

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 27 October 2005¹

I — Introduction

1. In this action for failure to fulfil obligations, the Commission takes issue with the application of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds² (‘the Birds Directive’) and of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (‘the Habitats Directive’)³ in connection with a road construction project in the Austrian province of Vorarlberg. The road in question is the S 18 Lake Constance dual carriageway close to the ‘Lauteracher Ried’ special protection area near Bregenz.

2. In particular, the Commission alleges that the Republic of Austria failed to designate certain sites affected by the project as a special protection area in accordance with the Birds Directive and, when approving the

road, did not sufficiently examine alternatives or take adequate measures to protect the coherence of Natura 2000.

II — Legal background

3. Natura 2000 is defined in Article 3(1) of the Habitats Directive:

‘A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

1 — Original language: German.

2 — OJ 1979 L 103, p. 1.

3 — OJ 1992 L 206, p. 7.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.'

(c) species considered rare because of small populations or restricted local distribution;

4. Article 4 of the Birds Directive contains provisions concerning the areas that the Member States should classify as special protection areas for birds ('SPAs'). The protection of these areas was also initially governed by the first sentence of Article 4(4):

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

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

States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

6. This provision is elucidated in the following terms in the seventh recital in the preamble to the Habitats Directive:

3. ...

‘... all the areas designated, including those classified now or in the future as special protection areas pursuant to Council Directive 79/409/EEC ... , will have to be incorporated into the coherent European ecological network’.

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. ...’

7. Article 6(3) and (4) of the Habitats Directive, which are of relevance here, read as follows:

5. Article 7 of the Habitats Directive amended the rules on the protection of SPAs:

‘Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.’

‘3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

...

8. The tenth recital in the preamble to the Habitats Directive has the following to say in this regard:

‘... an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future’.

III — Facts, pre-litigation procedure and forms of order sought

9. An initial application for the road construction project in question was submitted

in 1992. No decision could be reached at that time, and the proposal was completely revised and resubmitted on 8 March 1994. This procedure led to determination of the road line in an order issued by the Federal Minister for Economic Affairs on 8 April 1997.

10. Nature conservancy consent for the planned road was applied for on 19 January 1999 and granted on 6 July 2001. In considering the application, the decision-making authority was bound to the road line that had been set. Alternative routes were not examined. The consent imposed a number of conditions for execution of the project and stipulated compensatory payments of EUR 2 625 802.63 to create replacement habitats. In a subsequent administrative procedure (‘appeal’), the consent was essentially confirmed by a decision of 21 February 2003, with amendments to the statement of reasons. The compensatory payments were reduced to EUR 2 056 922.26.

11. In the meantime the Republic of Austria had joined the European Community on 1 January 1995. By a letter dated 7 June 1995, the ‘Lauteracher Ried’ area was notified to the Commission as an SPA. The ‘Soren’ and ‘Gleggen-Köblern’ sites are not part of the SPA.

12. That area was protected by several successive orders⁴ relating to the area as a whole and, as regards various portions of the area, by the order of the Provincial Government of Vorarlberg on the 'Litter Meadows Biotope Network Rheintal-Walgau'.⁵ However, a large part of the biotope network lies outside the SPA, including substantial sections of the 'Gleggen-Köblern' site and parts of the 'Sören' site. The orders regulated use of the area, among other things, and in particular prohibited access to certain sites.

13. The SPA is considered to be an important breeding ground for the corncrake (*Crex crex*), which is listed in Annex I to the Birds Directive. The corncrake was long considered to be *globally* threatened and vulnerable, that is to say there was a high risk of extinction. Recently, however, its status has been reassessed as 'near threatened' because

of new information on populations outside the European Union.⁶ In Europe the corncrake is classed as 'depleted'.⁷

14. The standard data forms dated June 1997 that the Austrian authorities sent to the Commission also list the following migratory species: common snipe (*Gallinago gallinago*) with 15 breeding pairs, Northern lapwing (*Vanellus vanellus*) with 20 breeding pairs and Eurasian curlew (*Numenius arquata*) with 10 breeding pairs. Globally, these species are evaluated as being of 'low risk/least concern',⁸ but in Europe the common snipe and the Eurasian curlew are classified as being in decline and the Northern lapwing as endangered.⁹

15. All four of the bird species named nest in meadows, especially in litter meadows as protected and promoted in the 'Litter Meadows Biotope Network Rheintal-Walgau'.

4 — It appears that the first order to apply was the Order on the Protection of the Lauteracher Ried, LGBl. 22/1966, in the version published in LGBl. 24/1969, followed by the Order on the 'Lauteracher Ried' Countryside Protection Area (LGBl. 82/1997), and finally a further order with the same title, published in LGBl. 63/2002. In addition, the order of the Provincial Government on the temporary protection of the Lauteracher Ried (LGBl. 15/1993) applied, the validity of which was clearly extended several times.

5 — *Vorarlberger Landesgesetzblatt*, 1995, Vol. 27, No 61, of 28 December 1995.

