

OPINION OF ADVOCATE GENERAL

LÉGER

delivered on 21 September 2006¹

1. By the present action, the Commission of the European Communities requests the Court to declare that, by failing to take all the necessary measures to implement Article 12(1) of Directive 92/43/EEC² and by retaining provisions in Irish legislation that are inconsistent with the provisions of Articles 12(1) and 16 of that directive, Ireland has failed to fulfil its obligations under that directive.

3. The otter, all species of cetaceans, the leatherback turtle,⁴ the natterjack toad,⁵ the Kerry slug⁶ and all species of bats are among the species listed in Annex IV(a) to the Habitats Directive. The species listed in that annex are animal species of Community interest requiring strict protection.

4. Article 12 of the Habitats Directive is worded as follows:

I — Legal background

2. The main aim of the Habitats Directive is to promote the maintenance of biodiversity through the conservation of natural habitats and of wild flora and fauna in the territory of the Member States to which the Treaty on European Union applies.³

'1. Member States shall take the requisite measures to establish a system of strict

1 — Original language: French.

2 — Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive').

3 — See the third and fourth recitals in the preamble to the Habitats Directive.

4 — The leatherback turtle measures approximately 1.50 m and weighs 300 to 400 kg, making it the biggest sea turtle. Unlike other turtles, it does not have a hard shell but a kind of pseudo-carapace divided into seven long folds and made up of a layer of fat, which enables it to withstand cold waters at 5 °C.

5 — The natterjack toad (*Bufo calamita*) is a toad native to sand dune areas of northern Europe. The adult toad measures 60 to 70 mm in length. It is distinguished from the common toad by a yellow stripe which starts at the top of its snout and runs down its back.

6 — The Kerry slug (*Geomalacus maculosus*) is considered to be the only slug capable of curling itself into a ball. It feeds mainly on lichens that it finds on rocks and tree trunks.

protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
- (c) deliberate destruction or taking of eggs from the wild;
- (d) deterioration or destruction of breeding sites or resting places.

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.

3. The prohibition referred to in paragraph 1(a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.

4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.'

5. Article 13 of the Habitats Directive imposes, likewise, a system of strict protection for the plant species listed in Annex IV(b), prohibiting:

- '(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;
- (b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species

taken in the wild, except for those taken legally before this Directive is implemented'.

reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

6. Article 16(1) of the Habitats Directive is worded as follows:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative

(d) for the purpose of research and education, of repopulating and reintroducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

7. Article 16(2) of the Habitats Directive provides that, where they avail themselves of Article 16(1), the Member States are to forward to the Commission every two years a report on the derogations applied. The Commission must give its opinion on those derogations within a maximum time-limit of 12 months following receipt of the report and give an account to the committee assisting it.

8. Article 16(3) of the Habitats Directive sets out the information that must be included in the report.

12 and 16 of the Habitats Directive. It therefore gave Ireland formal notice to submit its observations in that regard.

9. The Habitats Directive entered into force on 21 May 1994.

11. By letter dated 20 December 2002, the Irish authorities agreed that the specific provisions of the Irish legislation intended to transpose Articles 12(2) and 13 of the Habitats Directive were limited to Annex IV(a) and (b) species that occur in Ireland. They referred the Commission to the existence of enabling provisions in Irish law allowing for an extension of the system of strict protection required under Articles 12(2) and 13 of that directive, should the need arise.

II — The pre-litigation procedure

10. On 18 October 2002, the Commission established that the transposition of the Habitats Directive into Irish law was defective in a number of respects. Firstly, Ireland had failed to extend the transposition of Articles 12(2) and 13 to species listed in Annex IV to the Habitats Directive that do not naturally occur in Ireland. Secondly, Ireland had failed to adopt specific measures to establish a system of strict protection for the animal species listed in Annex IV(a) to the Habitats Directive, as required by Article 12(1) of that directive. Thirdly, Ireland had failed to establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a) to the Habitats Directive, as required by Article 12(4) of that directive. Lastly, the Commission stated that there were provisions in Irish legislation which were inconsistent with both Articles

12. Also, the Irish authorities had adopted a series of measures for the effective implementation of the system of strict protection for animal species listed in Annex IV(a) to the Habitats Directive, pursuant to Article 12(1) thereof.

13. Being dissatisfied with Ireland's response, by letter of 11 July 2003 the Commission sent it a reasoned opinion in which it reiterated the observations made in its letter of formal notice. The Commission

called upon Ireland to adopt the necessary measures to comply with the reasoned opinion within two months of its receipt.

slug and the Killarney fern,⁷ to be completed, in all likelihood, in September 2005. With regard to cetaceans, Ireland stated that those species presented particular challenges and that research was being undertaken on the most effective means of protecting them in Irish waters.

