Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

22 June 2022 *

Table of contents

* Language of the case: Slovak.

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Article 6(2) and (3) – Conservation of natural habitats and of wild fauna and flora – Directive 2009/147/EC – Article 4(1) – Conservation of wild birds – Capercaillie (*Tetrao urogallus*) – Forest management strategies – Emergency felling – Appropriate assessment of their implications – Natura 2000 sites – Special protection areas designated for the conservation of the capercaillie – Absence of measures to prevent the deterioration of habitats and of special conservation measures in certain areas)

In Case C-661/20,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 5 December 2020,

European Commission, represented by C. Hermes and R. Lindenthal, acting as Agents,

applicant,

v

Slovak Republic, represented by B. Ricziová, acting as Agent,

defendant,

THE COURT (Sixth Chamber),

composed of I. Ziemele, President of the Chamber, A. Arabadjiev (Rapporteur), President of the First Chamber, and P.G. Xuereb, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that:

– pursuant to Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive'), read in conjunction with Article 7 thereof, by exempting forest maintenance programmes ('FMPs') and their modifications, emergency felling and measures to prevent threats to forests and to eliminate the consequences of damage caused by natural disasters from the obligation, in the event that they are likely to have a significant effect on Natural 2000 areas, that they be subject to an appropriate assessment of their implications for the relevant areas in view of the conservation objectives of those areas;

– pursuant to Article 6(2), read in conjunction with Article 7 of the Habitats Directive, by failing to take appropriate steps for the prevention of the deterioration of the habitats and of significant disturbance in the special protection areas ('SPAs') designated for the conservation of the capercaillie (*Tetrao urogallus*) (SPA Nízke Tatry SKCHVU018, SPA Tatry SKCHVU030, SPA Veľká Fatra SKCHVU033, SPA Muránska planina-Stolica SKCHVU017, SPA Chočské vrchy SKCHVU050, SPA Horná Orava SKCHVU008, SPA Volovské vrchy SKCHVU036, SPA Malá Fatra SKCHVU013, SPA Poľana SKCHVU022, SPA Slovenský Raj SKCHVU053, SPA Levočské vrchy SKCHVU051 and SPA Strážovské vrchy SKCHVU028);

– pursuant to Article 4(1) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive'), by failing to take the special conservation measures applicable to the habitat of the capercaillie (*Tetrao urogallus*) in the SPAs designated for its conservation in order to ensure its survival and reproduction in its area of distribution (SPA Nízke Tatry SKCHVU018, SPA Tatry SKCHVU030, SPA Veľká Fatra SKCHVU033, SPA Muránska planina-Stolica SKCHVU017, SPA Volovské vrchy SKCHVU036, SPA Malá Fatra SKCHVU013 and SPA Levočské vrchy SKCHVU051),

the Slovak Republic has failed to fulfil its obligations.

I. Legal context

A. European Union law

1. The Habitats Directive

2 Article 2(2) of the Habitats Directive provides:

'Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.'

3 Article 6 of that directive is worded as follows:

'1. 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.

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

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

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

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

4 Under Article 7 of that directive:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of [Council] Directive 79/409/EEC [of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1)] in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive

or the date of classification or recognition by a Member State under Directive [79/409], where the latter date is later.'

2. The Birds Directive

5 Article 4(1) of the Birds Directive provides:

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

In this connection, account shall be taken of:

(a) species in danger of extinction;

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

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

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

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

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

6 The animal species which are the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution, listed in Annex I to that directive, include the capercaillie (*Tetrao urogallus*).

B. Slovak law

1. The Law on nature conservation

7 The Zákon č. 543/2002 Z. z. o ochrane prírody a krajiny (Law No 543/2002 Rec. on the protection of nature and the countryside), in the version applicable on 24 March 2019 ('the Law on nature conservation'), provides in Paragraph 4(1) and (2):

'1. Any person carrying out activities likely to endanger, deteriorate or destroy plants, animals or their habitats shall be required to carry out those activities in such a way as to avoid their unnecessary death, deterioration or destruction.

2. If any of the activities referred to in subparagraph 1 endangers the existence of plant and animal species or causes their degeneration, disturbance of their breeding capacities or the extinction of their population, the State authority responsible for nature and countryside

conservation ("authority responsible for nature conservation") shall limit or prohibit such activities, subject to prior warning.'

8 Paragraph 26(5) and (6) of that law, as amended by Law No 356/2019 Rec., which entered into force on 1 January 2020, states:

'5. In a bird protection area, activities which are likely to have an adverse effect on species that are subject to the area's conservation measures shall be prohibited. The provisions of Paragraph 14(6) and (7) shall apply *mutatis mutandis* to the implementation of emergency felling and forest protection measures in any bird protection area benefiting from a conservation level other than the fifth level.

6. The Government shall classify, by decree, the habitats of bird species of Community interest and the habitats of migratory birds species on the approved list of ornithological sites in bird protection areas and it shall establish the boundaries of bird protection areas and the list of activities referred to in subparagraph 5, including territorial and temporal restrictions on their implementation.'

9 Paragraph 28(4) to (9) of the Law on nature conservation is worded as follows:

'4. The district authority of a region's headquarters shall deliver an expert opinion on whether the draft plan or project referred to in subparagraph 3 is likely to have a significant effect on the area which is part of the network of protected areas. If the plan or project is to be implemented in the territory of several regions, that opinion shall be issued by the district authorities at the headquarters of the region in whose territory most of the plan or project is to be implemented. An expert opinion may also be issued by the Ministry or district office at the headquarters of the Region, on its own initiative, if the initiative to issue such an opinion has been identified in the course of the procedure for granting an exemption, consent or a declaration under this law. If, according to the expert's opinion, a plan or project is likely, either individually or in combination with another plan or project, to have a significant effect on that territory, it shall be the subject of an impact assessment in accordance with the specific legislation.

5. A plan or project may be approved or authorised only if it is demonstrated, on the basis of the results of an impact assessment carried out in accordance with specific legislation, that it will not adversely affect the integrity of an area which is part of the network of protected areas in the light of its conservation objectives ("adverse effect on the integrity of the area").

6. A plan or project likely adversely to affect the integrity of the territory may be approved or authorised only if it is shown that there are no alternative solutions and it must be implemented for imperative reasons of overriding public interest, including those of a social or economic nature. In that case, compensatory measures shall be taken to ensure that the overall coherence of the European network of protected areas is protected.

7. Where priority habitats or priority species are hosted in the network of protected areas, a plan or project likely adversely to affect the integrity of the site may be approved or authorised only for imperative reasons of overriding public interest relating to public health and public safety or to beneficial consequences of primary importance for the environment and for other imperative reasons of overriding public interest based on the opinion of the European Commission.

8. The question whether the approval of a plan or the authorisation for a project adversely affecting the integrity of the territory constitutes an overriding public interest shall be decided by the government on the basis of a proposal submitted by the Ministry at the request of the central governmental authority responsible for the approved plan or project. The request shall contain information on the scope, location of the proposed compensatory measures and the amount of the funding necessary for their implementation, as well as the Ministry's opinion on the scope and location of the proposed measures referred to in the information provided. The information shall be drawn up by the developer and the notice shall be issued by the Ministry at the request of the developer.

