OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 25 June 2009[1]

I — Introduction

1. The parties are in dispute as to whether France has correctly transposed Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora[2] ('the Habitats Directive') in Article L. 414-1, Article L. 414-4 and Article R 414-21 of the French Code of the Environment (*Code de l'environnement*). These provisions relate to sites which are protected under Community law as a result of their importance for the conservation or restoration of certain habitat types and/or the conservation of species.

2. The following issues are the subject of dispute:

— May the Member State limit the permitted steps for the prevention of the deterioration of sites to the extent that human activities which do not have any significant effects may not be prohibited?

— Is a statutory statement to the effect that certain activities do not cause significant disturbance compatible with the prohibition of significant disturbance of species?

— Is the assessment of the implications for the site applicable to all relevant plans and projects?

1 — Original language: German.

2 — OJ 1992 L 206, p. 7; the applicable version of the Habitats Directive is that amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33).

— And do the French provisions ensure that alternatives to projects which adversely affect the integrity of a site are adequately examined?

II — Procedure and forms of order sought

3. On 18 December 2005 the Commission informed France of its concerns by means of a request for an opinion ('letter of formal notice'). After the French reply of 7 February 2006, the Commission issued a reasoned opinion on 15 December 2006. In the reasoned opinion it prescribed a final time limit of two months in which to remedy the matters of which it complained.

4. Since the reply of 28 February 2007 did not satisfy the Commission, it brought the present action on 30 May 2008 by electronic means and subsequently filed the pleading by post on 2 June 2008. It claims that the Court should:

declare that, by failing to adopt all the laws and regulations necessary to transpose correctly Article 6(2) and (3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the French Republic has failed to fulfil its obligations under that directive; and order the French Republic to bear the costs.

5. The French Republic claims that the Court should, dismiss the action; and order the Commission of the European Communities to bear the costs.

6. The parties have stated their respective opinions exclusively in writing.

III — Legal evaluation

7. The Commission considers that France has not correctly transposed Article 6(2) and (3) of the Habitats Directive.

A — *Article 6(2) of the Habitats Directive*

8. Article 6(2) of the Habitats Directive provides as follows:

'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.'

9. The Court has already held that, in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in special areas of conservation to deteriorate. [3]

10. Article L. 414-1(5) of the French Code of the Environment provides that to this end the necessary conservation or restoration measures are defined for each area in collaboration with the various interest groups. The Commission objects to the restrictions of these measures contained in the third and fourth sentences of the third subparagraph of the provision.

1. Admissibility

11. The admissibility of the pleas in law directed against the third and fourth sentences of the third subparagraph of Article L 414-1(5) of the French Code of the Environment is questionable, since in the application the Commission criticises a different version from that criticised in the pre-litigation procedure.

12. In the pre-litigation procedure the Commission referred to the version which was in force at that time as a result of Law No 2005-157 of 23 February 2005 on the development of rural areas: [4]

'They shall not result in human activities being prohibited where those activities do

3 — Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 34.

4 — JORF No 46 of 24 February 2005.

not have a significant effect on the objectives listed in the preceding paragraph. Fish farming, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force shall not constitute activities causing disturbances or having such an effect.'

13. However, in the proceedings the Commission contests the third and fourth sentences of the third subparagraph of Article L 414-1(5) in the version of Law No 2006-1772 of 30 December 2006 on water and aqueous areas, [5] which are therefore amendments which came into force after the reasoned opinion was sent but before the expiry of the time-limit it prescribed.

'They shall not result in human activities being prohibited where those activities do not have a significant effect on the *maintenance or restoration of those natural habitats and those species at a favourable conservation status*. *Fishing, aquaculture*, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force shall not constitute activities causing disturbances or having such an effect.' [6]

14. The subject-matter of proceedings brought under Article 226 EC is delimited by the pre-litigation procedure. The letter of formal notice sent by the Commission to the Member State and its reasoned opinion delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to be able to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the EC Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure. [7]

15. Further, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation

5 — JORF No 303 of 31 December 2006.

6 — Emphasis added.

7 — Case C-186/06 *Commission* v *Spain* [2007] ECR I-12093, paragraph 15 with further references.

prevailing in the Member State at the end of the period laid down in the reasoned opinion. [8]

16. If these rules were applied in a strict and formalistic way, extending the proceedings to the amendments made by the 2006 statute would be an inadmissible expansion of the subject-matter of the action when compared with the reasoned opinion. In the form of the pre-litigation procedure the action would be unfounded, on the other hand, because when the time-limit in the reasoned opinion expired, the offensive provisions no longer existed in the form in which the Commission criticised them.

