Commission's view, the conservation objectives must be distinguished according to whether they are to be achieved by maintaining or restoring the protected interests, it would then be necessary with each change in the degree of conservation in an SAC to modify the corresponding conservation objective for each habitat type

³⁸ In its written submissions before the Court, the Commission provides three examples: (1) for the habitat type (6210) Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco-Brometalia*), the Bavarian authorities set the conservation objective: 'maintenance, and if necessary restoration, of dry limestone grasslands near natural and largely free woody plants'; (2) in Brandenburg, the conservation objective of habitat type (6240) Sub-Pannonic steppic grasslands for one site is set as: 'maintenance and restoration of structurally and species-rich semi-dry and steppe grasslands'; and (3) in Lower Saxony, on one site, the conservation objectives for the habitat type (91D0) Bog woodland are 'maintenance and restoration of favourable conservation status'.

³⁹ In its written submissions before the Court, the Commission refers to an example from the Walloon region of Belgium, which has set as a conservation objective for habitat type (5110) Stable xerothermophilous formations with *Buxus sempervirens* on rock slopes (*Berberidion* p.p.) that it should only be 'maintained' because neither its extent nor its quality environment should be increased, while for habitat type (6210) Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco-Brometalia*), 150 hectares and the ecological quality must be 'restored'.

and species. In particular, in dynamic habitats, such as the Elbe estuary where the plant species *Oenanthe conioides*, mentioned by the Commission, is present, the conservation objectives might need to be repeatedly adapted to changing environmental conditions. This could result in a situation in which no conservation objectives aimed at maintenance would be set in the interim, but only conservation objectives aimed at restoration, or vice versa. The position taken by the Commission could therefore lead to gaps in the level of protection.

87. Germany also rejects the Commission's line of argument based on the wording of the Habitats Directive. In particular, the fact that there is dichotomy between the objective of maintaining and the objective of restoring which runs through the entire text of that directive does not plead against the German practice, since the mandatory target state must, at all times, be either maintained or restored. It also does not appear that maintenance and restoration should be distinguished from one another; a combined reading of the eighth recital and Article 3(1) of the Habitats Directive shows that there is a single variable criterion: the objective is generally favourable conservation status, and maintenance or restoration measures are based on dynamically changing circumstances in each specific case.

88. As regards Article 6(1) of the Habitats Directive, Germany agrees that conservation measures which seek to maintain the condition of the protected interest are different from those which seek to restore it. However, no conclusions can be drawn from this about the requirements that conservation objectives have to satisfy. As to arguments based on Article 6(3) of the Habitats Directive, the question of whether a proposed plan or project is likely to have a significant effect on a site depends on the concrete conditions prevailing on the site at the time of the assessment, and not on the formal choice made in the past, attributing to the conservation objectives of the site the purpose of maintenance or restoration. Indeed, Germany further maintains, in this context, that the Court has found nothing wrong with a conservation objective formulated without such a distinction.⁴⁰

89. Does the Habitats Directive require Member States to differentiate between the need to maintain and the need to restore when expressing the conservation objectives for an SAC?

90. To start with, similar to what I have said in relation to the question of whether conservation objectives need to be quantified (see points 51 and 52 of this Opinion), the case-law of the Court implying that conservation objectives need to be sufficiently specific has not dealt with the question as to whether that means that such objectives must differentiate between maintenance and restoration. The Commission cannot, therefore, rely on that case-law to substantiate its position on the necessity of such differentiation. Furthermore, the arguments based on the practice in one Member State are, as already explained in point 72 of this Opinion, irrelevant.

91. That being said, I would like to point out that, as stated in Article 2(1) thereof, the overall objective of the Habitats Directive is the maintenance of biodiversity. That is also expressed in its preamble:

'Whereas, the main aim of this Directive being to promote the *maintenance* of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas *the maintenance* of

⁴⁰ Germany refers, in that regard, to the judgment of 25 July 2018, *Grace and Sweetman* (C-164/17, EU:C:2018:593, paragraph 36), in which the Court considered that 'the conservation objective of the SPA is to maintain or restore favourable conservation conditions for the hen harrier. In particular, it is by providing the protected species with a habitat including a foraging area that the SPA enables that objective to be attained'. Ultimately, the Court ruled that the proposed project at issue in that case did not meet the requirements of Article 6(3) of the Habitats Directive (see paragraphs 42 to 57 of that judgment).