9. The proposal for compensatory measures shall be drawn up, at the expense of the developer, by a nature conservation body or a competent professional (Paragraph 55) in cooperation with a nature conservation body. For a proposal for compensatory measures, the developer shall be required to seek the consent of the Ministry before approving or authorising the plan or project.'

10 Paragraph 85(3) and (4) of that law states:

'3. In the case of a procedure designed to guarantee obligations under a special law, the authority responsible for nature conservation shall issue a decision no later than the date of the proposed activity, if the request has been made in accordance with Paragraph 82(1) at least 30 days before the start of the proposed activity.

4. Where the authority responsible for nature conservation does not issue a decision pursuant to subparagraph 3, the application is deemed to have been granted.'

11 Paragraph 104g(4) and (11) of the Law on nature conservation, as amended by Law No 356/2019 Rec., which entered into force on 4 January 2020, provides:

'4. The prohibitions laid down in Paragraph 13(1)(c) and Paragraph 14(1)(l) do not apply to activities carried out under forest maintenance programmes for which a protocol has been established, in accordance with specific rules, before 31 December 2019.

…

11. The nature conservation body (Paragraph 65(a)) shall, by 31 December 2020 at the latest, assess the effect of felling planned in forest maintenance programmes approved in accordance with subparagraph 10 in the areas of the network of European areas of conservation and, within that period, it shall ask the authority responsible for nature conservation to issue a decision in accordance with Paragraph 14(6) and (7) if the execution of such felling is likely to have an adverse effect on the species which are the subject of conservation measures in the area, or it shall propose to the authority responsible for nature conservation to submit a request for amendment of the forest maintenance programme in order to include therein measures to exclude such an adverse effect.'

2. The Law on Forests

12 Under Paragraph 14 of the Zákon č. 326/2005 Z. z. o lesoch (Law No 326/2005 Rec. on forests), in its version applicable on 24 March 2019 ('the Law on Forests'):

'1. Forests intended for special use shall be forests declared as such and the purpose of which is to meet the specific needs of society, legal entities or natural persons for which the management schemes evolve significantly in comparison with normal management ("special management scheme").

2. Forests may be declared forests intended for special use if they are:

(a) in phases I and II protection areas in which, during the abstraction of surface water or groundwater, the abundance and quality of the water spring can be ensured only by a specific method of management;

(b) in protection areas for natural mineral resources and in the internal area of a spa site;

(c) peri-urban forests or other forests with a significant health, cultural or recreational function;

(d) in a pheasantry or enclosures for the rearing of artiodactyls;

(e) in protected areas and forest plots in which habitats of Community interest or protected species are present;

(f) part of established forest genetic bases;

(g) intended for forest research and training;

(h) essential to the defence needs of the State by virtue of specific regulations ("military forests").

3. Where forests with a specific purpose within the meaning of subparagraph 2(e) are declared to be in the public interest, a proposal for a specific management scheme shall be drawn up in the context of an overall study of the state of forests (Paragraph 38(2)(b)) carried out jointly with the applicant or his or her authorised organisation.'

13 Paragraph 23(6) to (10) of that law provides:

'6. If the accidental harvest exceeds 1/20 of the total volume of timber prescribed for harvesting in a forest management programme for the forest unit or the owner concerned or cannot be carried out by the forest manager within a period of six months, he or she shall draw up a draft schedule for its implementation and submit it to the National Forestry Authority for approval. The National Forestry Authority shall inform the national authority for the protection of nature and the countryside of the opening of the procedure. An appeal against the decision approving the incidental harvest programme shall not have suspensory effect.

7. The volume of timber harvested in a meadow established for over 50 years may not be exceeded by more than 15% compared with the volume recommended in the forest management programme. If the volume of timber harvested, including that of dead and preserved trees, has

reached the harvest volume recommended in the forest management programme, increased by 15%, the forest manager may continue to carry out accidental harvests or supplementary harvests.

8. The total volume of timber prescribed for harvesting under the forest management programme for the forest entity (Paragraph 39(3)) may not be exceeded by harvesting. Where a forest entity includes more than one forest manager, neither of them may exceed the total volume of timber prescribed for harvesting in the property unit or stand.

9. Where the total quantity of timber referred to in subparagraph 8 is exceeded by carrying out accidental or special harvests, the forest manager may undertake:

(a) an urgent harvest (Paragraph 22(3)(a)) following an amendment to the forest management programme (Paragraph 43(2) and (3));

(b) an accidental harvest;

(c) an extraordinary production; or

(d) the tasks of the economic measures plan (Paragraph 40(2)(c)) on the basis of an update of the forest management programme (Paragraph 43(4)).

10. The replacement of the forest cover by deliberate harvesting shall not be reduced below 7/10 of the total replacement; this provision shall not apply if:

(a) the objective is to reduce replacement by means of regenerative mining extraction;

(b) the forest is subject to reforestation; or

(c) this results from the functional purpose of protective forests or from a specific management scheme.'

14 Paragraph 28(1) and (2) of that law provides:

'1. The forest manager shall implement preventive measures to prevent damage to forests and to implement protection and defence measures against damage caused by harmful agents; in particular, he or she shall:

(a) ensure that the emergence and development of harmful agents and forest damage caused by those agents are detected and recorded; in the event of excessive occurrences, inform the State Forestry Administration and the professional body responsible for monitoring the protection of forests of the State without delay (Paragraph 29);

(b) implement preventive measures to prevent the excessive spread of biotic disturbance, ensure the stability and resilience of forest stands;

(c) remove, as a matter of priority, sick and damaged trees from forest stands, which may be a source of increased biotic disturbance other than in areas benefiting from the fifth level of protection;

(d) promote sound forest protection practices and products, in particular by focusing on biological and biotechnical protection practices against damage caused by biotic agents;

(e) manage forests affected by immissions in accordance with the economic measures specified in the forest management programmes in order to mitigate the negative consequences of their effects;

(f) implement measures to prevent damage caused by game;

(g) implement preventive measures against forest fires;

(h) manage the forest in such a way as not to endanger the forests of other owners;

(i) respect other forest protection measures imposed by the National Forestry Authority or the professional body responsible for monitoring the protection of forests of the State (Paragraph 29).

2. In the event of a threat to forests or of damage caused by harmful agents, the forest manager is required to implement, at his or her own expense, urgent measures to prevent threats to forests and to make good the consequences of the damage; on protected sites benefiting from the fifth level of protection, that obligation arises only after the entry into force of the decision of the national authority for the conservation of nature and landscape authorising the derogation.'