17. However, where the legislation contested in the pre-litigation procedure has, on the whole, been maintained by new measures which were adopted by the Member State after the issue of the reasoned opinion and which have been challenged in the action, the judicial proceedings may be extended to the new legal situation. [9] Since — as the Commission correctly emphasises without being contradicted — the amendments to French law in 2006 only marginally affect the content of the provisions which is relevant to the proceedings, their inclusion in the proceedings is a justified amendment to the subject-matter of the proceedings.

8 — Case C-221/04 *Commission* v *Spain* [2006] ECR I-4515, paragraph 23 with further references.

9 — Case C-221/03 *Commission* v *Belgium* [2005] ECR I-8307, paragraph 39 with further references.

18. Therefore the pleas in law directed against the third and fourth sentences of the third subparagraph of Article L 414-1(5) of the French Code of the Environment are admissible.

2. Restriction to 'significant effects'

19. By the first ground for complaint, the Commission contests the third sentence of the third subparagraph of Article L 414-1(5) of the French Code of the Environment to the extent that it provides that human activities may only be restricted if they have significant effects on the maintenance or restoration at a favourable conservation status of natural habitats and of wild species.

20. It correctly emphasises that Article 6(2) of the Habitats Directive prohibits any kind of deterioration of natural habitats and the habitats of species and only includes a restriction to significant effects in relation to disturbance of species. It would be contrary to that article

if human activities could only be restricted if they have significant effects.

The second sentence provides that a plan or project is to be authorised only if in the light of the conclusions of the assessment of the implications for the site it will not adversely affect the integrity of the site.

Concept of deterioration

21. While the Court has not yet expressly defined the concept of deterioration of habitats, the case-law on Article 6(3) of the Habitats Directive may be drawn on for guidance. It is agreed in principle that Article 6(2) and (3) are aimed at the same level of protection. [10]

22. Article 6(3) of the Habitats Directive includes two references to adverse effects on special areas of conservation. According to the first sentence, any plan or project likely to have a significant effect on such a site is to be assessed as to its implications for the site in view of the site's conservation objectives.

23. As France also observes, plans or projects are likely to have a significant effect on a site, within the meaning of the first sentence of Article 6(3) of the Habitats Directive, if such a plan or project is likely to undermine the conservation objectives of the site concerned. [11] If this is the case, an assessment must be made of the measure's implications for the site in view of the site's conservation objectives.

24. It must be emphasised that an effect on conservation objectives does not presuppose any separate assessment of whether effects are significant. On the contrary, every risk of an effect on conservation objectives is enough to trigger the duty to carry out an assessment of the implications for the site. In contrast, possible effects on the site are not of concern if they do not affect the conservation objectives. [12]

10 — See, to that effect, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging (Waddenzee)* [2004] ECR I-7405, paragraph 36; Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 263; and my Opinions of 29 January 2004 in *Waddenvereniging and Vogelbeschermingsvereniging (Waddenzee)*, point 118; of 19 April 2007 in Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, point 62; and of 14 September 2007 in Case C-418/04 *Commission* v *Ireland*, point 173.

11 — *Waddenzee*, cited in footnote 10, paragraph 48.

12 — Case C-179/06 *Commission* v *Italy* [2007] ECR I-8131, point 35.

25. The outcome of the assessment of the implications for the site is decisive as to whether the plan or project may be authorised under the second sentence of Article 6(3) of the Habitats Directive. The competent authorities are to agree to the plan or project only after having ascertained, in the light of the results of the assessment of the implications for the site, that it will not adversely affect 'the integrity' of the site concerned.

26. On this basis the French Government is of the following opinion: plans or projects could be authorised if they affected a site significantly but did not affect its 'integrity'. It therefore considers it to be contradictory categorically to exclude significant effects under Article 6(2) of the Habitats Directive.

27. However, this argument is based on an erroneous distinction between significantly affecting a site and an adverse effect on 'the integrity' of a site. In fact, the conservation objectives are not only applicable in relation to the significant effect, but also in relation to whether 'the integrity' of a site is adversely affected. [13]

13 — *Commission* v *Ireland*, cited in footnote 10, paragraph 259.