such biodiversity *may in certain cases require the maintenance, or indeed the encouragement, of human activities.*⁴¹

92. The preservation of biodiversity will thus require different actions, depending on whether the conservation status of certain habitats or species is favourable or not. In a nutshell, the status of a habitat or a species is favourable when it does not need human action to survive in the foreseeable future.⁴² When establishing SACs, Member States need to be clear about their purpose with respect to the more general effort of preservation of biodiversity, and about the state (favourable or not) of habitats and species which were the reason why that specific area was chosen to participate in Natura 2000. I can, therefore, agree with Germany that the conservation objectives for an SAC need to express targets (qualitative or quantitative), which express the favourable conservation status of the habitat and species it covers.

93. If the conservation status is favourable, reaching those targets will often require no human action (except monitoring to make sure that the positive trend continues). However, it seems that many SACs do not achieve a favourable conservation status with respect to the habitats and species they cover.⁴³ At the same time, a favourable conservation status might change due to an event (natural or provoked by humans) which causes its deterioration (for example, a serious drought over an extended period or an oil spill in a river). Reaching the targets will, in such a case, require active human measures. Thus, the conservation measures necessary to reach the same target might aim, at times, at maintenance and, at other times, at restoration. Setting the targets which, when achieved, demonstrate that the conservation status is favourable allows for the adoption of measures which are necessary to achieve those targets.

94. Whereas the targets remain the same (or might need to be slightly modified in the course of time), the measures need to be adapted constantly and need to be aimed at either maintenance or restoration. In my view, what is expressed by the term ‘conservation objectives’ are the targets to be achieved within an SAC. Conservation objectives do not, therefore, need to be set in terms of maintenance or restoration.

95. The authorities responsible for managing an SAC need to be aware at all times whether achieving the conservation objectives requires either maintenance or more active restoration measures, and need to adjust the conservation measures accordingly. In my view, it is relevant to make a distinction between maintenance and restoration at the level of conservation measures, not at the level of conservation objectives. Such understanding enables a distinction to be made between the notions of conservation objectives and conservation measures. Conservation objectives are, in such a view, stable targets set for the habitats and species within an SAC, and conservation measures are a dynamic category, which has to be constantly adjusted depending on the actual conservation status of an SAC. Otherwise, the difference between conservation objectives and conservation measures becomes only one of degree, making the use of the two notions unnecessary.

⁴¹ Emphasis added.

⁴² In that respect, Article 1(e) of the Habitats Directive explains what is understood as a favourable conservation status of a habitat, and Article 1(i) thereof defines when a favourable conservation status of a species can be taken to exist.

⁴³ See, for example, Commission Staff Working Document, ‘Fitness Check of the EU Nature Legislation (Birds and Habitats Directives)’, SWD(2016) 472 final, Brussels, 16 December 2016, in particular points 5.5, 6.1.1 and 7; the Commission Report, cited in footnote 16 to this Opinion, in particular points 2, 3 and 6.

96. The German practice, which prescribes a target state of a habitat or a species and obliges the authorities to achieve that state on a case-by-case basis through maintenance or restoration measures, satisfies the Habitats Directive, and in particular the objective set out in Article 2(2) thereof to ensure the maintenance or restoration, at a favourable conservation status, of habitats and species.

97. In conclusion, I consider that the Commission's allegation that Germany has infringed Article 4(4) of the Habitats Directive by setting conservation objectives which do not distinguish between the maintenance and the restoration of the protected interests present on the site to be unfounded because the Habitats Directive does not require that Member States make such differentiation at the level of conservation objectives.

3. The allegation that conservation objectives must be binding in relation to third parties

98. The Commission alleges that there are sites for which the conservation objectives that are specified at the level of management plans are not binding in relation to third parties.⁴⁴

99. The Commission takes the view that Article 4(4) of the Habitats Directive requires that conservation objectives must be set out in acts which are binding not only on the competent national authorities internally, but also in relation to third parties.

100. Germany disputes that position. In its view, conservation objectives, by virtue of their very nature as being 'objectives', are not designed to be imposed on third parties, but to be implemented by the competent authorities.