15 Under Paragraph 41(13) of that law, as amended by Law No 355/2019 Rec., which entered into force on 1 January 2020:

'The maintenance programme proposal shall be approved by the authority responsible for the management of forests by means of a decision setting out in an annex the maintenance programme after issue by the forestry information system administrator of the Forests Authority (Paragraph 45) of a certificate attesting to the accuracy and conformity of the links between the digital and graphic data of the maintenance programme proposal and after the departments concerned have issued a binding opinion on the monitoring of compliance with the comments and requirements formulated in accordance with subparagraph 8; in the case of areas of the European network of conservation areas, the authority responsible for the management of forests shall also make its decision on the basis of an assessment carried out in accordance with specific rules [(note No 57aa, which refers to Paragraph 28 of the Law on nature conservation, as amended)], including a proposal for measures to ensure that the implementation of the maintenance programme will not have an adverse effect on those areas. …'

II. Pre-litigation procedure

16 In the course of 2017, the Commission received several complaints reporting that forests were being overexploited in the 12 SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*) in Slovakia and that overexploitation allegedly affected the conservation status of that protected species.

17 At meetings held in October 2017, February 2018 and from 31 May to 1 June 2018, the Commission repeatedly invited the Slovak Republic to comply with Article 6(3) of the Habitats Directive.

18 On 19 July 2018, the Commission sent that Member State, in accordance with Article 258 TFEU, a letter of formal notice, in which it considered that that Member State had failed to fulfil its obligations under the Habitats Directive and the Birds Directive in that FMPs, emergency felling and measures intended to prevent threats to forests and to eliminate the consequences of damage caused by natural disasters, which related to harmful agents, were not subject to an appropriate assessment of their implications in view of the conservation objectives of the SPAs concerned.

19 The Slovak authorities replied to the letter of formal notice on 12 September 2018, accepting that the current status of the population of capercaillie (*Tetrao urogallus*) and the current trends affecting that population were detrimental to the conservation of that protected species and that it was necessary to take measures to improve the situation, including amending the relevant legislation in force, namely the Law on nature conservation and the Law on Forests.

20 By letter of 24 January 2019, the Commission sent a reasoned opinion to the Slovak Republic, complaining that it had not correctly transposed Article 6(3) of the Habitats Directive, read in conjunction with Article 7 thereof, and had failed to fulfil its obligations under Article 6(2) of the Habitats Directive, read in conjunction with Article 7 thereof, and under Article 4(1) of the Birds Directive. The Commission called on that Member State to comply with the reasoned opinion within two months.

21 By letters of 21 March 2019, 21 June 2019, 20 December 2019 and 2 July 2020, the Slovak Republic replied to the reasoned opinion, contending that the claims that it failed to fulfil obligations were unfounded.

22 In September 2019, the Law on nature conservation and the Law on Forests were amended, with effect from 1 January 2020 and, accordingly, the Slovak Republic considered that its domestic legislation fully complied with EU law as from that date.

23 In November 2019, June 2020 and October 2020, the Commission received updated information from the complainants confirming the destruction of capercaillie (*Tetrao urogallus*) habitats, the decline of that species between 2015 and 2018 and felling carried out in the course of 2019 in SPAs designated for the conservation of that species.

24 Between May and July 2020, the Commission received information on the assessment of emergency felling as carried out in accordance with the legislative amendments which entered into force on 1 January 2020 in Slovak law.

25 The Commission took the view that the measures communicated by the Slovak Republic were insufficient to put an end to the alleged failure to fulfil obligations and decided, on 5 December 2020, to bring the present action.

III. The action

26 In support of its action, the Commission relies on three complaints, alleging infringement of (i) Article 6(3) of the Habitats Directive, (ii) Article 6(2) of that directive and (iii) Article 4(1) of the Birds Directive.

A. The first complaint, alleging infringement of Article 6(3) of the Habitats Directive, read in conjunction with Article 7 thereof

1. Arguments of the parties

27 The Commission considers that the Slovak Republic has infringed Article 6(3) of the Habitats Directive, read in conjunction with Article 7 thereof, by exempting FMPs and their modifications, emergency felling and measures to prevent threats to forests and to eliminate the consequences of damage caused by natural disasters from the obligation, in the event that they are likely to have a significant effect on Natura 2000 areas, that they be subject to an appropriate assessment of their implications for the relevant areas in view of the conservation objectives of those areas.

28 In that regard, in the first place, the Commission considers, with regard to FMPs, that they should be regarded as plans or projects which are not directly connected with or are not necessary for the management of the site in so far as they do not establish any conservation objective or measure.

29 According to the Commission, FMPs may compromise the conservation objectives of Natura 2000 sites given that their implementation may, inter alia, result in felling or the construction of logging roads on those sites, or adversely affect them. Therefore, in accordance with Article 6(3) of the Habitats Directive, the Slovak authorities are required to subject them to an appropriate assessment of their implications and to approve them only on condition that they will not adversely affect the integrity of the sites concerned.

30 The Commission notes that, at the end of the period laid down in the reasoned opinion, namely 24 March 2019, Slovak legislation did not comply with that provision since FMPs were considered to be documents for nature conservation and were thus exempt from being subject to an appropriate assessment of their implications for the affected sites and that, as from 1 January 2015, the pre-existing obligation to include in the opinion of the authority responsible for nature conservation an opinion on the appropriate assessment of implications was removed. In particular, it is apparent from the procedure laid down in Paragraph 41(13) of the Law on Forests that (i) the consultation of the authority responsible for nature conservation concerned the proposal for a plan and not the final version of that plan, although that final version could differ from the version for which that authority had issued an opinion and (ii) there was no appropriate assessment of implications if the authority did not respond within 15 days.

31 In addition, the Commission sets out the facts at the time the present action was brought, while taking account of the legislative amendments which entered into force on 1 January 2020, as mentioned in paragraph 22 of this judgment. In that regard, it finds that those amendments ensure that FMPs are subject to an appropriate assessment of their implications if it cannot be ruled out that they may have a significant effect on Natura 2000 sites and they have thus remedied the problem of non-compliance with Article 6(3) of the Habitats Directive as concerns FMPs drawn up and approved after the entry into force of those legislative amendments. By contrast, existing FMPs that have already been approved are not subject to the obligation to carry out an appropriate assessment of their implications.

32 The Commission considers that the transitional provisions laid down by those legislative amendments are not sufficient to ensure that the national legislation complies with Article 6(3) of the Habitats Directive. First, in the Commission's view, those provisions do not indicate clearly the basis on which the nature conservation body is required to undertake the

modification of an FMP which has already been approved. Second, there is no express obligation to assess whether such an FMP is likely to have a significant effect on the site concerned, nor is there an express obligation to carry out an appropriate assessment of its implications. Third, there is no guarantee that such a request from the nature conservation body seeking the amendment of an FMP which has already been approved will be granted. Fourth, only the effect of felling provided for by FMPs is assessed, and not the effect of the FMP as a whole. Fifth, it is not stated that approved FMPs can be implemented only in so far as they will not adversely affect the integrity of Natura 2000 sites.

33 In the second place, as regards emergency felling, the Commission observes, first of all, that it must be regarded as constituting plans or projects which are not necessary for Natura 2000 sites given that they do not pursue the objective of conserving habitats or species justifying the designation of a site as a 'protected site of the Natura 2000 network'.

34 Next, the Commission points out that, on expiry of the period laid down in its reasoned opinion, Paragraph 23(9) of the Law on Forests provided for the possibility of carrying out emergency felling outside the framework agreed in the FMP, without the authorisation of the authority responsible for nature conservation being required.