28. Accordingly, the deterioration of habitats within the meaning of Article 6(2) of the Habitats Directive must also be assumed to exist if the conservation objectives of the relevant area of conservation are affected.

Effect on conservation objectives

29. France is clearly of the opinion that only *significant* effects on the maintenance or restoration of natural habitats at a favourable conservation status could also affect the conservation objectives of a site. However, pursuant to Article 1(l), Article 4(4) and Article 6(1) of the Habitats Directive, the conservation objectives of a site are concerned precisely with the maintenance or the restoration of natural habitats at a favourable conservation status. Consequently, all effects on these habitats may also affect the conservation objectives of a site, regardless of whether those effects are judged to be significant or not.

30. Whether the effects of certain activities, in particular the various activities the parties gave as examples, do in fact affect the conservation objectives may only be determined on an individual basis in the light of the specific objectives concerned. Particularly in

borderline cases, that involves a difficult scientific prediction which requires the exercise of a certain amount of discretion by the competent national authorities.

31. However, the disputed French provision does not open up the exercise of this discretion, but instead prevents the prohibition of human activities which do 'not have significant' effects on habitats. To put it more simply: these activities are *allowed* in principle. Even if specialists are convinced that an activity affects conservation objectives, it would also have to be shown that these effects are significant before the activity may be prohibited.

Interpretation of subparagraphs 1 and 3 of Article L 414-1(5) of the Code of the Environment

32. France further argues that the Commission does not correctly understand subparagraphs 1 and 3 of Article L 414-1(5) of the Code of the Environment. Human activities with significant effects on the maintenance or restoration of a favourable conservation status are prohibited in every case. If there are no such significant effects, then while activities may not be forbidden, nevertheless the objective of preventing the deterioration of habitats, which is laid down in subparagraph 1, applies. This must be ensured by means of appropriate measures.

33. If subparagraphs 1 and 3 of Article L 414-1(5) of the Code of the Environment were interpreted and applied in that way, substantial elements of Article 6(2) of the Habitats Directive would be put into effect. It would merely remain open what happens if no measures are possible within the framework of which the activity may be continued without causing damage. This lack of clarity would also be dispelled if — as the French Government submits in the rejoinder — any deterioration within the meaning of Article 6(2) of the Habitats Directive was a significant effect within the meaning of the third sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment.

34. However, the French Government's submissions fail to recognise that it is not sufficient to transpose the Habitats Directive in such a way that its objectives may possibly be achieved by an interpretation of national law which is consistent with the directive but which is not a compulsory interpretation. Even administrative practices which are consistent with the directive, which by their

nature are alterable at will by the authorities and are not always given the appropriate publicity, cannot be regarded as constituting valid fulfilment of the Member States' obligations in connection with the transposition of a directive. [14]

35. On the contrary, faithful transposition of the Habitats Directive becomes particularly important where management of the common heritage is entrusted to the Member States in their respective territories. [15] 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. [16]

36. The third sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment does not fulfil these requirements. While the interpretation submitted by the French Government is not completely impossible, the unbiased reader would be more likely to assume that activities are permitted if they do not have any significant effects on habitats. This conclusion would probably be particularly compelling for the interest groups affected, who, pursuant to the second subparagraph of Article L 414-1(5), are involved in consultation in relation to measures for the protection of sites. It has to be a concern that on this basis unnecessary conflicts arise as to whether certain effects on conservation objectives are significant or not.

37. As the Commission emphasises, the interpretation of the third sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment presented by the French Government also contradicts the understanding of Article 6(2) of the Habitats Directive which that Government advances. It submits that a prohibition on any deterioration of habitats is 'radical' [17] and tries to argue that not all types of deterioration have to be prevented.

Taking into account other interests

38. France also relies on Article 2(3) of the Habitats Directive and the third recital of that directive. Pursuant to that recital, the

14 — Case C-507/04 *Commission* v *Austria* [2007] ECR I-5939, paragraph 162 with further references.

15 — *Commission* v *United Kingdom*, cited in footnote 3, paragraph 25; Case C-98/03 *Commission* v *Germany* [2006] ECR I-53, paragraph 59; and Case C-508/04 *Commission* v *Austria* [2007] ECR I-3787, paragraph 58.

16 — *Commission* v *United Kingdom*, cited in footnote 3, paragraph 26.

17 — Paragraph 34 of the defence.

directive must be applied taking account of economic, social, cultural and regional requirements. In the light of this, it submits that Article L 414-1(5) of the Code of the Environment is an appropriate and proportionate means of transposing the directive.