6 — IUCN Red List of Threatened Species, [http://www.redlist.org/BirdLife Species Factsheet](http://www.redlist.org/BirdLife%20Species%20Factsheet), <http://www.birdlife.org>.

7 — BirdLife International (Papazoglou et al.), *Birds in the European Union — a status assessment*, 2004, p. 32, http://www.birdlife.org/action/science/species/birds_in_europe/index.html; see also the species factsheet at the same address.

8 — IUCN, cited in footnote 6.

9 — BirdLife International, cited in footnote 7, p. 32 et seq.; see also the respective species factsheets.

16. In addition, according to information from the Austrian Government, the SPA is an important wintering, stop-over and feeding area in Vorarlberg for twelve species of migratory bird, some of which are also listed in Annex I.

17. The Commission examined the project in response to a complaint. First, on 12 November 2001 it sent a request for information to the competent Austrian authorities. After examining the reply of 1 February 2002 and reaching the conclusion that the Republic of Austria had failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive and Article 6(4) of the Habitats Directive, on 27 June 2002 the Commission called on it to submit its observations in accordance with Article 226 EC (letter of formal notice). Austria's observations reached the Commission on 29 October 2002. The Commission adhered to its earlier view, and on 11 July 2003 delivered a reasoned opinion, in which it called on Austria to bring the alleged infringement to an end by 11 September 2003. As the replies from the Austrian Government did not convince the Commission that its objections had been met, it brought the present action.

18. The Commission of the European Communities claims that the Court should:

(1) declare that:

— by failing to include in the designated special protection area 'Lau-

teracher Ried' the 'Soren' and 'Gleggen-Köblern' sites, which, according to scientific criteria, are, together with that special protection area, among the most suitable territories in number and size within the meaning of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, and

— by failing, when authorising the planned construction of the S 18 Lake Constance dual carriageway, to comply properly and fully with the requirements applicable by virtue of Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora in the case of execution of a project where there has been a negative assessment of the implications for the site,

the Republic of Austria has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive and Article 6(4), in conjunction with Article 7, of the Habitats Directive;

(2) order the Republic of Austria to pay the costs.

19. The Government of the Republic of Austria contends that the Court should:

IV — Assessment

- (1) dismiss the action of 11 May 2004 brought by the European Commission for a declaration that, by failing to include in the designated SPA ‘Lauteracher Ried’ the ‘Soren’ and ‘Gleggen-Köblern’ sites, which, according to scientific criteria, are, together with that SPA, among the most suitable territories in number and size within the meaning of Article 4(1) and (2) of the Birds Directive, and by failing, when authorising the planned construction of the S 18 Lake Constance dual carriageway, to comply properly and fully with the requirements applicable by virtue of Article 6(4) of the Habitats Directive in the case of execution of a project where there has been a negative assessment of the implications for the site, the Republic of Austria has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive and Article 6(4), in conjunction with Article 7, of the Habitats Directive;

20. The Commission claims that Austria committed two different breaches of Community law. It alleges first that Austria failed to designate certain sites as part of the ‘Lauteracher Ried’ SPA and secondly that Austria infringed the provisions for the protection of the SPA when approving the road construction project.

A — Site designation

- (2) dismiss the European Commission’s application for costs.

21. Pursuant to the fourth subparagraph of Article 4(1) of the Birds Directive, Member States are to classify the most suitable territories in number and size as special protection areas (SPAs) for the conservation of the species mentioned in Annex I, taking into account their protection requirements in the geographical sea and land area where the directive applies. Under Article 4(2) Member States are to take similar measures for regularly occurring migratory species not listed in Annex I as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States are to pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

22. It is settled case-law that although Member States have a certain margin of discretion with regard to the choice of special protection areas, those areas must be designated and their boundaries defined solely on the basis of the ornithological criteria determined by the directive.¹⁰

23. The parties disagree as to whether the 'Soren' and 'Gleggen-Köblern' sites form part of the most suitable territories for the protection of birds in accordance with the applicable ornithological criteria.

24. The documents in the case show that the 'Lauteracher Ried' SPA is a diamond-shaped enclosed area of 580 hectares. Its maximum diagonal width from both east to west and north to south is about 3 kilometres. A highway, the provincial L 41 road, runs along its south-eastern boundary.

25. Along the south-eastern boundary, separated in some places from the SPA by the L 41, lies the 'Soren' site measuring about 64 hectares. This strip of land, which runs from north-east to south-west, is about 2.6 kilo-

metres long and at its maximum about 500 metres wide. A motorway forms its eastern boundary. A section of the contested road would cross the southern part of the site.

26. The 'Gleggen-Köblern' site, measuring 352 hectares, is to the south-west of the SPA. This strip of land, which runs from north to south, is up to 400 metres wide and more than 2 kilometres long. Its northern tip is separated from the SPA by a junction between the provincial roads L 41 and L 42 and by the Dornbirnerach river. In this area the planned new dual carriageway is to be constructed on the existing highway.