14. On 12 September 2003, Ireland replied to the reasoned opinion, informing the Commission that it was proposed to give effect by means of regulations to Articles 12(2) and 13(1)(b) of the Habitats Directive in respect of all species listed in Annex IV(a) and (b). It also indicated that it rejected the Commission's interpretation that Irish legislation implemented Articles 12 and 16 of the Habitats Directive incorrectly. In addition, Ireland disclosed a 2002 protection plan for the natterjack toad and notified the Commission of the monitoring mechanisms and the initiatives it had undertaken in this area with regard to that species, bat species, the otter and the leatherback turtle. Ireland indicated that information on the Kerry slug and cetaceans was to follow.

16. Since it considered that the response given did not enable it to conclude that Ireland had complied with its obligations under the Habitats Directive, the Commission brought the present action.

III — The action

17. In support of its application, the Commission put forward three complaints, relating, respectively, to:

15. On 8 January 2004, Ireland provided the Commission with further information concerning the reasoned opinion. It indicated that four species action plans ('SAPs') were being prepared and were due for completion in March 2004, for one mammal, one bird, one fish and one plant. They were to be used as a basis for establishing SAPs for the otter, bat species, the natterjack toad, the Kerry

- the failure fully to transpose Articles 12(2) and 13 of the Habitats Directive with regard to the species listed in

⁷ — The Killarney fern (*Trichomanes speciosum*) is a perennial fern which takes the form of triangular evergreen leaves and is 10 to 30 cm long, dark green, slender and translucent with delicately feathered fronds. This species, which was reasonably widespread during the last century, is today threatened with extinction.

Annex IV to that directive which do not naturally occur in Ireland;

IV — Assessment

A — *The second complaint*

- the absence of specific measures for the effective implementation of the system of strict protection required under Article 12(1) of the Habitats Directive;

- the existence in Irish law of provisions which are inconsistent with both Article 12 and Article 16 of the Habitats Directive.

18. In the light of the responses given by Ireland, the Commission is of the view that Irish law now complies with Articles 12(2) and 13 of the Habitats Directive. It has accordingly withdrawn the first complaint in its application.

19. I will therefore proceed to examine the two other complaints in the order set out below.

20. Under the third paragraph of Article 249 of the EC Treaty, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods for implementing the directive in question in domestic law. However, in accordance with settled case-law,⁸ while the transposition of a directive into domestic law does not necessarily require that the content of the directive be incorporated formally and verbatim and a general legal context may be adequate for the purpose, that is on condition that that context does indeed guarantee the full application of the directive in a sufficiently clear and precise manner.

21. It is important in each individual case to determine the nature of the provision, laid down in a directive, to which the action for infringement relates, in order to determine

8 — See, in particular, Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7; Case C-361/88 *Commission v Germany* [1991] ECR I-2567, paragraph 15; and Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, paragraph 21.

the extent of the obligations imposed on the Member States.⁹

22. It is apparent from the 4th and 11th recitals in the preamble to the Habitats Directive that threatened habitats and species form part of the Community's natural heritage and that the adoption of measures to promote the conservation of priority natural habitats and priority species of Community interest is the responsibility of all Member States. The Court has thus held with regard to that directive and, in particular, Article 12(1) thereof, that faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories.¹⁰

23. It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise.¹¹

24. More specifically, the transposition of Article 12(1) of the Habitats Directive requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures.¹² The Court has also held that a system of strict protection within the meaning of Article 12(1) requires coherent and coordinated measures of a preventative nature to be adopted.¹³

25. In accordance with Article 2(1) and (2) of the Habitats Directive, the purpose of measures intended to transpose Article 12(1) of that directive is to preserve biodiversity by maintaining or restoring, at favourable conservation status, natural habitats and species of wild flora and fauna of Community interest.

26. Under Article 1(e) and (i) of the Habitats Directive, 'conservation status' is considered to be 'favourable' when the 'natural range [of the habitat] and [the] areas it covers within that range are stable or increasing', and when

9 — Case C-233/00 *Commission v France* [2003] ECR I-6625, paragraph 77.

10 — See, in particular, *Commission v United Kingdom*, paragraph 25, and Case C-98/03 *Commission v Germany* [2006] ECR I-53, paragraph 59.

11 — See *Commission v United Kingdom*, paragraph 26, and Case C-98/03 *Commission v Germany*, paragraph 60.

12 — Case C-103/00 *Commission v Greece* [2002] ECR I-1147, paragraphs 34 to 39.

13 — Judgment of 16 March 2006 in Case C-518/04 *Commission v Greece*, not published in the ECR, paragraph 16.