39. However, there is a discrepancy between that view and the case-law on the first sentence of Article 4(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [18] ('the Birds Directive'). This provision, like Article 6(2) of the Habitats Directive, obliges the Member States to take appropriate steps, in the protection areas, to avoid deterioration of habitats or any significant disturbances of species for which the special protection areas have been designated for the purposes of the Birds Directive. [19] A failure to fulfil the obligation arising from the first sentence of Article 4(4) of the Birds Directive may not be justified by economic or social interests, since the mention of these interests in the Birds Directive does not constitute an autonomous reason for a derogation. [20]

40. The same must apply, in principle, to the Habitats Directive. In the present case it can remain open whether exceptionally the interests mentioned may override site protection in the context of Article 6(2) of the Habitats Directive [21] or whether taking into account overriding interests always requires the application of Article 6(3) and (4). The third sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment does not in fact distinguish according to whether there are overriding interests in the activity in question. Consequently, this provision may not be justified by such interests either.

Conservation measures with adverse effects

41. The French Government also objects that even measures for the conservation and development of habitats may cause their deterioration, and in spite of this they are permitted. It should also be possible to permit human activities which do not have any significant effects.

18 — OJ 1979 L 103, p. 1.

19 — Case C-96/98 *Commission* v *France* [1999] ECR I-8531, paragraph 35; Case C-117/00 *Commission* v *Ireland* [2002] ECR I-5335, paragraph 26; and Case C-388/05 *Commission* v *Italy* [2007] ECR I-7555, paragraph 26.

20 — Case C-57/89 *Commission* v *Germany* [1991] ECR I-883, paragraph 22, and *Commission* v *Spain*, cited in footnote 7, paragraph 37.

21 — See in this regard my Opinion in *Waddenzee*, cited in footnote 10, point 119. A pragmatic solution, which is already established in more recent French law (see in this regard below, point 80 et seq.) would be extending the authorisation procedure under Article 6(3) and (4) of the Habitats Directive — possibly only on a case by case basis — to the activities at issue, since overriding interests may be taken into account in that context.

42. France lists various examples in order to illustrate measures for conservation and restoration which cause degradation: in particular, various habitat types could supersede each other in the same area. Each change inevitably results in the loss of a habitat type. Certain conservation measures could also cause degradation to other habitat types or temporarily even cause degradation to the habitat type at which the measures are aimed. In this respect France mentions the regular draining of ponds which prevents silting up but temporarily removes the protected habitat type. Finally, it submits that, for example, while agriculture adversely affects certain elements of habitat types, it is required for the further use of the areas by birds.

43. However, these arguments fail to recognise that measures which are appropriate and necessary in order to achieve the conservation objectives cannot in principle be regarded as deterioration of the site within the meaning of Article 6(2) of the Habitats Directive. If certain conservation objectives conflict with one another in the sense that the conservation measures required for one objective adversely affect the achievement of another objective, then this conflict must be resolved in the context of defining these objectives.

44. The Court has already decided that, as is apparent from Article 3 and Article 4 of the Habitats Directive and in particular Article 4(4), [22] the conservation objectives may be determined in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed. [23] Therefore, if necessary, these objectives have to be weighed up against one another and priorities have to be established. For the sake of completeness, it should be mentioned here that while this very complex decision requires a broad margin of discretion for the competent authorities, it is not completely immune to review by the courts. [24]

45. On the other hand, human activities which are not defined more precisely, and which could therefore be of any nature at all, are not comparable with necessary conservation measures or a conflict between conservation objectives.

22 — This provision reads as follows: 'Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.'

23 — *Waddenzee*, cited in footnote 10, paragraph 54.

24 — See my Opinion of 23 April 2009 in Case C-254/08 *Futura Immobiliare and Others* [2009], pending before the court, point 58.

Conclusion on the review of the third sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment

46. Accordingly, it must be concluded that the third sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment is not compatible with Article 6(2) of the Habitats Directive.

3. Exceptions for certain activities

47. By its second plea, the Commission contests the fourth sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment. Fishing, aquaculture, hunting and other activities similar to hunting which are carried out within the limits of the applicable provisions are not activities which cause disturbance, according to this provision. The Commission considers this statement to be incompatible with Article 6(2) of the Habitats Directive.