27. The two sites contain both nearly-natural litter meadows and intensively cultivated areas. They serve as a local recreation area for the surrounding settlements. While there is a wetland in the heart of the SPA, there is nothing comparable in either Soren or Gleggen-Köblern.

28. A comparison with existing protection areas under national law shows that only a few areas within the SPA and the 'Soren' site are protected as part of the 'Litter Meadows Biotope Network Rheintal-Walgau'. By contrast, most of the 'Gleggen-Köblern' site

¹⁰ — Case C-355/90 *Commission v Spain (Santoña marshes)* [1993] ECR I-4221, paragraph 26, Case C-44/95 *Royal Society for the Protection of Birds (Lappel Bank)* [1996] ECR I-3805, paragraph 26, and, concerning the IBA 1989 Inventory, Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031, paragraph 60 et seq.

appears to be included in the biotope network.¹¹

lapwings and 8 pairs of Eurasian curlews. In addition, there may have been one nesting pair of Eurasian curlews in Soren.

29. The Commission relies primarily on the results of monitoring and on scientific studies, which, it alleges, show that the 'Soren' and 'Gleggen-Köblern' sites form an indivisible natural unit with the designated 'Lauteracher Ried' SPA.

30. According to the reasoned opinion, in 2000, 2001 and 2002 respectively 4-5, 4 and 3 singing male corncrakes were observed within the SPA. The numbers in Soren and Gleggen-Köblern were only slightly lower: 4 (1 + 3), 2 (1 + 1) and 3 (0 + 3).

31. The Commission further states that in 2001 the numbers of migratory common snipe, Northern lapwings and Eurasian curlews breeding in the two undesignated sites were even higher than in the SPA. Within the SPA there were 3-5 pairs of common snipe nesting, 11-12 pairs of Northern lapwings and 3 pairs of Eurasian curlews, while in Soren there were 3 pairs of common snipe and 6 pairs of Northern lapwings, and in Gleggen-Köblern 3-4 pairs of common snipe, 9 pairs of Northern

32. The Austrian Government counters these figures, first, by stating, as is correct, that not every occurrence of birds listed in Annex I to the Birds Directive or migratory birds creates an obligation to designate an SPA. The figures, which the Austrian Government does not dispute, do show, however, that as far as the corncrake, common snipe, Northern lapwing and Eurasian curlew are concerned the 'Soren' and 'Gleggen-Köblern' sites are of an importance comparable to, and in some respects even greater than, that of the territory within the SPA. The numbers of Eurasian curlews, Northern lapwings and common snipe reported in the standard data forms for the SPA tally only if the sites outside the SPA are included. Hence it is reasonable to assume that these sites in the immediate vicinity of the SPA form, together with the SPA itself, a single area from an ornithological point of view.

33. Furthermore, the Austrian Government deduces from disturbance of the sites, especially as a result of farming and leisure activities, that they are not best suited for the protection of the species in question. The figures show, however, that such disturbance is of only secondary importance. Although smaller in area, the sites are home to

¹¹ — Cartographic server of the Province of Vorarlberg, <http://vogis.cnv.at/dva04/init.aspx?ks=allgemein&karte=naturschutz>.

breeding populations comparable to those within the SPA. In other words, on the basis of the density of the breeding population they are actually better suited than the areas within the SPA.

areas for protection of the corncrake. Even the Austrian Government does not dispute this, however. Moreover, it is not surprising that some of the most suitable areas are better than others from the point of view of bird protection.

34. In addition, it is apparent from the studies submitted by the Commission that other factors are far more significant than the disturbances relied upon, especially the time of mowing of the meadows and the threat posed by foxes and badgers. Clearly the roads separating the sites have not been particularly important to date, presumably because they are not a serious obstacle for birds. Hence, the sites in question cannot be excluded from the SPA on the ground that they are 'less suitable'.

36. Austria takes the view, however, that the obligation to designate SPAs crystallises at a particular point in time and does not entail continually updating designations that have already been made. In the case of a reduction in the extent of an SPA, it maintains that this is expressly stated in case-law.¹² Moreover, according to Austria, the Birds Directive differs from the Habitats Directive in that it contains no provisions for the subsequent amendment of protected areas. In so far as rules are laid down for the treatment of areas after they have been designated, they relate to the protection of the areas and not to their extension.

35. Nor does comparison with the 'Bangs-Matschels' SPA, where the corncrake population is denser than in the 'Soren' and 'Gleggen-Köblern' sites, provide scientific justification for excluding the sites. The supposedly higher quality of the 'Bangs-Matschels' SPA could at most raise the question whether the 'Lauteracher Ried' SPA together with the 'Soren' and 'Gleggen-Köblern' sites is one of the most suitable

37. I agree with the Austrian Government that the obligation to designate the most suitable areas as SPAs arose at a particular point in time. Since no transitional periods were agreed, under Article 168 of the Act of Accession Austria was obliged to transpose both the Habitats Directive and the Birds

¹² — Case C-57/89 *Commission v Germany (Leybucht)* [1991] ECR I-883, paragraph 20.