35 In addition, the Commission states that, in accordance with the applicable national provisions, it is necessary to inform the authority responsible for nature conservation only if the volume of timber cut exceeds 20% of the forest stands in the area covered by the FMP, or if it was felled on a continuous area of more than 0.5 hectares. Moreover, the consent of that authority was presumed to have been obtained if it did not issue an opinion within 30 days.

36 During the pre-litigation phase, the Slovak authorities also acknowledged, in that regard, that the relevant legislation did not comply with Article 6(3) of the Habitats Directive and provided information on legislative amendments which entered into force on 1 January 2020 and introduced new rules on emergency felling for each level of protection but which, in the Commission's view, remain inadequate.

37 In particular, according to Paragraph 23(14) of the Law on Forests, forest managers retain the possibility of carrying out emergency felling beyond the total volume of timber set out in the FMP. For second to fourth level sites, within which most Natura 2000 sites fall, although the authority responsible for nature conservation may, under certain conditions, prohibit or limit emergency felling, no appropriate assessment of its implications is provided for. Moreover, the Slovak authorities confirmed that, even for the fifth level of protection, it was possible, until 1 January 2020, to derogate from the prohibition of those measures with the presumed consent of the authority responsible for nature conservation.

38 Finally, the Commission observes that emergency felling represented approximately 52% of the total volume of felling carried out in Slovakia in 2017. Between 2014 and 2017, their share of the total volume of felling in Slovakia was on average in excess of 55% of the felling provided for in FMPs and, during the last decade, emergency felling represented between 40% and 65% of timber extraction in that Member State.

39 In the third place, as regards measures intended to prevent threats to forests and to eliminate the consequences of damage caused by harmful agents, which, for the same reasons as those mentioned in paragraph 33 of the present judgment, are not directly connected to the management of the sites, the Commission observes that, as is the case for emergency felling, the

decision of the authority responsible for nature conservation was required only at the fifth level of protection and, even in that case, that authority's authorisation was presumed to have been given if the authority had not adopted a decision within 30 days, and accordingly no appropriate assessment of their implications was carried out.

40 The Slovak Republic disputes the Commission's claim that the FMPs are exempt from the obligation that they be subject to an appropriate assessment of their implications. In that regard, that Member State welcomed the fact that the Commission's complaint no longer concerns FMPs which were drawn up and approved after 1 January 2020 and acknowledges, in its rejoinder, that FMPs adopted before 1 January 2020 were not subject, between 1 January 2015 and 31 December 2019, to appropriate assessments of their implications because of shortcomings in the practical application of the legislation in force during that period.

41 Nonetheless, the Slovak authorities note that, first, those FMPs were not however exempt from the appropriate assessment obligation laid down in Article 6(3) of the Habitats Directive, since Paragraph 28 of the Law on nature conservation, which transposes that provision into Slovak law, was applicable to them. Second, in accordance with Paragraph 104g(11) of the Law on nature conservation, which entered into force on 1 January 2020, the nature conservation body was required to carry out, before 31 December 2020, an assessment of the effect of deliberate felling in the context of the old FMPs on Natura 2000 network sites.

42 In addition, as regards emergency felling and other forest protection measures, the Slovak Republic observes that, since 1 January 2020, there is no longer a presumption that the authority responsible for nature conservation had given consent, as mentioned in paragraph 35 of this judgment.

43 Lastly, the Slovak Republic disputes the admissibility of the argument raised by the Commission in its reply, according to which the pre-assessment, by the authority responsible for nature conservation, of the possibility of a significant effect on the site does not lead to the adoption of a decision establishing whether emergency felling is likely to have a significant effect on Natura 2000 sites, goes beyond the scope of the alleged infringements and is therefore inadmissible.

2. Findings of the Court

(a) Admissibility

44 In order to establish the scope of the present complaint, the question whether a Member State has failed to fulfil obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (judgment of 27 February 2020, *Commission* v *Belgium (Accountants)*, C-384/18, EU:C:2020:124, paragraph 18 and the case-law cited). The subject matter of an action under Article 258 TFEU for failure to fulfil obligations is determined by the Commission's reasoned opinion, so that the action must be based on the same grounds and pleas as that opinion (judgment of 24 June 2021, *Commission* v *Spain (Deterioration of the Doñana natural area)*, C-559/19, EU:C:2021:512, paragraph 160 and the case-law cited).

45 Where the national legislation at issue in proceedings for failure to fulfil obligations is subsequently amended, the Commission does not alter the subject matter of its action by imputing its complaints against the earlier legislation to the legislation resulting from the

amendment adopted, where the two versions of the national legislation are identical in content (judgment of 27 February 2020, *Commission* v *Belgium (Accountants)*, C-384/18, EU:C:2020:124, paragraph 19 and the case-law cited).

46 Conversely, the subject matter of the dispute cannot be extended to obligations arising under new provisions which do not correspond to those arising under the original version of the measure concerned, for otherwise it would constitute a breach of the essential procedural requirements of infringement proceedings (judgment of 27 February 2020, *Commission* v *Belgium (Accountants)*, C-384/18, EU:C:2020:124, paragraph 20 and the case-law cited).

47 In the present case, in so far as the Commission imputed, in its application and in its reply, the first complaint which it initially made in its reasoned opinion, also to the legislative amendments mentioned in paragraph 22 of this judgment, it is necessary to determine whether that imputation entails, as such, a change in the scope of that complaint.

48 In the first place, as regards the first part of the first complaint, relating to the absence of an appropriate assessment of the implications of FMPs, it should be noted that Paragraph 41(13) of the Law on Forests, in the version resulting from the amendments which entered into force on 1 January 2020, now includes an express obligation for FMPs to be subject to an appropriate assessment, which, however, has no bearing on existing FMPs approved before that date, which remain outside the scope of the obligation to carry out such an assessment. That provision therefore has no equivalent in the earlier legislation.

49 In the second place, as regards the second part of the first complaint, alleging failure to carry out an appropriate assessment of emergency felling, the Commission itself acknowledges that the amendment to the Law on nature conservation introduced new rules concerning that emergency felling for each level of protection and, consequently, there are no equivalent rules in the earlier legislation.

50 In the third place, with regard to the third part of the first complaint, concerning the absence of an appropriate assessment of the measures intended to prevent threats to forests and to eliminate the consequences of damage caused by harmful agents, it is apparent from the wording of Paragraph 26(5) of the Law on nature conservation, in the version resulting from the amendments which entered into force on 1 January 2020, that that provision introduces a new rule, namely the application of rules relating to the third level of protection to protected bird areas.

51 Thus, to the extent that the amendments to the Law on nature conservation and the Law on Forests, as entered into force on 1 January 2020, significantly altered the legislative framework for the protection of forests in the Slovak territory, their content cannot be regarded as identical to that of the earlier legislation.

52 Accordingly, in so far as the first complaint also relates to those legislative amendments in question, those amendments alter the scope of that complaint and it is therefore necessary to examine it without taking account of the extension made by the Commission in the application and the reply and thus to restrict the examination to the scope of that complaint as determined in the reasoned opinion.