48. In fact the Court has already refused, in relation to Article 6(3) of the Habitats Directive, to exclude generally certain otherwise legal activities from the need for an assessment of the implications for the site. There is of course no assurance that these activities might not significantly affect areas of conservation and therefore adversely affect their integrity. [25]

49. As a result of the same protective purpose, these considerations also apply to Article 6(2) of the Habitats Directive. Certain activities may only be classified generally as not causing disturbance for the purposes of this provision if it is guaranteed that they do not produce any disturbance which, having regard to the objectives of the Directive, could have significant effects.

50. However, the Court has already acknowledged the fact that mussel farms may have significant effects on areas of conservation. [26] It is not only the construction of a mussel farm that can cause disturbance but also its operation. This surely applies equally to fish farms. Hunting and fishing may involve lower risks, but there may still be conservation objectives which are affected by

25 — See *Commission* v *Germany*, cited in footnote 15, paragraphs 43 and 44.

26 — See in this regard *Commission* v *Ireland*, cited in footnote 10, paragraph 236 et seq.

related disturbance. Therefore it must be possible to prohibit these activities if, in relation to particular areas of conservation, they could cause disturbance which could have significant effects having regard to the objectives of the directive.

51. This conclusion is not called into question as a result of the fact that in carrying out these activities the general rules applicable to them must be followed.

52. France states that in the applicable rules relating to aquaculture in particular, the sites were identified in which this activity is permitted, and that in doing this sensitive sites were taken into account. Quotas could also be set for hunting and fishing.

53. Such measures may reduce the risk of significant disturbance, but that risk can only be completely excluded by the applicable rules for these activities if they provide for mandatory compliance with Article 6(2) of the Habitats Directive, that is to say, if they are particularly aimed at ensuring that conservation objectives under the Habitats Directive are met.[27] However, the French Government does not state this.

54. The French Government also submits that for every site a document is prepared ('document d'objectifs' — statement of objectives) which forms the basis of regulating the activities mentioned in such a way that they would not cause any significant disturbance.

55. The parties are in dispute as to the existence of an obligation to lay down such rules. The Commission relies on the wording of the corresponding legal basis, Article L 414-2(4) of the Code of the Environment, which does not establish such an obligation. On the other hand, France derives such an obligation from the first subparagraph of Article L 414-1(5) of the Code of the Environment.

56. However, the decision on this plea does not turn on that. The obvious interpretation

27 — See *Commission* v *Germany*, cited in footnote 15, paragraph 43.

of the fourth sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment is that, in relation to the activities listed there, no measures for the prevention of disturbance are permitted. Otherwise this provision would not have any regulatory effect.

57. Even if the fourth sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment were applied in practice in the way in which the French Government explains, that would not change the fact that this provision is at least capable of being misunderstood. The interest groups concerned would rely on it to the effect that their activities could not in fact be regarded as disturbance and be made subject to restrictions.

58. Consequently, the fourth sentence of the third subparagraph of Article L 414-1(5) of the Code of the Environment also fails to meet the requirements of a sufficiently clear implementation [28] of Article 6(2) of the Habitats Directive.

28 — See above in this regard, point 34.

B — *The first sentence of Article 6(3) of the Habitats Directive*

59. In addition, the Commission criticises the French implementation of Article 6(3) of the Habitats Directive. The first sentence of this provision regulates which plans and projects must be assessed as to whether they are compatible with the conservation objectives of special areas of conservation:

'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.'

60. This provision has been transposed in French law by Article L. 414-4(1) of the Code of the Environment:

'Programmes and projects for works and developments which are subject to

administrative authorisation or approval, the completion of which is likely significantly to affect a Natura 2000 site, shall be subject to an assessment of their implications in view of the site's conservation objectives. For any of those programmes which are provided for in legislative or regulatory provisions and are not subject to an impact study, the assessment shall be carried out in accordance with procedure laid down in Article L. 122-4 et seq. of this code.

The works and developments provided for in Natura 2000 contracts shall be exempt from the assessment procedure referred to in the foregoing paragraph.'

61. The Commission objects to two aspects of this implementation:

— The exception for works or developments provided for in so-called Natura 2000 contracts is too far-reaching;

and

— Projects which do not require authorisation should also be subject to an assessment of the implications for the site if they might have significant effects on the conservation objectives.

1. Natura 2000 contracts

62. The Commission objects to the fact that pursuant to the second subparagraph of Article L. 414-4(1) of the Code of the Environment, works or developments provided for in so-called Natura 2000 contracts are excluded from the assessment of the implications for the site under the first sentence of Article 6(3) of the Habitats Directive.