Directive fully at the time of accession on 1 January 1995.¹³

38. The obligation is not restricted to that point in time, however. It is apparent from the seventh recital in the preamble to the Habitats Directive that not only SPAs designated at the time but also other SPAs to be designated ‘in the future’ were to be incorporated into Natura 2000. Hence, when adopting the Habitats Directive the legislature assumed that the obligation to designate areas is not restricted to the time of transposition.

39. Nor is there anything indicating such a limitation in the wording of Article 4 of the Birds Directive. Also, it would hardly be compatible with the objective of effective protection of birds if outstanding areas for the conservation of the species to be protected were not brought under protection merely because they had become such areas only after transposition of the Birds Directive.

40. Irrespective of whether the obligation to designate areas is confined to the situation at 1 January 1995, on the basis of the information available it must be assumed that from an ornithological perspective the ‘Lauteraacher Ried’ and the ‘Soren’ and ‘Gleggen-

Köblern’ sites together already formed a single unit in 1995, all the parts of which were sufficiently suitable to be designated as an SPA. The remarks about the history of the territory in the expert studies submitted by the Commission indicate that in the past the bird population was actually appreciably larger than it is today.¹⁴

41. The Austrian Government cannot object to this more recent evidence on the ground that the obligation to designate SPAs should be judged solely on the basis of the best information available when that obligation arose. The obligation to designate areas is not limited by the knowledge available at a particular point in time.

42. It is true that the Member States must use the best available scientific evidence in fulfilling their obligation to designate areas.¹⁵ The obligation means that in preparing the designation the Member States must make every reasonable effort to identify the most suitable areas. The use of the best available evidence is the necessary minimum in this respect, but if, even on the basis of the

¹³ — Cf., with regard to Spain, *Santoña marshes*, cited in footnote 10, paragraph 11.

¹⁴ — Frühauf, *Der Wachtelkönig Crex crex in Österreich: Langfristige Trends, aktuelle Situation und Perspektiven*, Vogelwelt 118: 195 (1997), Annex 13b to the application, p. 201, on the Northern Rhine valley, and Grabherr, *Bodensee Schnellstraße S 18 — Ökologische Auswirkungen unter besonderer Berücksichtigung der Vogelwelt*, Annex 13d to the application, p. 5, in both cases with reference to the corncrake.

¹⁵ — See the judgment, concerning hunting seasons, in Cases C-157/89 *Commission v Italy* [1991] ECR I-57, paragraph 15, and *Commission v Netherlands*, cited in footnote 10, paragraph 69 et seq.

best available evidence, not all of the most suitable sites are fully identified, the Member States cannot justify shortcomings in the designation of areas by pleading a lack of evidence. Rather, they should have carried out further investigation in order to avoid such shortcomings.

virtue of Article 6(4) of the Habitats Directive in the case of execution of a project where there has been a negative assessment of the implications for the site.

43. Consequently, the Commission rightly bases this head of claim on the more recent expert studies.

1. Applicability of Article 6(3) and (4) of the Habitats Directive to the project

44. It must therefore be found that, by failing to designate the 'Soren' and 'Gleggen-Köblern' sites as SPAs, Austria has infringed Article 4(1) and (2) of the Birds Directive.

46. It is necessary to examine first whether the decision at issue is to be judged in relation to Article 6(3) and (4) of the Habitats Directive or — as the Austrian Government asserted in its reply to the letter of formal notice from the Commission — in relation to the first sentence of Article 4(4) of the Birds Directive.

B — *Site protection*

45. In its second head of claim, the Commission alleges that in authorising the S 18 Lake Constance dual carriageway project the Republic of Austria failed to comply properly and fully with the requirements applicable by

47. Under Article 7 of the Habitats Directive, the obligations arising under Article 6 (2), (3) and (4) of the Habitats Directive replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive as from the date of implementation of the Habitats Directive — that is to say, in the case of Austria as from 1 January 1995 — or the date of classification of the area in question as an SPA, or its similar recognition, by a Member State under the Birds Directive, where the latter date is later. In *Basses Corbières* the Court ruled that areas which have not been classified as SPAs but should have been so classified continue to be subject to the first sentence of Article 4(4) of

the Birds Directive and are not subject to Article 6(2) to (4) of the Habitats Directive.¹⁶

48. Consequently, the ‘Soren’ and ‘Gleggen-Köblern’ sites, which up to now have been neither notified nor designated as SPAs, continue to be governed by the first sentence of Article 4(4) of the Birds Directive, and not by Article 6(2), (3) and (4) of the Habitats Directive. This has no effect on the action, however, as in its pleas the Commission confines itself solely to the harm caused to the notified areas.