53 In those circumstances, the first complaint must be rejected as inadmissible in so far as it relates to amendments to the Law on nature conservation and the Law on Forests, as entered into force on 1 January 2020, and the examination of the national legislation in the version applicable at the end of the period laid down in the reasoned opinion must be confined solely to its compatibility with Article 6(3) of the Habitats Directive.

54 In the fourth and last place, as regards the inadmissibility raised by the Slovak Republic concerning the argument developed by the Commission in its reply relating to the pre-evaluation procedure, it should be noted that the fact that that institution set out, in that pleading, the first part of its first complaint, which it had already put forward in more general terms in the application in order to respond to the arguments put forward by the Slovak authorities in their defence, did not alter the subject matter of the alleged failure to fulfil obligations and therefore had no effect on the scope of the dispute (see, to that effect, judgment of 10 November 2020, *Commission* v *Italy (Limit values – PM10)*, C-644/18, EU:C:2020:895, paragraph 68 and the case-law cited).

55 It follows that that argument is admissible.

(b) Substance

(1) Preliminary observations

56 It must be recalled that Article 6 of the Habitats Directive imposes upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of that directive, to maintain, or as the case may be, restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of interest for the European Union, in order to attain that directive's more general objective, which is to ensure a high level of environmental protection as regards the sites protected pursuant to it (judgment of 7 November 2018, *Holohan and Others*, C-461/17, EU:C:2018:883, paragraph 30 and the case-law cited).

57 The Habitats Directive has the aim that the Member States take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 107 and the case-law cited).

58 Accordingly, Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 108 and the case-law cited).

59 In particular, having regard to the precautionary principle, where a plan or project not directly connected with or necessary to the management of a site may undermine the site's conservation objectives, it must be considered as being likely to have a significant effect on that site. The assessment of that risk must be made in the light, in particular, of the characteristics and specific environmental conditions of the site concerned by such a plan or project (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 112 and the case-law cited).

60 The appropriate assessment of the implications of the plan or project for the site concerned that must be carried out under the first sentence of Article 6(3) of the Habitats Directive requires that all the aspects of the plan or project which can, either by themselves or in combination with other plans or projects, affect the conservation objectives of that site must be identified in the light of the best scientific knowledge in the field (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 113).

61 It is in the light of those principles that it should be examined whether, as the Commission contends in its first complaint, the Slovak Republic failed to fulfil its obligations under Article 6(3) of the Habitats Directive.

(2) The first part of the first complaint, relating to FMPs

62 At the outset, it should be noted that the Slovak Republic does not dispute that FMPs constitute plans which are not directly connected with or necessary to the management of the 12 SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*) in its territory which must, in that capacity, be subject to an appropriate assessment of their implications.

63 It should be noted that, according to that Member State's own statements, FMPs have not been subject to an appropriate assessment of their implications since 1 January 2015 because of a lack of sufficiently complete and harmonised procedures and processes.

64 In particular, it is apparent from the documents before the Court that, as from that date, the pre-existing obligation, laid down in Paragraph 28(4) of the Law on nature conservation, to include a scientific opinion on the risk that an FMP significantly affects a Natura 2000 site in the opinion of the authorities responsible for nature conservation has been removed.

65 It follows that the first part of the first complaint must be upheld.

(3) The second part of the first complaint, relating to emergency felling

66 In the first place, it should be noted that it is not disputed that emergency fellings are plans which are not directly connected with or necessary to the management of the 12 SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*) in Slovakia, within the meaning of Article 6(3) of the Habitats Directive, which must, therefore, be subject to an appropriate assessment of their implications.

67 In the second place, it must be observed, first, that Paragraph 23(9) of the Law on Forests, read in conjunction with subparagraph 8 of that provision, authorises felling which exceeds the total quantity of timber prescribed for harvesting under the FMP without any mention of a prior assessment of the implications of such felling and without the need for the authorisation of the nature conservation body. Second, although the fifth level of protection, together with a non-intervention scheme, does not fall within the scope of the abovementioned provisions, it is clear that, in accordance with Paragraph 85(4) of the Law on nature conservation, the consent of the authority responsible for nature conservation for emergency felling in a site with that level of protection was presumed to have been acquired where it had not adopted a decision at least 30 days before the proposed activity.

68 The Slovak Republic states, in its defence, that the nature conservation body's presumed consent was only removed as from 1 January 2020.

69 In that regard, it should be observed that the option of generally exempting certain activities, in accordance with the rules in force, from the need for an assessment of their implications for the site concerned is not such as to guarantee that those activities do not adversely affect the integrity of the protected site. Thus, Article 6(3) of the Habitats Directive does not authorise a Member State to enact national legislation which allows the environmental impact assessment obligation for certain types of plans or projects to benefit from a general waiver (judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 114 and the case-law cited).

70 It follows from the foregoing that, by generally exempting emergency felling from an assessment of its implications for the SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*), the Slovak Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive.

71 Accordingly, the second part of the first complaint must be upheld.

(4) The third part of the first complaint, relating to measures intended to prevent threats to forests and to eliminate the consequences of damage caused by harmful agents

72 It should be noted at the outset that the Slovak authorities developed their arguments in that regard solely in the light of the situation prevailing following the legislative amendments made with effect from 1 January 2020, so that, for the reasons set out in paragraphs 52 and 53 of the present judgment, that argument cannot be taken into account in the assessment of the third part of the first complaint.

73 In any event, the Slovak Republic does not dispute the classification of measures intended to prevent threats to forests and to eliminate the consequences of damage caused by harmful agents as a plan or project which is not directly connected with or necessary to the management of Natura 2000 sites.

74 As the Commission states, the decision of the authority responsible for nature conservation was required only for the fifth level of protection, combined with a system of non-intervention, so that measures intended to prevent threats to forests and to eliminate the consequences of damage caused by harmful agents in the first four levels of protection were not subject to any authorisation and, therefore, to any appropriate assessment of their implications for the SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*).

75 Furthermore, for the reasons mentioned in paragraphs 67 and 68 of this judgment, it must be held that, on the date of expiry of the period prescribed in the reasoned opinion, the system of non-intervention associated with the fifth level of protection also did not make it possible to ensure that national legislation complied with Article 6(3) of the Habitats Directive.

76 Consequently, the third part of the first complaint must be upheld.

77 It follows from the foregoing considerations that, by exempting FMPs and modifications thereto, emergency felling and measures to prevent threats to forests and to eliminate the consequences of damage caused by natural disasters from the obligation, in the event that they are likely to affect

the SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*), that they be subject to an appropriate assessment of their implications for the relevant area in view of the conservation objectives of that area, the Slovak Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive, read in conjunction with Article 7 thereof.

B. The second complaint, alleging infringement of Article 6(2) of the Habitats Directive, read in conjunction with Article 7 thereof

1. Arguments of the parties

78 By its second complaint, the Commission claims that the Slovak Republic infringed Article 6(2) of the Habitats Directive by failing to take appropriate steps to prevent the deterioration of habitats and significant disturbance in the SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*).