63. Natura 2000 contracts are agreements, provided for in French law, with the users of certain land in areas of conservation under the Habitats Directive.

64. It is not disputed that works or developments can be plans or projects for the purposes of the first sentence of Article 6(3)

of the Habitats Directive, whereas plans or projects directly connected with or necessary to the management of the site do not require an assessment of the implications for the site.

65. Therefore the success of the action on this point requires that French law allows works or developments which are not directly connected with or necessary to the management of the site to be included in Natura 2000 contracts.

66. The content of the contracts is regulated in the first sentence of subparagraph 2 of Article L 414-3(1) of the Code of the Environment:

'A Natura 2000 contract shall contain a series of commitments consistent with the policies and measures established in the statement of objectives, concerning the conservation and, if necessary, the restoration of the natural habitats and species which justified the creation of the Natura 2000 site.'

67. It is accordingly clear that in a Natura 2000 contract it is not possible to agree measures at will and in that way avoid the assessment of the implications for the site. On the contrary, the agreement must correspond to the statement of objectives for the site concerned. This document might well in essence constitute the implementation of Article 4(4) [29] and Article 6(1) [30] of the Habitats Directive, namely determining in particular the conservation objectives and the management plans for the individual sites.

68. Accordingly, France is probably correct in emphasising that the implementation measures agreed in the Natura 2000 contracts do not conflict with the conservation and restoration objectives for a site.

69. However, for the Commission this consistency with the site objectives is not sufficient. Measures which do not conflict with the objectives would not necessarily be directly connected with the management of

29 — For the text of this provision see footnote 22.

30 — This provision is worded as follows: 'For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.'

the site. The French provision would therefore deprive too many measures of an assessment of the implications for the site.

70. The exception for measures involved in the management of the site is based on the fact that they are concerned with the realisation of the conservation and restoration objectives for this site. Setting those objectives is not dissimilar, by its very nature, to an assessment of the implications for the site. It requires the scientific evaluation of a complex set of facts, namely of the respective affected site, of the species and habitats found there and of development potential. An assessment of the implications for the site in relation to these measures would therefore result in duplication of assessments.

71. Contrary to the Commission's opinion, Article 6(3) of the Habitats Directive does not compel measures relating to the management of the site to be subject to the assessment of the implications for the site if such measures could have an effect on certain conservation objectives. Setting conservation and restoration objectives may in fact require decisions to be made on conflicts between various objectives. Therefore it may be necessary to accept adverse effects on certain habitat types or species in order to facilitate other developments. Here, the relative importance of the respective conservation and restoration objectives for Natura 2000 is decisive. [31]

72. However, the substitution of the assessment of the implications for the site by decisions about the management of the site may not be extended to measures which lack the necessary direct connection to the management of the site. The Commission correctly emphasises that exceptions to general rules must be interpreted strictly. Pursuant to the first sentence of Article 6(3) of the Habitats Directive, plans and projects must in principle be individually assessed. In such an assessment procedure the specific effects of the individual measure may be taken into account.

73. In contrast, the Natura 2000 contracts are necessarily general in nature. They will scarcely be able to take into account the specific place concerned or its condition at the time of the measure. In addition, experience with similar measures from the time between the conclusion of the contract and the measure being implemented can only be incorporated by means of an amendment to the contract. If such an amendment leads to the restriction of activities, it will often be controversial and therefore difficult to achieve.

31 — See above, point 43 et seq.

74. Therefore, it is not sufficient for an exception from the assessment of the implications for the site that measures are compatible with the objectives document: measures must be directly necessary for achieving the conservation objectives. The practical effects of a corresponding adaptation of French law might be small, but it would probably contribute to avoiding misunderstandings.

75. Consequently, the second subparagraph of Article L. 414-4(1) in conjunction with the first sentence of the second subparagraph of Article L 414-3(1) of the Code of the Environment are incompatible with the first sentence of Article 6(3) of the Habitats Directive, to the extent that it is sufficient for Natura 2000 contracts to be consistent with the statement of objectives for the relevant site.

76. In so far as the Commission criticises France, in the reply — and therefore presumably too late — because Natura 2000 contracts could be concluded before a statement of objectives is agreed and therefore could be concluded irrespective of such a statement of objectives, it fails to prove this allegation, which is disputed by France.