101. Nevertheless, that Member State explains that, as a first step, site-specific conservation objectives are set out in laws or regulations by which the SACs are designated and thus are unquestionably binding in relation to third parties. Then, as a second step, conservation measures and, if necessary, more specific conservation objectives are set out in more detail within the framework of management and development plans, which are also indirectly binding in relation to third parties.

102. The Commission does not refute Germany's arguments that site-level conservation objectives are set out in legal acts which are generally binding in relation to third parties. However, the Commission considers that more detailed conservation objectives set in the management plans are not, but should be, legally binding.

103. According to Germany, the maintenance or restoration measures developed in accordance with Article 6(1) of the Habitats Directive as necessary to achieve the conservation objectives might need to be carried out by third parties. In that case, the management and development plans do not in themselves contain the necessary arrangements, but require other instruments,

⁴⁴ In its written submissions before the Court, the Commission provides three examples: (1) Article 4(2) of the Bavarian Natura 2000 regulations provides that management plans do not create obligations for landowners and private grazing permit holders, and the Integrated Management Plan for the Elbe estuary states that it imposes no direct obligations on individuals; (2) the relevant website of the *Land* of Saxony indicates that the provisions of the management plans are not binding on individuals and that management plans are only binding for nature conservation authorities, while for other authorities they simply have to be consulted or taken into consideration; and (3) the handbook for site management planning in the *Land* of Brandenburg provides that management plans are binding on the nature conservation authorities.

such as, for instance, concluding contracts or adopting further regulatory measures. Only those contracts or further regulations will then create the obligation on contracting third parties to carry out those measures.

104. Nevertheless, as Germany argues, the conservation objectives specified in more detail by management and development plans are indirectly binding in relation to third parties in that, first, such parties cannot implement any plan or project or other action likely to undermine the conservation objectives⁴⁵ and, second, landowners of areas in an SAC must tolerate maintenance and restoration measures.⁴⁶

105. In my view, conservation objectives, indeed by their very nature of being ‘objectives’, are designed to be further implemented, which is to be secured by the competent authorities. The Court’s case-law stating that the designation of sites has to be binding⁴⁷ cannot be understood as a requirement that such an act of designation needs to impose any concrete active obligations on third parties. However, as explained by Germany, conservation objectives limit the freedom of third parties to take private actions which are contrary to those objectives and require third parties to tolerate active measures taken with the aim of fulfilling those objectives. Once conservation objectives are implemented through measures, those measures may create concrete obligations for third parties (for example, prohibition to enter certain parts of a forest), if that is necessary to achieve the target reflecting the favourable conservation status.

106. In conclusion, I consider that the Commission has not demonstrated that Germany has infringed Article 4(4) of the Habitats Directive by failing to set conservation objectives in acts that are binding in relation to third parties.

107. On the basis of the foregoing reasons, the second complaint raised by the Commission that Germany has infringed Article 4(4) of the Habitats Directive in a general and persistent manner by setting conservation objectives which do not satisfy the legal requirements of that provision cannot be upheld.⁴⁸

V. Conclusion

108. In the light of the foregoing considerations and without prejudice to the examination of the other complaints raised in this case, I propose that the Court should:

- declare that Germany has failed to fulfil its obligations under Article 4(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, by failing to establish any conservation objectives for 88 of the 4 606 sites in question;
- dismiss the remainder of the second complaint raised by the Commission.

⁴⁵ This is guaranteed by Paragraph 34 of the Gesetz über Naturschutz und Landschaftspflege (Bundesnaturschutzgesetz) (Law on Nature Conservation and Landscape Management (Federal Law on Nature Conservation)) of 29 July 2009 (BGBl. 2009 I, p. 2542), in the version applicable for the purposes of the present proceedings (‘the BNatSchG’), which transposes Article 6(3) of the Habitats Directive into domestic law.

⁴⁶ This is guaranteed by Paragraph 65 of the BNatSchG.

⁴⁷ See, in that regard, judgments of 27 February 2003, *Commission v Belgium* (C-415/01, EU:C:2003:118, paragraph 22), and of 14 October 2010, *Commission v Austria* (C-535/07, EU:C:2010:602, paragraphs 64 and 65).

⁴⁸ It is not necessary to analyse whether the infringement is of the general and persistent nature, as the individual instances of infringement were not established in the present case. On the concept of a general and persistent infringement, see my Opinion in *Commission v Ireland (Protection of special areas of conservation)* (C-444/21, EU:C:2023:90, points 103 to 107).