‘population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats’.

of [that directive] and it must be transposed in a detailed, clear and precise manner’.¹⁵

27. In my view, in order to maintain natural habitats and the species listed in Annex IV to the Habitats Directive at favourable conservation status, it is necessary to implement enhanced monitoring and surveillance measures. I am of the opinion that, in drawing up a list of species that are to enjoy strict protection, the Community legislature intended to distinguish such species from other species of wild flora and fauna, not least because the species listed in Annex IV to that directive and their natural habitats are more vulnerable.¹⁴

29. In the present case, it is not disputed that Ireland has several of the species listed in Annex IV to the Habitats Directive in its territory. It is also accepted that the most important of these, in terms of their number and natural range, are bats and cetaceans, all species of which are protected under Annex IV. The other species listed in Annex IV which are present in Ireland are the otter, the natterjack toad, the leatherback turtle and the Kerry slug.

28. Moreover, I consider that strict protection of the species listed in Annex IV is to be achieved above all through detailed knowledge of each species, its breeding sites and resting places, and the potential threats it may face. In my view, that requires long-term surveillance of those species. The Court indeed held in *Commission v United Kingdom* that ‘the surveillance obligation [referred to in Article 11 of the Habitats Directive] is fundamental to the effectiveness

30. In the light of the above, it is now necessary to consider whether the second complaint, which relates to the absence of specific measures for the effective implementation of the system of strict protection required under Article 12(1) of the Habitats Directive, is well founded.

31. In support of that complaint, the Commission puts forward seven arguments.

14 — See the 15th recital in the preamble to the Habitats Directive.

15 — Paragraph 65 of the judgment.

1. The first argument

32. The Commission criticised Ireland for failing to implement a system of strict protection in accordance with Article 12 of the Habitats Directive with regard to the leatherback turtle and the Kerry slug in that neither of those species is listed in the First Schedule to the European Communities (Natural Habitats) Regulations, 1997.

33. The Commission has now indicated that it is satisfied with Ireland's response concerning the leatherback turtle and the Kerry slug. I do not therefore consider it necessary to consider whether the first argument is well founded.

2. The second argument

34. The Commission refers to the existence of a parallel derogation system under the Irish Wildlife Act, 1976, as amended by the Wildlife (Amendment) Act, 2000 ('the 1976 Wildlife Act'), which undermines the establishment of specific measures for the effective implementation of the system of strict protection for species listed in Annex IV to the Habitats Directive.

35. As this argument is framed in the same terms as the third complaint, I think it is appropriate to join the two and consider their merits together.

3. The third argument

36. According to the Commission, the SAPs, which would be an effective means of implementing Article 12(1) of the Habitats Directive, are not yet completed, with the exception of the plan for the natterjack toad. The specific measures taken by Ireland are, on the whole, disparate and patchy and cannot be regarded as an appropriate system of strict protection within the meaning of the Habitats Directive. In the Commission's view, only the situation of the natterjack toad would appear to be satisfactory.

37. The Commission submits that the expression 'is under way', used by Ireland to denote the fact that further SAPs would be published at a future date, provides no certainty as to when and ultimately in what form such future SAPs will be published.

38. With regard to the species listed in Annex IV(a) to the Habitats Directive, Ire-

land acknowledges that the plans in question have yet to be edited and published. It also states that a programme for the publication of further SAPs, which are intended to address all of the Annex IV species, is under way.

39. Like the Commission, I consider SAPs to be an effective means of meeting the strict protection requirement under Article 12(1) of the Habitats Directive. They provide important information on species and their habitats, breeding sites and resting places, and set out specific recommendations aimed at ensuring the successful conservation of the species in question.

40. The SAP established by Ireland for the natterjack toad¹⁶ would appear to meet the requirements under Article 12(1). It enabled research to be carried out on the natterjack toad's breeding sites and, as a result, new ponds to be dug which are suitable for that species. A systematic monitoring programme for breeding sites occupied by that species was initiated in 2004 and extended to include 2005 and 2006.

41. However, as far as the other species listed in Annex IV to the Habitats Directive are concerned, Ireland acknowledges that the

plans in question are yet to be edited and published, whilst at the same time stating that a programme for the publication of further SAPs, to encompass all the species listed in Annex IV, is 'under way'.

42. Suffice it to note that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down by the reasoned opinion.¹⁷

43. SAPs for the species listed in Annex IV to the Habitats Directive had not been completed on the expiry of the period laid down by the reasoned opinion, namely on 11 September 2003, and it follows that the third argument is well founded.

4. The fourth argument

44. The Commission takes the view that the existence of a network of full-time officials responsible for the conservation of species does not of itself demonstrate that specific measures have been adopted for the effective implementation of the system of strict

16 — See paragraphs 13 and 14 of the defence.