2. Projects which do not require authorisation

77. Pursuant to the first sentence of the first subparagraph of Article L. 414-4(1) of the Code of the Environment in the version applicable here, works or developments were subject to an assessment of the implications for the site if they required authorisation.

78. Since according to the first sentence of Article 6(3) of the Habitats Directive, plans or projects must be assessed for the implications for the site where there are doubts as to the lack of significant effects, certain categories of projects may only be excluded from an assessment of the implications for the site on the basis of criteria which are capable of ensuring that those projects will not have a significant effect on the protected sites. [32]

79. On that basis, the Commission complains that there are projects which under French law did not require administrative authorisation or approval and were consequently outside the scope of the assessment procedure. Some of these projects had significant effects

32 — *Commission* v *Germany*, cited in footnote 15, paragraph 41.

on areas of conservation, having regard to the objectives of conservation of species.

Superfluous assessments may thus be avoided and specific risks targeted. However, if the relevant lists are not issued or remain incomplete, the protection of the site is necessarily adversely affected. Precisely in the area of site-specific measures, the Commission will possibly only be able to review them selectively.

80. France does not disagree with this submission, but refers to amendments to the applicable provisions, which were introduced, in part, by a law of 1 August 2008 [33] and which in other respects are being prepared.

81. These provisions provide that in principle all conceivable measures, whether they require authorisation or not, must be subject to an assessment of the implications for the site. However, it is a precondition that they are included in a national or local list produced taking into account the relevant conservation objectives.

82. It cannot be ruled out that the local lists in particular are appropriate for limiting the assessment obligation to the necessary cases in relation to measures which by their very nature have minor effects. Local lists may define both the possible measures and also the risks for conservation and restoration objectives more precisely than general provisions.

83. However, as the Commission correctly submits, the present case does not ultimately turn on these new provisions. The Court cannot take them into account, since the legal position at the time of the expiry of the time-limit which the Commission prescribed in the reasoned opinion, namely 15 February 2007, is relevant here. [34] The French Government does not dispute the fact that the provision at that time was not sufficient for the first sentence of Article 6(3) of the Habitats Directive.

84. Accordingly, it must be concluded that the first sentence of the first subparagraph of Article L. 414-4(1) of the Code of the Environment is incompatible with the first sentence of Article 6(3) of the Habitats Directive, to the extent that is restricts the assessment of the implications for the site to works or developments which require authorisation.

33 — Law No 2008-757 of 1 August 2008 concerning environmental liability and various provisions for adaptation to Community law in the environmental sector (JORF No 179 of 2 August 2008, p. 12361).

34 — See above, point 15.

C — *Assessment of alternatives*

85. Finally, the Commission criticises the fact that the assessment of the implications for the site to be submitted by the applicant for a plan or project does not have to include any presentation of alternatives if it leads to a negative conclusion. It argues that an appropriate assessment of the implications for the site within the meaning of Article 6(3) of the Habitats Directive would also have to include those alternatives.

86. At first glance it appears that this issue has already been decided contrary to the Commission's opinion. Alternatives to a plan or a project do not relate to the application of Article 6(3) of the Habitats Directive, but to the authorisation of projects or plans under Article 6(4). To the extent that it is significant for the purposes of the present case, Article 6(4) states as follows:

'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. …'

87. The application of Article 6(4) of the Habitats Directive is not mandatory. On the contrary, in the event of a negative outcome of the assessment of the implications for the site, the competent authorities have the *choice* of either refusing authorisation for the project or of authorising it under Article 6(4) of the Habitats Directive, provided that the conditions laid down therein were satisfied. [35] Consequently, an assessment of the implications for the site under Article 6(3) does not have to extend to the aspects listed in Article 6(4). [36]

88. However, on closer examination, the Commission raises a somewhat differently supported ground for complaint in the present case. Article R 414-21(3) of the Code of the Environment, which it contests, expressly concerns the eventuality that a plan or project is to be carried out in spite of the negative outcome of the assessment of the implications for the site. In such cases an assessment of the alternatives is mandatory.

35 — Case C-239/04 *Commission* v *Portugal* [2006] ECR I-10183, paragraph 25. See also *Waddenzee*, cited in footnote 10, paragraphs 57 and 60.

36 — Case C-441/03 *Commission* v *Netherlands* [2005] ECR I-3043, paragraphs 28 and 29.