49. These areas were notified to the Commission as an SPA in 1995. As far as one can tell, since then they have been continuously subject to area-specific protection arrangements.¹⁷

50. The prerequisites for designation of an area are thus met. The SPA was designated by means of a formal measure, that is to say by notifying the Commission and issuing the protection orders.¹⁸ Furthermore, it is not disputed that the necessary area-specific protection measures were laid down.¹⁹

51. However, the Austrian Government raised doubts, first, as to the applicability of Article 6(2), (3) and (4) of the Habitats Directive, as the Province of Vorarlberg did not transpose the Birds Directive and the Habitats Directive with regard to the protection of sites until it adopted a regulation in 2003.²⁰ Previously, Paragraph 26(4) of the Vorarlberg Law on Nature Conservancy provided for the designation of SPAs, but the protection arrangements for SPAs did not become, for Vorarlberg, part of domestic Austrian law until this regulation was adopted.

52. The legal transposition of the two directives is not mentioned in Article 7 of the Habitats Directive as a precondition for the application of Article 6(2), (3) and (4). However, the protection afforded by designation is significantly restricted if designation does not bring the protection arrangements under the Habitats Directive into force at the same time. Although State bodies are bound by such protection arrangements, they cannot be enforced against private individuals unless they have been incorporated into domestic law. Hence the Austrian Government rightly points out that in practical terms the SPA was not placed fully under protection until 2003.

16 — Case C-374/98 *Commission v France* [2000] ECR I-10799, paragraphs 47 and 57.

17 — See point 12 above.

18 — Cf. *Basses Corbières*, cited in footnote 16, paragraph 53.

19 — Cf. *Santoña marshes*, cited in footnote 10, paragraph 31 et seq.

20 — Regulation of the Provincial Government amending the Nature Conservancy Regulation, LGBl. 36/2003.

53. However, this deficiency in the protection afforded by the classification of an SPA does not automatically trigger the application of the more stringent protection arrangements under the first sentence of Article 4(4) of the Birds Directive. The Court has already established that inadequate protection afforded by classification of an area can constitute an infringement of Article 6(2) of the Habitats Directive.²¹ However, this presupposes the transition from the protection arrangements under the Birds Directive to those under the Habitats Directive.

54. Consequently, the road construction project is to be assessed in relation to Article 6(3) and (4) of the Habitats Directive.

2. Temporal scope

55. The application of Article 6(3) and (4) of the Habitats Directive could be precluded, however, by the fact that the procedure for determining the line of the planned road began in 1994, in other words at a time when Austria was bound by neither the Birds Directive nor the Habitats Directive.

56. The basis for the application of Article 6 (3) and (4) of the Habitats Directive to ongoing procedures is the second sentence of Article 6(3), under which, in the light of the conclusions of the assessment of the implications for the site, the competent national authorities are to agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned. This militates in favour of applying Article 6(3) and (4) of the Habitats Directive if the plan or project has not yet been approved when the time limit for implementation expires.

57. However, the Court has declined to apply Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment²² ('the EIA Directive') to projects for which the approval procedure was initiated before 3 July 1988, in other words before expiry of the time-limit for implementation of the directive ('pipeline' projects).²³ The Court could transpose this case-law to the Habitats Directive. Like Article 6(3) of the Habitats Directive, Article 2(1) of the EIA Directive provides that certain projects be made subject to an assessment with regard to their effects before consent is given.

21 — See the judgment, concerning the Owenduff-Nepin Beg Complex in Case C-117/00 *Commission v Ireland* [2002] ECR I-5335, paragraph 25, and the judgment, concerning maps demarcating SPAs, in Case C-415/01 *Commission v Belgium* [2003] ECR I-2081, paragraph 16.

22 — OJ 1985 L 175, p. 40.

23 — Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 24. The Court uses the term 'pipeline' project in Case C-201/02 *Wells* [2004] ECR I-723, paragraphs 40, 43 and 48.

58. The reason cited by the Court for the temporal restriction on application of the EIA Directive was that ‘the directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time-consuming by the specific requirements imposed by the directive, and for situations already established to be affected by it’.²⁴ Advocate General Gulmann therefore considered that the application of the EIA Directive to consent procedures that were in progress when the time-limit for implementing the directive expired would affect the principle of legal certainty, the protection of legitimate expectations and the principle of proportionality, which would thus militate against such an interpretation.²⁵ The legislature adopted a similar solution when it introduced transitional arrangements for the 1997 amendment of the EIA Directive.²⁶

59. At first sight, similar considerations could also be expressed with regard to Article 6(3) and (4) of the Habitats Directive. This directive may likewise apply to large-

scale projects which will often require a long time to complete and the consent procedures for which are already very complex at national level. They may be made cumbersome and be delayed by the requirements imposed by the directive. This is illustrated in particular by the present case. If the failure to examine alternatives must be made good and perhaps even a new route found, a completely fresh consent procedure will be necessary.

60. Such an interpretation of Article 6(3) of the Habitats Directive would, however, overlook essential differences between the Habitats Directive and the EIA Directive.