17 — Case C-200/88 *Commission v Greece* [1990] ECR I-4299, paragraph 13, and Case C-161/02 *Commission v France* [2003] ECR I-6567, paragraph 9.

protection required by Article 12(1) of the Habitats Directive. The Commission mentions, by way of example, the conservation manual on the natterjack toad¹⁸ which demonstrates that the competent authorities 'have many other duties and are responsible for large areas, and ... have insufficient time to monitor natterjack populations systematically'.

45. Ireland does not seriously challenge the Commission's observations on that issue.

46. It argues that its officials are active and effective in the conservation of species, in particular the natterjack toad, thereby playing a vital role in the enforcement of the protection of that species. Also, it acknowledges that Ireland's national network of conservation rangers and district conservation officers carry out 'passive surveillance' but considers this, none the less, to be effective.

47. It is apparent from the documents before the Court that Ireland does no more than state that the members of that network are aware of the conservation status of animal species and of any significant changes in the conservation status of a species.¹⁹

48. As we have already seen, the Court has held that the obligation to conduct surveillance of habitats and species listed in Annex IV to the Habitats Directive is fundamental to the effectiveness of that directive. I consider that the lack of time the manual refers to demonstrates that the human resources allocated to surveillance and monitoring of the species listed in Annex IV and of their habitats are insufficient to meet the requirement of strict protection within the meaning of Article 12(1) of the Habitats Directive. In my view, there is nothing in the case-file to indicate that there is ongoing, systematic surveillance of the conservation status of habitats and species or that the data deriving from the passive surveillance carried out by officials is gathered and organised in a coherent manner so as to meet the requirement of strict protection.

49. I therefore also consider this argument to be well founded.

5. The fifth argument

50. The Commission criticises Ireland for failing to carry out species impact studies systematically before approving building or demolition projects. According to the Commission, environmental impact assessments

18 — See paragraph 53 of the application.

19 — See, in particular, paragraphs 16 and 23 of the defence.

(‘EIAs’) undertaken pursuant to Directive 85/337/EEC²⁰ can play a useful role in alerting the authorities to specific threats to the breeding sites and resting places of species listed in Annex IV to the Habitats Directive. The Commission states, however, that not all projects are subject to an EIA.

51. Furthermore, even where EIAs are undertaken, the Irish authorities require property developers to provide information on protected species only after development consent has been granted, thus undermining the potential effectiveness of EIAs as a means of information-gathering.

52. By way of example, the Commission refers to three projects. Firstly, it submits that a proposed hotel development on the Lough Rynn Estate was the subject of an EIA which showed negative impacts on bat populations. In spite of this, the Irish authorities did not request any further information before granting consent and failed to make any reference to the need for the conditions set out in Article 16 of the Habitats Directive to be observed. The Commission then refers to the Ennis Bypass

project, which would cause the destruction of lesser horseshoe bat²¹ roosts. Lastly, it cites the example of the proposed laying of a gas pipeline in Broadhaven Bay, the Corrib Gas project, which would disturb the breeding sites and resting places of cetaceans in that area.

53. With regard to the Lough Rynn Estate project, Ireland maintains that An Bord Pleanála (the Irish Planning Appeals Board; ‘the Board’) had regard to all the information submitted by the various parties and was satisfied that the Habitats Directive and Directive 85/337/EEC would be duly complied with when it granted planning permission for that development.

54. Moreover, Ireland submits that Leitrim County Council, the local authority, was competent to review and adjudicate on the adequacy of the comprehensive survey of bat populations at the site and to enter into an agreement with the developer in relation to mitigation measures. That survey was to be carried out prior to the commencement of the development. Ireland further argues that, where there is non-compliance with the specific requirements of any of the conditions attached to a planning permission, this may be addressed by enforcement action by a local planning authority.

20 — Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

21 — The lesser horseshoe bat is found in Europe and Asia. Of slender appearance, it is distinguished by a horseshoe-shaped nose. It measures 3.7 to 4.5 cm, with a wingspan reaching up to 29.4 cm.

55. The documents in the case-file²² show that that development was approved by the Board in 2002, whereas the survey demonstrating negative impacts on bats was completed only in 2004 and works commenced in 2003.

56. Ireland does not challenge the findings of the comprehensive survey²³ submitted by the developer in June 2004. That survey, which was completed after planning permission had been granted, demonstrated that the renovation of certain buildings and the removal of certain trees would lead to the total disappearance of those habitats as breeding sites and resting places. It also noted that noise and lighting as a result of human occupation would have a significant impact on bat species.

57. I believe that it follows from Article 12(1)(d) of the Habitats Directive that it was not possible for the Irish authorities to approve the Lough Rynn Estate development project, at least without a valid derogation. It is not disputed in the present case that the derogations provided for in Article 16 of that directive were not applied to the project.