79 In that regard, first, the Commission maintains that intensive logging, the clear-cutting of large areas which include plantations of dark monocultures and the use of pesticides damaged the habitat of the capercaillie (*Tetrao urogallus*) in the 12 SPAs concerned by reducing the area of that habitat and its specific structure and functions, thus contributing to a significant decline in the population of that species in those SPAs.

80 The Commission also observes that the greatest reduction in the habitat of the capercaillie (*Tetrao urogallus*) was identified in one of the five main SPAs, namely SPA Nízke Tatry, in which a large quantity of timber has been cut to solve the issue of subcortical insects.

81 It states that the Slovak Republic itself recognised the deterioration of the capercaillie (*Tetrao urogallus*) habitats in the context of the Capercaillie Conservation Programme 2018/2022 approved by the Ministry of the Environment in April 2018 ('the conservation programme').

82 In the second place, the Commission observes that, even though, as the Slovak Republic submitted during the pre-litigation stage, the authorities responsible for nature conservation have, between 2015 and 2018, issued 7 decisions, out of 33 applications, seeking to limit or prohibit logging, and carried out 10 inspections as a result of an alert raised by a non-governmental organisation (NGO) which led to the interruption of felling in 5 SPAs, those decisions and individual checks are not sufficient or appropriate for the conservation of the capercaillie (*Tetrao urogallus*) in that they are confined to isolated cases and have only been carried out in response to requests from individuals or NGOs. While Article 6(2) of the Habitats Directive requires a coherent, specific and comprehensive system of legal protection, the Slovak Republic did not introduce a structural system allowing felling to be carried out only if it does not significantly affect Natura 2000 sites.

83 In the third place, the Commission notes that that situation persisted at the time the present action was brought. First, although the Slovak authorities stated that they had issued opinions regarding 1 599 instances of emergency felling and issued an unfavourable opinion in almost 150 cases, there had not however been, in the 1 000 cases where strict and specific conditions had been laid down, any examination of the likelihood that the sites would be significantly affected or any appropriate assessment of their implications. Furthermore, in approximately 450 cases, no limitation was imposed and it would have therefore been possible to carry out emergency felling without an examination of the likelihood that the sites would be affected significantly and without an appropriate assessment of their implications.

84 Second, the Commission submits that the most important measures of the conservation programme, such as amendments to the decrees designating SPAs in order to prohibit harmful activities, the adoption of programmes for the maintenance of SPAs, the zoning of the largest protected areas and the introduction of a non-intervention regime associated with the fifth level of protection, have still not been adopted by the Slovak Republic.

85 Third, while the Slovak Republic explained that favourable forest management for the capercaillie (*Tetrao urogallus*) was possible if the forests concerned were classified as 'special use forests' under Paragraph 14(2)(e) of the Law on Forests, the Commission notes that the designation procedure provided for in that provision has not yet commenced.

86 Fourth, the Commission observes that the adoption of interim measures under the new Paragraph 104g(4) of the Law on nature conservation, pending the end of the process for amending the legislation, does not comply with Article 6(2) of the Habitats Directive, which lays down obligations intended to apply permanently to special areas of conservation.

87 In the first place, the Slovak Republic replies that, in order to prevent the deterioration of the capercaillie (*Tetrao urogallus*) habitats and disturbance with significant effects in the SPAs designated for the conservation of that species, the nature conservation authorities adopted decisions under Paragraph 4(2) of the Law on nature conservation, including prior to the new legislation entered into force.

88 That Member State notes, in the second place, that it intervenes continuously in order to assess and approve the plans and projects the implementation of which could have a negative impact on the habitats of the capercaillie (*Tetrao urogallus*), as is demonstrated by the discontinuation of the construction carried out in the context of the project of the company STIV Čertovica, s. r. o. on the SPA Nízke Tatry site relating to the expansion of ski runs and related constructions and, second, the ongoing assessment of the implications of the 'Optimisation of mountain transport infrastructure and of transport in Štrbské Pleso' project.

89 In the third place, the Slovak Republic identifies a number of measures, adopted between 2018 and 2020, which demonstrate, in its view, the progress made in the preparation, pre-negotiation and approval process for SPA maintenance programmes. In this respect the following are, inter alia, mentioned:

– approval of the FMP for SPA Horná Orava, which is the subject of a proposal for its transition to the 'special use forest' category, within the meaning of Paragraph 14(1) and (2)(e) of the Law on Forests;

– drawing up, in the course of 2019, of the FMP project for SPA Muránska planina-Stolica by the nature conservation body;

– preparation, between September 2020 and January 2021, of FMP scientific proposals for six SPAs (Nízke Tatry, Tatry, Veľká Fatra, Malá Fatra, Volovské vrchy et Levočské vrchy) by the nature conservation body;

– finalisation, in August 2020, of the preparation and scientific consultations on the project for the Pralesy Slovenska (primary forests of Slovakia) nature reserve which should enable that reserve to benefit from the fifth level of protection;

– drawing up, in October 2020, of a protection project in order to create the Hlucháň natural reserve, the objective of which is to protect residual forest stands on that capercaillie (*Tetrao urogallus*) initial habitat site.

90 In addition, the Slovak Republic observes that, as is apparent from an analysis carried out by the nature conservation body in July 2020, the habitats of the capercaillie (*Tetrao urogallus*) benefiting from the non-intervention scheme cover 23 952.19 hectares out of a total area of 54 346.17 hectares. However, such a scheme, which, moreover, is not an obligation laid down in Article 6(2) of the Habitats Directive, could prove to be manifestly inappropriate for that species depending on the actual conditions of the habitat in question, in particular if the forest has become too old and uniform.

91 In the fourth and last place, according to that Member State, the adequate and proportionate nature of the measures adopted in the SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*) are already partially visible. Thus, in last two years, a trend towards stabilisation of the population of individual members of that species can be observed, even though it continues to decline slightly.

2. Findings of the Court

(a) Admissibility

92 It should be noted at the outset that, in the context of the present complaint, the Commission refers to both facts preceding and subsequent to the reasoned opinion.

93 According to settled case-law, as recalled in paragraph 44 of this judgment, the question of 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 in the reasoned opinion.

94 It is also apparent from settled case-law that, in so far as an action seeks to raise a systematic and consistent failure to comply with the provisions of Article 6(2) of the Habitats Directive, the production of additional evidence intended, at the stage of the proceedings before the Court, to support the proposition that the failure thus alleged is general and consistent cannot be ruled out in principle (see, to that effect, judgment of 5 April 2017, *Commission* v *Bulgaria*, C-488/15, EU:C:2017:267, paragraph 42 and the case-law cited).

95 The Court, in particular, has already stated that the subject matter of an action for failure to fulfil obligations may extend to events which took place after the reasoned opinion, provided that they are of the same kind as the events to which the opinion referred and constitute the same conduct (judgment of 5 April 2017, *Commission* v *Bulgaria*, C-488/15, EU:C:2017:267, paragraph 43 and the case-law cited).