89. Nevertheless, it could be replied to the Commission that its complaint does not relate to the transposition of Article 6(3) of the Habitats Directive but to an infringement of Article 6(4). If the subject-matter of the action were to be defined strictly on the basis of the Commission's application, it could therefore be concluded that this ground for complaint should be rejected. [37]

90. However, Article 6(3) of the Habitats Directive, the grounds for the application and even the reasoned opinion refer to the connection with Article 6(4) of the directive. Therefore the application should be given a new interpretation to the effect that the Commission in fact intended to complain of an infringement of Article 6(4).

91. Further, France was clearly aware of this connection, since all of the written observations in the pre-litigation procedure and the pleadings in the Court proceedings proceeded on the basis of an allegation of an infringement of Article 6(4). Consequently, the defence against the Commission's complaints was not made any more difficult as a result of the lack of a literal reference to Article 6(4) of the Habitats Directive.

37 — See *Commission* v *United Kingdom*, cited in footnote 3, paragraph 57 et seq.

92. Under point 1 of Article R 414-21(3), the applicant must explain the reasons why no other satisfactory solution exists.

'If, despite the measures provided for in paragraph II, the programme or project may have significant harmful effects on the conservation status of the natural habitats and species which justified the designation of the site or sites, then the assessment documentation must also set out:

1. the reasons why there is no other satisfactory solution and the factors which justify allowing the programme or project to be carried out under the conditions provided for in Article L. 414-4 (III) or (IV);

2. …'

93. The Commission is of the opinion that that information is not sufficient for the purposes of carrying out an assessment of alternatives. It submits that the competent authorities would in fact have to examine the alternatives for this purpose themselves.

94. First of all, the French Government states in reply that Article 6(4) of the Habitats Directive does not expressly require a presentation of the alternatives but only the absence of an alternative solution.

95. The French position is correct if the text is viewed in isolation, but it is apparent from the context and the aim of the provision that the absence of alternatives requires such a comparison. [38]

96. France further submits that demonstrating the reasons for the lack of alternatives required under point 1 of Article R 414-21(3) of the Code of the Environment calls, in practically every case, for the applicant to investigate the alternatives, describe them and map them. It says that this will be clarified in future in implementing provisions.

97. However, even if practical alternatives are presented, point 1 of Article R 414-21(3) of the Code of the Environment is not aimed at an assessment of alternatives within the meaning of Article 6(4) of the Habitats Directive.

98. This is apparent primarily from the fact that the finding as to the absence of alternatives is not for the applicant to make but for the authorising authority. The latter may, in weighing up all the advantages and disadvantages of other variants of the plan or project applied for, reach a different conclusion to that reached by the applicant. In choosing between various alternatives, the applicant will normally be influenced by his own interests. In contrast, Article 6(4) of the Habitats Directive permits an area of conservation to be affected only if this is required by imperative reasons of overriding *public* interest. Only the authorising authority can decide this.

99. The possibility of entrusting the applicant with the preparation of the assessment of the alternatives is not excluded, but the applicant's preparatory work should not prejudice the conclusion. On the contrary, the comparison should, if appropriate, lead to carrying out the project in another way which protects the area of conservation concerned. I have also already pointed out that at least the most likely alternatives must be examined on the basis of comparable scientific criteria, both with regard to their effects on the site concerned and with regard to the relevant reasons of public interest. [39]

38 — *Commission* v *Portugal*, cited in footnote 35, paragraph 36 et seq.

39 — See my Opinion of 27 April 2006 in *Commission* v *Portugal*, cited in footnote 35, point 46. See also *Commission* v *Italy*, cited in footnote 10, paragraph 83.

100. Point 1 of Article R 414-21(3) of the Code of the Environment does not express sufficiently clearly the need for the authorising authority to undertake a comprehensive comparison which is open to solutions. In particular, it is not sufficient merely to state the reasons why no alternative exists, even if in so doing alternatives are presented. On the contrary, the competent authorising authority must also be made aware of the arguments in support of the alternatives, so that it may also take these arguments into account.

101. Consequently, point 1 of Article R 414-21(3) of the Code of the Environment is incompatible with Article 6(4) of the Habitats Directive.

IV — Conclusion

102. I therefore propose that the Court should decide as follows:

'(1) The French Republic has failed to fulfil its obligations under Article 6(2), (3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, by not adopting all the laws and regulations necessary to transpose these provisions correctly.

(2) The French Republic shall bear the costs of the proceedings.'