61. The EIA Directive contains procedural provisions designed to ensure that the consideration given to environmental issues is improved. It sets no binding environmental standards, so that it does not oblige the competent authorities to draw particular conclusions from the findings of the environmental impact assessment. The influence of the environmental impact assessment stems above all from the fact that the authorities, developers and the public are informed at an early stage about environmental issues and the project can as a result subsequently be adapted *inter alia* to meet those concerns. Hence, it makes little sense to ‘attach’ the procedural requirements of the EIA Directive onto a consent procedure that is already well advanced. Generally, the essential characteristics of a project have already been determined by this stage, so

24 — *Gedeputeerde Staten van Noord-Holland*, cited in footnote 23, paragraph 24.

25 — Opinion of Advocate General Gulmann in Case C-396/92 *Bund Naturschutz and Others* [1994] ECR I-3717, points 34 and 37. The Court expressly left these issues open in that case, at paragraph 19, and in Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraph 28.

26 — Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73, p. 5). Article 3(2) reads as follows: ‘If a request for development consent is submitted to a competent authority before the end of the time-limit laid down in paragraph 1, the provisions of Directive 85/337/EEC prior to these amendments shall continue to apply’.

that additional information can have little effect on the outcome of the procedure. For the sake of this small added value, the additional application of the EIA Directive to procedures in progress on expiry of the time-limit for implementation would be inappropriate.

sufficient basis for expectations deserving of protection. Legal certainty is not affected either. As regards proportionality, there is no significant difference between a procedure still in progress at the end of the period for implementation and one commenced subsequently.

62. The Habitats Directive, by contrast, lays down *substantive* requirements regarding approval of a project, which are intended to be served by the procedure envisaged in Article 6(3) and (4) of the Habitats Directive involving an impact assessment, followed, if necessary, by the examination and consideration of alternatives. As a rule, this procedure prevents the integrity of a protection area from being adversely affected. Only in exceptional cases is an adverse effect permissible under Article 6(4) for imperative reasons of overriding public interest, including those of a social or economic nature, if no alternative solution is available. In these circumstances all necessary compensatory measures must be taken to ensure that the overall coherence of Natura 2000 is safeguarded. Thus, the protection provisions have a practical effect even when applied to procedures that are already under way.

64. Hence Article 6(3) and (4) of the Habitats Directive are also applicable to the road construction project *ratione temporis*.

3. The application of Article 6(3) and (4) of the Habitats Directive

63. Nor does the application of Article 6(3) and (4) of the Habitats Directive to 'pipeline' projects conflict with the principles of proportionality, legal certainty and the protection of legitimate expectations. Until consent has been granted, there is no

65. Both parties agree that even though the proposed S 18 dual carriageway runs outside the designated 'Lauteracher Ried' SPA it may have significant effects on the SPA and therefore, as a matter of principle, had to be the subject of an assessment of its implications for the site under Article 6(3) of the Habitats Directive.²⁷

²⁷ — With regard to the steps in the procedure, see the judgment, concerning transposition of the Habitats Directive, in Case C-441/03 *Commission v Netherlands* [2005] ECR I-3043, paragraphs 23 to 26.

66. It is apparent from the matters set out in the report in the decision of the Office of the Vorarlberg Provincial Government of 21 February 2003²⁸ that in particular road noise, the planned noise-protection measures and the separation of the SPA from litter meadows south of the road may have adverse effects, especially on the corncrake and other grassland-nesting species.

67. In the light of this finding, both the Commission and the Austrian Government²⁹ consider it necessary to base approval of the project on Article 6(4) of the Habitats Directive. It is not disputed that in principle the project can be justified by reference to imperative reasons of overriding public interest. However, the Commission maintains that Austria did not give sufficient consideration to whether alternatives exist and failed to take adequate measures to safeguard the coherence of Natura 2000.

(a) The examination of alternatives

68. This complaint on the part of the Commission is based on the first sentence of Article 6(4) of the Habitats Directive,

according to which a project can be carried out in spite of a negative assessment of the implications for the site only if there is no alternative solution. As the Austrian Government relies on this exemption, it is for it to prove that the requirements of the first sentence of Article 6(4) have been met.³⁰

69. The Austrian Government concedes that the road line had already been set definitively, thus precluding an examination of alternatives, when, in 2000 and 2002, the assessment of the implications for the site pursuant to Article 6(3) of the Habitats Directive was submitted and was the subject of a decision by the competent authorities. However, the Austrian Government maintains that all the alternatives to be considered had already been examined, and rightly discarded, in 1994 as part of a general examination of the *environmental impact* in accordance with the EIA Directive.

70. However, the Austrian Government overlooks the fact that the first sentence of Article 6(4) of the Habitats Directive permits approval of a project only in the *absence* of alternative solutions, whereas the examina-

²⁸ — Annex 2 to the defence, p. 111 et seq.

²⁹ — See in particular paragraph 105 of the defence.