58. Ireland does not seriously challenge that complaint and merely points out that the comprehensive survey, which was considered by the local authorities, was adequate and that the Board adequately performed its duties.

59. Moreover, with regard to the Ennis Bypass, the documents in the case-file²⁴ show that that project was the subject of an EIA which indicated that the bypass would cause the destruction of lesser horseshoe bat roosts. In the light of the information submitted by the Commission, which was not challenged by Ireland, it would appear that the Irish authorities issued the derogation only on 7 July 2004, long after consent had been given for the project. There is nothing to indicate that, at the time when consent was given, the Irish authorities considered it necessary to require a valid derogation.

60. The same applies to the Corrib Gas project, which involves the laying of a pipeline in Broadhaven Bay. It is not disputed that several species of cetaceans protected by Annex IV to the Habitats Directive are present in the bay. The use of explosives was proposed for the execution of the project. It is clear from the letter dated 3 November 2003²⁵ from Ireland to the Commission's Directorate-General for the Environment that the Marine Licence Vetting Committee stated that the sound caused by the use of such explosives would have an

22 — See, in particular, Annexes 6 and 7 to the application.

23 — See Annex 7 to the application.

24 — See Annex 10 to the application.

25 — See Annex D-8 to the defence.

adverse effect on cetaceans. The deliberate use of explosives in an area containing species protected by Annex IV to the Habitats Directive is prohibited under Article 12(1)(b) of that directive. It is, however, clear from the letter of 3 November 2003 that the project was authorised without a derogation under Article 16 of that directive.

6. The sixth argument

63. As regards its sixth argument, the Commission submits that, with the exception of the lesser horseshoe bat and the natterjack toad, the Irish authorities do not possess necessary information concerning certain species listed in Annex IV(a) to the Habitats Directive, their breeding grounds, their resting places and the threats they are subjected to.

61. The assessments of the Ennis Bypass and Corrib Gas projects demonstrate that there was an appreciable risk of disturbing the breeding sites and resting places of protected species. Moreover, such an appraisal is borne out by the fact that, firstly, the Irish marine authorities considered it necessary to make provision for mitigation measures to 'minimise impacts' on cetaceans and, secondly, the National Park and Wildlife Service ('the NPWS') ordered the Ennis Bypass developer to adopt a whole range of measures to preserve a habitat for bat species.

64. Firstly, the Commission criticises Ireland for lacking an adequate level of information on bat species. The monitoring programme announced by Ireland involving 'car transects' — the crossing by car — of six study areas is quite limited in nature and will not enable roosts to be identified. Moreover, the Commission considers that Ireland's arguments that, firstly, that programme would 'in due course' provide vital information on population trends and, secondly, progress '[could] be made' before the end of 2005 in the compilation of data gathered, did not provide any certain guarantee that Ireland would establish an adequate system of strict protection going beyond the current pilot programme. No precise date has been given as to when an appropriate monitoring system will be set up.

62. In the light of the foregoing, I consider that the argument is well founded with regard to the Lough Rynn Estate, Ennis Bypass and Corrib Gas projects.

65. Secondly, the Commission states that a survey confirming the presence of otters in Irish territory predates considerably the

coming into force of the Habitats Directive. It therefore takes the view that it cannot be concluded that adequate comprehensive monitoring of the otter's breeding sites and resting places is currently in place. The mere statement that the report on a survey started in 2004 was scheduled for completion at the end of 2005 could not be regarded as a sufficient guarantee that an appropriate monitoring system and programme would be set up.

it submits that those programmes cannot qualify as a comprehensive monitoring system.

66. Thirdly, with regard to the Kerry slug, the Commission is of the view that Ireland has failed to demonstrate that it has put in place an information-gathering system comparable in detail to that which exists for the natterjack toad. The passive monitoring carried out by the Irish authorities and the employment of a biologist specialising in invertebrates do not provide any certainty as to the provision of regular monitoring information compiled in a coherent and integrated manner on the presence of the Kerry slug as well as on its breeding sites and resting places and the potential threats it may be subjected to.

68. In the same way, whilst the Commission welcomes the funding by the NPWS of a monitoring project on small cetaceans in Galway Bay and its involvement in the monitoring of cetaceans in Roaringwater Bay, it submits that such ad hoc projects and programmes cannot constitute a comprehensive monitoring programme as they are geographically limited and their long-term future is not guaranteed.