96 In the present case, it must be noted that although the date of expiry of the period prescribed in the reasoned opinion sent to the Slovak Republic was 24 March 2019, all the facts relied on by the Commission in its application, relating exclusively to the absence of or inadequacy of appropriate measures to protect the capercaillie (*Tetrao urogallus*) habitats in the SPAs designated for its conservation, are subsequent to that date.

97 Although they were not referred to during the pre-litigation procedure, those facts, of which the Commission became aware after that reasoned opinion had been issued, could legitimately be mentioned by the Commission in support of its application, by way of illustration of the general failure to fulfil obligations of which it complains.

(b) Substance

98 As a preliminary point, it should be recalled that an activity complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives (judgment of 24 November 2011, *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 126 and the case-law cited).

99 By virtue of that provision, the protective legal status of SPAs must guarantee the avoidance therein of the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been classified (judgment of 11 December 2008, *Commission* v *Greece*, C-293/07, not published, EU:C:2008:706, paragraph 24 and the case-law cited).

100 It is apparent from the case-law of the Court that, first, the protection of SPAs is not to be limited to measures intended to avoid external anthropogenic impairment and disturbance but must also, according to the situation that presents itself, include positive measures to preserve or improve the state of the site (judgment of 24 November 2011, *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 135).

101 Moreover, in order to establish a failure to fulfil obligations within the meaning of Article 6(2) of the Habitats Directive, the Commission does not have to prove a cause and effect relationship between a forest management activity and a significant disturbance to the capercaillie (*Tetrao urogallus*). Since Article 6(2) and (3) of the Habitats Directive is designed to ensure the same level of protection, it is sufficient for the Commission to establish the existence of a probability or risk that that activity might cause significant disturbance for that species (judgment of 24 November 2011, *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 142).

102 In the light of the foregoing, it must be held that, in the present case, the second complaint can be well founded only in so far as the Commission demonstrates to the requisite legal standard that the Slovak Republic did not take appropriate protective measures, consisting in preventing forest management activities from causing deterioration of the capercaillie (*Tetrao urogallus*) habitats and disturbance likely to affect significantly the objective of ensuring the conservation of that species pursued by the Habitats Directive.

103 In the first place, in that regard, it is apparent from the documents before the Court and, in particular, from the conservation programme that intensive felling of timber across large areas and the use of pesticides to combat subcortical insects, including during the capercaillie (*Tetrao urogallus*) breeding period, contributed to a significant decline in the population of that species in the 12 SPAs designated for its conservation, namely a decrease of 49.4% between 2004 and 2019.

104 In particular, as regards SPA Nízke Tatry, where the greatest habitat loss of the capercaillie (*Tetrao urogallus*) was identified as a result of emergency felling, the population of that species fell by 42.5% between 2004 and 2015.

105 It must be stated that the Slovak Republic continues to fail to establish that it has taken appropriate steps in order to prevent such forest management activities from causing significant disturbance for the capercaillie (*Tetrao urogallus*).

106 It is true that that Member State has demonstrated, through the approval of the conservation programme, that it is aware of the decline in the habitat and population of that species and that it intends to remedy that situation, as evidenced by the decisions adopted by the authorities responsible for nature conservation up to 20 June 2020 to limit or prohibit the deforestation in the habitat areas of the capercaillie (*Tetrao urogallus*) and the inspections carried out in certain SPAs.

107 However, those measures are incomplete in that they do not include conservation measures established systematically, depending on the ecological requirements of that species and each habitat type present in each of the 12 SPAs designated for its conservation. As the Commission observes, those measures are limited to isolated cases and were adopted, most often, only following complaints from individuals or NGOs, so that they are incomplete and attest to the lack of a structural system designed to ensure the conservation of the capercaillie (*Tetrao urogallus*) by putting an end to the deterioration of its habitat.

108 In the second place, it should be noted that the Slovak Republic refers, in its defence, to a series of measures which, in its view, are appropriate for preventing the deterioration of the habitats of the capercaillie (*Tetrao urogallus*) and the disturbance which has a significant effect on that species, namely the 'Optimisation of mountain transport infrastructure and of transport in Štrbské Pleso' project, the proposal for reclassification of SPA Horná Orava into a 'special use forest', the zoning project of the national park of SPA Muránska planina-Stolica, the scientific proposals for six SPAs, the Pralesy Slovenska (primary forests of Slovakia) and Hluchánia natural reserve projects and the integrated Natura 2000 SVK project.

109 As the Commission observes, with the exception of the Natura 2000 SVK project, the implementation of which began in January 2021, all the measures mentioned in the preceding paragraph of this judgment are at the planning stage and they had therefore not been implemented by the end of the period laid down in the reasoned opinion or at the date on which the present action was brought. Thus, in so far as they include obligations which will apply only in future, those measures cannot be described as 'appropriate measures' within the meaning of Article 6(2) of the Habitats Directive.

110 It follows that the Commission has proved, in a sufficiently documented and detailed manner, the consistent and generalised absence of appropriate protective measures, consisting in preventing forest management activities from causing deterioration of the capercaillie (*Tetrao urogallus*) habitats and disturbance of that species likely to have significant effects in view of the conservation objective of that species.

111 It follows from the foregoing considerations that, by failing to take appropriate steps to prevent deterioration of habitats and disturbance with significant effects in the SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*), the Slovak Republic has failed to fulfil its obligations under Article 6(2) of the Habitats Directive, read in conjunction with Article 7 thereof.

C. The third complaint, relating to infringement of Article 4(1) of the Birds Directive

1. Arguments of the parties

112 By its third complaint, the Commission alleges that the Slovak Republic has failed to fulfil its obligations under Article 4(1) of the Birds Directive by failing to adopt the special conservation measures applicable to the habitat of the capercaillie (*Tetrao urogallus*) in the SPAs designated for its conservation in order to ensure its survival and reproduction in its area of distribution.

113 In particular, the Commission stresses that that provision establishes a method of managing SPAs similar to that laid down in Article 6(1) of the Habitats Directive, so that SPAs are subject to a protection regime similar to that of the special areas of conservation referred to in the latter provision. Consequently, the obligation to provide for special conservation measures referred to in Article 4(1) of the Birds Directive includes the obligation to lay down conservation objectives and measures specific to the site concerned, which must actually be implemented.

114 The Commission observes that, at the date of expiry of the period prescribed in the reasoned opinion, the Slovak Republic had not adopted special conservation measures concerning the habitat of the capercaillie (*Tetrao urogallus*) in 11 of the 12 SPAs designated for its conservation. In addition, the Commission notes that, at the date on which the present action was brought, seven SPAs designated for the conservation of that species, including the most important site for that species, namely SPA Nizke Tatry, did not have maintenance programmes for the conservation areas.

115 In particular, the Commission observes that, although Paragraph 26(6) of the Law on nature conservation allows activities which have an adverse effect on the conservation of the capercaillie (*Tetrao urogallus*) to be prohibited by decree of the Government, that Member State has not put in place such prohibitions. That failure was acknowledged by the Slovak authorities themselves since the conservation programme requires that decrees designating SPAs be amended in order to introduce prohibitions on activities which have a negative effect on that species, which, at the time the present action was brought, is still not the case.