³⁰ — See, to that effect, with regard to the movement of goods, Case C-251/78 *Denkavit Futtermittel* [1979] ECR 3369, paragraph 24, and Case C-128/89 *Commission v Italy* [1990] ECR I-3239, paragraph 23; with regard to Article 88 (2) EC, Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 51; and, with regard to public procurement, Case C-318/94 *Commission v Germany* [1996] ECR I-1949, paragraph 13, and Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, paragraph 58.

tion of alternatives under the EIA Directive entails no restrictions on the choice of alternatives but requires only an *account* of the choice made and the reasons for it.

obviously — beyond reasonable doubt — out of the question.³¹ In selecting the alternative, the decisive factor is whether imperative reasons of overriding public interest demand the implementation of *this* alternative or whether they can also be met by *another* alternative.³²

71. Under Article 5(1) of, and point 2 of Annex III to, the EIA Directive, the developer must, where necessary, supply in an appropriate form an outline of the main alternatives studied by him and an indication of the main reasons for his choice, taking into account the environmental effects. However, there is no obligation concerning weighing the environmental effects against other considerations.

73. It is apparent from the documents submitted by the Austrian Government, however, that an allegedly less damaging alternative was not even considered in the procedure.³³

72. By contrast, Article 6(4) of the Habitats Directive permits projects to be approved only if *no* alternative is available. Although the Austrian Government is right that not every theoretically imaginable alternative stands in the way of project approval, the examination of alternatives cannot be confined — as in the case of an EIA — to ‘the main alternatives studied by the developer’ (point 2 of Annex III to the EIA Directive). That would not guarantee the absence of alternatives as required by Article 6(4) of the Habitats Directive. Consequently, the approving authority must ensure that at least those alternatives are examined that are not

74. Furthermore, it is doubtful whether sufficient weight was attached to the damage to the SPA, which at that time did not yet exist. The 1994 study on the environmental impact of the project³⁴ submitted by the Austrian Government and the environmental impact statement of 7 July 1994,³⁵ which were decisive in determining the road line, do refer to material causes of disturbance, but do not ultimately attach a weight to

31 — If an examination of the alternatives is to be carried out pursuant to both the EIA Directive and the Habitats Directive, the requirements of the more far-reaching Habitats Directive might well affect the EIA Directive, so that the examination of alternatives under the Habitats Directive is to be described in the EIA.

32 — Cf. my Opinion, concerning transposition of the Habitats Directive, in Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, point 46.

33 — Introduction of the section ‘Assessment’ in the report of the official expert for the protection of nature and landscapes of 29 April 1992, Annex 1 to Appendix C of the report in Annex 3 to the defence.

34 — Annex 3 to the defence; see in particular p. 33 et seq. of the report and Annex 1 to Appendix C thereof.

35 — Annex 8 to the statement of defence.

them. For no discernible reason, the assessments of the damage differ from those in an annexed nature conservation report dating from 1992,³⁶ and those in the later reports of May 2000 and 14 February 2002 which the Commission accepted as adequate.

75. Hence, the Austrian Government has been unable to prove that the examination of alternatives which it carried out in 1994 fulfilled the requirements of Article 6(4) of the Habitats Directive.

76. The Austrian Government further maintains that the road line set was reassessed when the approval decision was taken. It contends that in that context it was established that the project could fulfil the public interests being pursued and that those interests outweighed the likely damage to the SPA. It does not follow from that assessment, however, that there is no alternative to the planned road. Rather, the judgment of the Verwaltungsgerichtshof (Austrian Administrative Court) on the 'Wolfurt-Lauterach junction', which the Austrian Government cites as the basis for that assessment, states 'that alternatives to the present project, which would require a change in the order setting the road line, ... are not appropriate alternatives'.³⁷

77. Hence Austria has infringed Article 6(4) of the Habitats Directive in so far as the competent authorities gave fresh approval for the planned construction of the S 18 Lake Constance dual carriageway without establishing that no alternatives existed.

(b) The measures to safeguard the coherence of Natura 2000

78. The second requirement of Article 6(4) of the Habitats Directive which the Commission alleges that Austria has failed to fulfil relates to the compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. The approval as amended in the appeal procedure contains certain measures to be taken in connection with the road construction project and stipulates a compensatory payment of around EUR 2 million.

79. The Commission complains first that, in contravention of the second sentence of Article 6(4) of the Habitats Directive, it was not immediately informed of the compensatory measures adopted. Austria rightly responds that it was not even possible to inform the Commission at that stage, as the measures in question had not yet been carried out. In that regard, the application is to be dismissed.

³⁶ — Cited in footnote 33.

³⁷ — Judgment of 24 September 1999 in Case 98/10/0347.

80. In addition, however, the Commission objects in essence that Austria has not *laid down* all the measures necessary to safeguard the overall coherence of Natura 2000. This complaint raises the question as to the requirements that measures to ensure its coherence must meet, and in particular when they are to be laid down.