67. Lastly, the Commission criticises Ireland for failing to put in place a comprehensive, adequate, ongoing monitoring programme for cetaceans that could enable a system of strict protection for that species to be devised. Whilst the Commission welcomes the active monitoring programme and cetacean recording programme carried out around the Irish coast by a voluntary group,

69. Moreover, the Commission maintains that an analysis carried out in 2005 shows gaps in knowledge of cetaceans found in Irish waters, even though action taken by Ireland is particularly important for cetaceans, given the extent of that Member State's offshore and inshore waters and the number of species found there. The Commission adds that the NPWS's marine

conservation resources are especially meagre. Wildlife rangers are focused on terrestrial duties and do not have any or any meaningful seagoing capacity or experience.

70. In relation to the sixth argument, Ireland acknowledges that the pilot bat monitoring project is not a substitute for more detailed survey work. Nevertheless, it believes that the 'car transects' programme provides extensive data on the presence of certain bat species and their distribution and has potential for further development. Ireland adds that that programme has moved beyond the pilot stage, is now in its third year and will in due course provide vital information on developments in bat populations.

71. Furthermore, agreement was reached by Ireland with Bat Conservation Ireland on the expansion of the database on roosts. A contract was drawn up for the delivery of a database containing known bat roost records by the end of 2006. Ireland also stated that an expert report providing recommendations on monitoring requirements and conservation measures for bats was due at the end of 2005.

72. With regard to the otter, Ireland stated that a survey on that species was due for completion at the end of 2005 and the report on the survey was expected early in 2006. It is not a baseline study but a follow-up to two earlier surveys carried out in 1980/81 and 1990/91. Moreover, the radio tracking of otters was enabling a detailed study to be carried out of its resting places, as well as diurnal behaviour patterns, interactions within populations and movement. Ireland adds that if there were evidence of a decline, further investigations would be carried out to identify the nature of the decline and to enable appropriate measures to be taken.

73. Ireland also pointed out that an expert biologist was working on producing a SAP for the Kerry slug. That SAP was at an advanced stage and confirmed that the species continued to thrive in its known locations. Ireland hoped that that plan, which would include recommendations for a monitoring programme, would be published in 2006.

74. I would once again observe that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down by the reasoned opinion. In the present case, that period expired on 11 September 2003.

75. It is clear that, at the end of that period, specific information measures for the strict protection of the otter, the Kerry slug and bat species had still not been adopted.

the Irish coast. It also maintains that, since the report of 6 April 2005²⁸ on the interpretation of the strict protection of species under the Habitats Directive shows that policy at Community level is still at the development stage, the existing measures are adequate and meet the requirements of that directive.

76. Next, it is clear from *Commission v United Kingdom* that surveillance of species must be undertaken systematically and on a permanent basis.²⁶ Consequently, Ireland's argument that the two otter surveys carried out in 1980/81 and in 1990/91 constitute evidence of that Member State's commitment to the surveillance of that species does not appear to me to be satisfactory. In fact, it would appear that no systematic and ongoing survey of that species was undertaken between 1991 and 2005. Furthermore, the commitment to undertake further investigations in the event of a significant decline in the otter population being recorded cannot satisfy the requirements under Article 12(1) of the Habitats Directive. A system of strict protection under Article 12 implies the adoption of preventive measures.²⁷ It follows that the Member States must adopt measures to avert the decline of protected species and not take steps only when a decline has been established.

78. Moreover, Ireland maintains that, following the entry into force of Regulation (EC) No 812/2004,²⁹ it has been collecting observer data on incidental catches of cetaceans in a number of fisheries and it was to report on that data in an annual report due on 1 June 2006. Ireland also points out that the Bord Iascaigh Mhara (Irish Sea Fisheries Board) is involved in a Europe-wide project which commenced in March 2004 and aims at reducing incidental catches of cetaceans.

79. Ireland also relies on its decision to establish a national biological records database and the setting up of the National Biological Records Centre, a facility intended

77. With regard to cetaceans, Ireland relies on a series of monitoring programmes along

26 — Paragraph 68.

27 — See Case C-518/04 *Commission v Greece*, paragraph 16.

28 — This report, produced by a group of experts set up by the 'Habitats Committee', is designed to support initiatives by Member States on the question of Article 12 of the Habitats Directive and, more especially, the conservation of breeding sites and resting places.

29 — Council Regulation of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98 (OJ 2004 L 150, p. 12).

to make available databases of records for those who are researching or wish to obtain information on the distribution of species.

particular with a view to integrating cetacean data with fisheries data and with physical and oceanographic parameters, so as to enable the Irish authorities to devise a more effective management tool.

80. By way of evidence of the strict protection of the species under Article 12(1) of the Habitats Directive, Ireland relies on a programme of recording that was under way in the Shannon Estuary, Roaringwater Bay and the Blasket Island area as well as a monitoring project on the small cetaceans of Galway Bay and Roaringwater Bay. It also relies on a survey conducted by the Coastal and Marine Resources Centre between 1999 and 2001.³⁰

83. Moreover, a study by the Irish Whale and Dolphin Group in 2005 criticises gaps in the knowledge of cetaceans within the Irish Exclusive Economic Zone and stresses the pressing need for more precise information on the distribution and abundance of cetaceans in Irish waters so that, in particular, Ireland may comply with the requirements of the Habitats Directive.³¹

81. In 1991 Ireland designated Irish waters as a whale and dolphin sanctuary. The survey conducted by the Coastal and Marine Resources Centre recorded the presence of 21 cetacean species in Irish waters, including rare and threatened species such as the blue whale. That study highlights the threats facing cetaceans, in particular man-caused seismic activity.

84. In the light of the above, Ireland's argument that the foregoing action and studies establish that it has a long-term commitment to the monitoring and protection of cetacean species in its territorial waters cannot be accepted. It is clear that the cetacean monitoring programmes are ad hoc and confined to certain geographical areas. Ireland has failed to establish that cetaceans have been subject to a comprehensive, systematic, ongoing monitoring programme.

82. It is clear from that study that analytical and research work needs to be carried out, in

30 — See Annex D-5 to the defence.

31 — See the Annex to the reply.

85. Furthermore, it is not possible to accept Ireland's argument that the contribution to the interpretation of the strict protection of species under the Habitats Directive³² shows that policy in this area at Community level is still at the development stage and, therefore, legitimises its inaction.

86. The purpose of that guidance document, as its title suggests, is to provide the Member States with guidance on the implementation of their legislation. That document does not in any circumstances call into question the scope of the obligation under Article 12(1) of the Habitats Directive, which has been in force since 1994.

87. I therefore consider that the sixth argument is also well founded.

7. The seventh argument

88. The Commission takes the view that Ireland has failed to establish that it has

instituted any appropriate strategy for responding to the known types of threat to the breeding sites and resting places of bat species. The Commission criticises Ireland for failing to undertake assessments for such projects, which, as a general rule, are not the subject of an EIA. The Commission maintains that threats to bats include timber treatment, building renovations and demolition work.

89. It must be noted that, according to the settled case-law of the Court, in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove that the obligation has not been fulfilled and it is unable to rely on any presumption.³³

90. Accordingly, in the context of the present case, it is for the Commission to prove that the practice followed by Ireland in relation to small projects, such as wood treatment or building renovations, which do not require an EIA undermines the system of strict protection for species listed in Annex IV to the Habitats Directive.

32 — See point 77 of this Opinion.

33 — See, in particular, Case 96/81 *Commission v Netherlands* [1982] ECR 1791, paragraph 6, and Case C-221/04 *Commission v Spain* [2006] ECR I-4515, paragraph 59.

91. In support of its argument, the Commission simply makes allegations without adducing any evidence.³⁴ It contends, *inter alia*, that '[it] understands that many local authorities have never undertaken a bat survey of bridges prior to the undertaking of bridge repairs'. No evidence, such as precise and detailed examples of work undertaken in such circumstances, is adduced to substantiate that contention.

92. As a consequence, I do not consider the seventh argument to be well founded.

93. In the light of the foregoing, I propose that the Court declare that, by failing to take specific measures for the effective implementation of the system of strict protection required under Article 12(1) of the Habitats Directive, Ireland has failed to fulfil its obligations under that directive.

B — *The third complaint*

94. The Commission alleges that there exists under Irish law a parallel regime of derogations

which are incompatible with Articles 12 and 16 of the Habitats Directive. That parallel regime is to be found in sections 23(7) and 42 of the 1976 Wildlife Act.

95. In the light of Ireland's response in its defence, the Commission has withdrawn its argument relating to section 42 of the 1976 Wildlife Act.

96. The Commission observes, first of all, that Ireland transposed Article 12(1)(d) of the Habitats Directive in Regulation 23 of the European Communities (Natural Habitats) Regulations, 1997, and Article 16 of that directive in Regulation 25 of the regulations in terms that closely follow the wording of Article 16.

97. The Commission states, however, that section 23(7)(a), (b) and (c) of the 1976 Wildlife Act establishes currently applicable exemptions which depart from the requirements under Article 12(1)(d) of the Habitats Directive without observing the conditions under Article 16 of that directive. I would also point out that the 1976 Wildlife Act was amended in 2000 and, therefore, postdates the entry into force of the regulations implementing that directive.

³⁴ — See paragraph 62 of the application and paragraph 35 of the reply.

98. Under section 23(7)(a), (b) and (c) of the 1976 Wildlife Act, it is not an offence for a person: unintentionally to injure or kill a protected wild animal while engaged in agriculture, aquaculture, fishing, forestry or turbary; to interfere with or destroy the breeding place of such an animal while engaged in such activities; or unintentionally to kill or injure such an animal or unintentionally to destroy or injure the breeding place or resting place of such an animal while constructing a road or carrying on any archaeological operation, building operation or work of engineering construction, or while constructing or carrying on such other operation or work as may be prescribed.