81. The Commission maintains that measures to ensure the coherence of Natura 2000 are a precondition of approval. The measures must therefore already be at least planned when approval is granted. In the present case that was not so, as only the amount of the compensatory payment had been set, but not the precise way in which it was to be used. The Commission submits, finally, that it cannot be assessed whether the 'actual compensatory measures' to upgrade habitats adequately safeguard the coherence of Natura 2000, because of a lack of sufficient information.

82. Austria replies that the 'actual compensatory measures' to upgrade habitats will themselves make good or at least offset the deterioration. Also, the earmarking of the compensatory payment for particular purposes will ensure that the payment will safeguard the coherence of Natura 2000. It asserts that all measures will be implemented, at the latest, at the same time as the deterioration of the SPA. In that way, the requirements regarding measures to ensure the coherence of Natura 2000 will be satisfied.

83. When applying Article 6(4) of the Habitats Directive, the Member State is to take all compensatory measures necessary to ensure that, despite the adverse effect on the integrity of a site, the overall coherence of Natura 2000 is protected. According to Article 3(1) of the Habitats Directive, Natura 2000 is a coherent European ecological network of special areas of conservation. This network is composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, and of the SPAs for the bird species mentioned in Annex I to the Birds Directive and for regularly occurring migratory species. Natura 2000 must enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

84. The necessary measures can therefore be identified only in relation to the damage to the area in question. The competent authorities must establish the damaged area's contribution to Natura 2000 that is lost as a result of the project and how that loss is to be offset so that overall the coherence of the network is maintained.

85. In the context of Natura 2000, the 'Lauteracher Ried' SPA contributes among other things to maintaining or restoring, at a favourable conservation status, the habitats of grassland-nesting migratory birds, and in

particular the corncrake. This function will be impaired by the planned road, in particular because of noise and separation effects. The ‘actual compensatory measures’ that have already been laid down will reduce existing sources of noise and other disturbances, primarily by closure of a road. Nevertheless, the competent authorities assume that the overall noise level will increase and that the separation effects — especially because of the noise barriers — will weaken the overall links between the SPA and the grasslands to the south. Consequently, further measures are needed to safeguard the coherence of Natura 2000.

86. The compensatory payment may help to safeguard the coherence of Natura 2000, but, as the Commission rightly states, on its own it is not sufficient, because neither the calculation nor the use of the compensatory payment is linked sufficiently closely to the necessary measures for safeguarding coherence.

87. According to a document submitted by the Austrian Government,³⁸ the compensatory payment is calculated by multiplying the degree of damage to nature and landscape, measured in points, by the size of the project, also expressed in points, and comparing the resulting score with a set table. Hence,

although the compensatory payment reflects a value abstractly and generally assigned to the damaged natural assets, it is not related to the actual expenditure needed to carry out the necessary measures.

88. This decoupling from the measures necessary to ensure the coherence of Natura 2000 is also evident in the use of the compensatory payment. Although the resources are earmarked to create suitable habitats, there is no guarantee that they will be sufficient to take the measures actually needed, for example to purchase certain parcels of land in the vicinity.

89. Austria’s assertion that it can still carry out the necessary measures to preserve the coherence of Natura 2000 in good time before the project is completed is not challenged. However, the mere possibility that the necessary measures can be taken in good time does not guarantee that this will actually happen.

90. So long as implementation of the measures necessary to safeguard the coherence of Natura 2000 remains uncertain, a project that will cause damage may not be approved. Otherwise there is a danger that the protection area will be damaged without the measures necessary to ensure the coherence of Natura 2000 being taken.

³⁸ — Mechanism for calculating compensatory payments, Annex 4 to the defence.

91. Nor can Austria rely on the fact that there is as yet no effective nature conservancy consent because legal proceedings are still pending in which implementation of the consent was suspended. By granting consent, the competent authorities have already taken a decision that is incompatible with Article 6 (4) of the Habitats Directive. This infringement of Community law can be brought to an end by judicial annulment of the consent, but it has continued up to the present. In particular, it was therefore still continuing at the material time, namely when the period set by the Commission in its reasoned opinion expired.

92. Hence Austria has infringed Article 6(4) of the Habitats Directive in so far as the competent authorities gave fresh approval for the planned construction of the S 18 Lake

Constance dual carriageway without laying down the compensatory measures necessary to safeguard the overall coherence of Natura 2000.

V — Costs

93. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission is successful on almost all heads, the Republic of Austria must be ordered to pay the costs.

VI — Conclusion

94. I therefore propose that the Court should:

- (1) declare that, by failing to designate the 'Soren' and 'Gleggen-Köblern' sites as special protection areas, the Republic of Austria has infringed Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

(2) declare that, in so far as the competent authorities gave fresh approval for the planned construction of the S 18 Lake Constance dual carriageway

— without establishing that no alternatives existed and

— without laying down the compensatory measures necessary to safeguard the overall coherence of Natura 2000,

the Republic of Austria has infringed Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;

(3) dismiss the remainder of the application;

(4) order the Republic of Austria to pay the costs.