99. Although Ireland has amended its legislation by inserting section 23(8) in the 1976 Wildlife Act, thus putting an end to the conflict of rules between section 23 and Regulation 25 of the European Communities (Natural Habitats) Regulations, 1997, the Commission persists with its complaint since Regulation 3 of the European Communities (Natural Habitats) Regulations, 2005, which inserts that new paragraph, was adopted and notified by Ireland after the expiry of the period laid down by the reasoned opinion.

100. The Commission submits that, before the European Communities (Natural Habi-

tats) Regulations, 2005, entered into force, the exemptions set out in section 23(7) of the 1976 Wildlife Act applied to species listed in Annex IV(a) to the Habitats Directive. Ireland therefore relied on that section for derogation purposes.

101. According to the Commission, it would appear that the derogating provisions in Regulation 25 of the European Communities (Natural Habitats) Regulations, 1997, were never used for major projects such as the Corrib Gas project or the Lough Rynn Estate project. The Commission also notes that the report submitted on derogations under Article 16 of the Habitats Directive does not record any valid derogation corresponding to the circumstances covered by section 23(7) of the 1976 Wildlife Act.

102. Moreover, the Commission submits that the simultaneous existence of such a parallel derogation system gives rise to unacceptable confusion and doubt as to the law, contrary to the principle of legal certainty.

103. Ireland takes the view that the Commission has misinterpreted the effect of section 23(7) of the 1976 Wildlife Act. According to Ireland, the provisions of section 23(7) are available only in the context of a prosecution for an offence under section 23(5) of that Act and not under the European Communities (Natural Habitats) Regulations, 1997. For the avoidance of doubt, Ireland made the necessary amendments to that legislation to emphasise the clear demarcation between the regime under section 23(7) of the 1976 Wildlife Act and the regime under Regulations 23 and 25 of the European Communities (Natural Habitats) Regulations, 1997. Section 23(8) of the 1976 Wildlife Act expressly provides that the derogations under section 23(7) do not apply to species listed in Annex IV(a) to the Habitats Directive.

104. It is to be noted once again that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down by the reasoned opinion and that the Court cannot take account of any subsequent changes.³⁵ In the present case, Ireland adopted the amendment in question in 2005, namely, after the expiry of the period laid down in the reasoned opinion. It follows that it is not necessary to take that amendment into account.

105. Section 23(7)(b) and (c) of the 1976 Wildlife Act provide that it is not an offence to commit certain acts, whether intentional or not, which interfere with or destroy breeding place and certain acts which unintentionally destroy or injure breeding places or resting places of wild animals. Under Article 12(1)(d) of the Habitats Directive, in relation to the species listed in Annex IV thereto, such acts are prohibited, whether or not they are intentional.³⁶

106. It is clear from the report submitted by Ireland on derogations granted under Article 16 of the Habitats Directive that the Irish authorities relied on section 23 of the 1976 Wildlife Act for the purposes of derogating from the requirement of strict protection for bat species, the natterjack toad and certain species of dolphin and whale.³⁷

107. Consequently, Ireland's argument that the provisions of section 23(7) of the 1976 Wildlife Act are available only in the context of a prosecution for an offence under section 23(5) of that Act cannot be accepted. It is clear that the regime of parallel derogations adopted in 2000 is incompatible with Articles 12 and 16 of the Habitats Directive.

35 — Case C-394/00 *Commission v Ireland* [2002] ECR I-581, paragraph 12, and Case C-299/01 *Commission v Luxembourg* [2002] ECR I-5899, paragraph 11.

36 — *Commission v United Kingdom*, paragraphs 73 to 79.

37 — See Annex 8 to the application.

108. In the light of the above, I propose that the Court should declare that, by retaining provisions in Irish legislation which are inconsistent with Articles 12(1)(d) and 16 of the Habitats Directive, Ireland has failed to fulfil its obligations under that directive.

109. Since the complaints are well founded, Ireland must be ordered to pay the costs, in accordance with the form of order sought by the Commission and the first subparagraph of Article 69(2) of the Rules of Procedure.

V — Conclusion

110. In the light of the foregoing, I propose that the Court should:

- (1) declare that, by failing to take specific measures for the effective implementation of the system of strict protection required under Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, with the exception of measures concerning the leatherback turtle and the natterjack toad and the measures to deal with threats to bats, and by retaining provisions in Irish legislation which are inconsistent with Articles 12(1)(d) and 16 of Directive 92/43, Ireland has failed to fulfil its obligations under that directive;
- (2) order Ireland to pay the costs.