116 At the outset, as regards admissibility, the Slovak Republic submits that, contrary to what is stated in the Commission's application, the third complaint raised by that institution relates, in reality, only to 7 SPAs and not to 11 or 12 SPAs.

117 Furthermore, that Member State contends, in its rejoinder, that the reference by the Commission, in its reply, to the case-law, as referred to in paragraph 100 of the present judgment, according to which special conservation measures must not be limited to measures intended to avoid external anthropogenic impairment and disturbance but must also, according to the situation that presents itself, include positive measures to preserve or improve the state of the site, is inadmissible in that it constitutes a new complaint.

118 As regards the substance, the Slovak Republic states, first, that the nature conservation body has prepared a proposal for permanent monitoring sites for the monitoring of the capercaillie (*Tetrao urogallus*) in the context of the draft 'Quality of the Environment' operational programme entitled 'Monitoring of species and habitats of Community interest within the meaning of the Habitats Directive and the Birds Directive'. In total, 54 sites of that species were proposed for monitoring, both within SPAs and outside them, so that, according to that Member

State, monitoring includes a representative sample of the population. The Slovak Republic states that that monitoring is carried out through a supplier selected in a tender procedure which has not yet been finalised.

119 In the second place, the Slovak Republic notes, first, that the implementation of the approved maintenance programmes is regularly evaluated and, second, that, as at 10 March 2021, out of 72 measures proposed in order to achieve the objectives of protecting the capercaillie (*Tetrao urogallus*) in the SPAs designated for its conservation, 68 of them are in the process of being implemented.

120 In the third place, that Member State submits that the preparation of scientific projects for the maintenance programmes for six SPAs was completed between September 2020 and January 2021. For the remaining SPA, SPA Muránska planina-Stolica, a proposal for the creation of a national park enjoying temporary protection for a period of two years was announced on 24 January 2020. That protection also applied to the 76 sites covered by the proposal for the natural reserve 'Pralesy Slovenska' since the publication, between September and November 2020, of the public notices concerning them.

121 The Slovak Republic concludes that the temporary lack of maintenance programmes does not however mean that, pending their approval, conservation measures were not implemented on the sites concerned to protect the capercaillie (*Tetrao urogallus*).

2. Findings of the Court

(a) Admissibility

122 In the first place, as regards the subject matter of the third complaint, it should be noted that the present complaint seeks to raise the Slovak Republic's systematic and persistent failure to comply with Article 4(1) of the Birds Directive. In the light of the case-law referred to in paragraphs 94 and 95 above, it must be held that the facts of which the Commission became aware after the issue of its reasoned opinion could legitimately be invoked by that institution in support of its application.

123 Furthermore, it is important to note, as does the Slovak Republic, that although the Commission has developed, in the application, arguments relating to the absence of special conservation measures concerning the habitat of the capercaillie (*Tetrao urogallus*) in 11 of the 12 SPAs designated for its conservation, the application's paragraph drawing conclusions in that regard and the heads of claim thereof refer not to those 11 SPAs, but only to 7 of them, namely SPA Nízke Tatry SKCHVU018, SPA Tatry SKCHVU030, SPA Veľká Fatra SKCHVU033, SPA Muránska planina-Stolica SKCHVU017, SPA Volovské vrchy SKCHVU036, SPA Malá Fatra SKCHVU013 and SPA Levočské vrchy SKCHVU051.

124 Therefore, in the assessment of the third complaint, account must be taken only of the arguments which the Commission raised concerning those seven SPAs.

125 In the second place, as regards the plea of inadmissibility raised by the Slovak Republic, it is sufficient to note that, in its reply, the Commission merely reproduced a citation in the case-law which has the sole effect of setting out an argument which the Commission had already put

forward more generally in the application, which consists in recalling that measures specific to SPAs provided for in Article 4(1) of the Birds Directive must be implemented effectively by complete, clear and precise measures.

126 Therefore, it must be held that that citation in the case-law does not alter the subject matter of the alleged failure to fulfil obligations and has no bearing on the scope of the proceedings (see, to that effect, judgment of 10 November 2020, *Commission* v *Italy (Value limits – PM10)*, C-644/18, EU:C:2020:895, paragraph 68 and the case-law cited) and, accordingly, the Slovak Republic's plea of inadmissibility must be rejected.

(b) Substance

127 It is necessary from the outset to recall that, in accordance with Article 4(1) of the Birds Directive, the designation of a territory as an SPA for the conservation of a species entails the lasting preservation of the constitutive characteristics of the habitat in that area, the survival of the species in question and its reproduction being the objective justifying the designation of that area (judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 35).

128 In particular, that provision requires, if it is not to be rendered redundant, that the conservation measures necessary for maintaining a favourable conservation status of the protected habitats and species within the site concerned not only be adopted, but also, and above all, be actually implemented (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 213).

129 In the light of those preliminary clarifications, it is necessary to examine whether, as the Commission submits, the Slovak authorities failed to fulfil their obligation to adopt special conservation measures concerning the habitat of the capercaillie (*Tetrao urogallus*).

130 In that regard, first, it should be noted that the Slovak Republic accepts, in its defence, that the seven SPAs covered by the third complaint are precisely those for which maintenance programmes have not yet been adopted.

131 By contrast, that Member State contends that it is aware of the necessity and urgency of ensuring sufficient protection for the capercaillie (*Tetrao urogallus*) and that it has thus availed itself, effectively, of all the legal tools made available to it by the Law on nature conservation.

132 That assertion is not, however, substantiated by any reference to a maintenance programme actually adopted and implemented within the seven SPAs concerned. Although it is true, as is apparent from the Slovak Republic's defence and the documents annexed thereto, that that Member State drew up and prepared a number of projects to ensure the conservation of the capercaillie (*Tetrao urogallus*) habitats in the SPAs designated for that purpose, such as, in particular, the zoning of the national park 'Muránska planina-Stolica' and the creation of the 'Pralesy Slovenska' natural reserve, the fact remains that they are projects which have neither been finalised nor, even more so, implemented either by the date of expiry of the period prescribed in the reasoned opinion or by the date on which the present proceedings were brought.

133 Second, as regards special conservation measures adopted following decisions by the authorities responsible for nature conservation taken on the basis of Paragraph 4(2) of the Law on nature conservation, it is apparent from the information in the file submitted to the Court that those measures are temporary measures and must be extended by the adoption of subsequent

decisions, so that the protection provided by that provision cannot provide a lasting guarantee that the conservation status of the capercaillie (*Tetrao urogallus*) species and its habitats will remain favourable within the SPAs concerned.

134 It follows that the Commission has demonstrated to the requisite legal standard that the Slovak Republic had not complied with the requirements of Article 4(1) of the Birds Directive. Consequently, the third complaint, alleging infringement of that provision, is well founded.

135 It follows from the foregoing considerations that, by failing to adopt the special conservation measures applicable to the habitat of the capercaillie (*Tetrao urogallus*) in the SPAs designated for its conservation in order to ensure its survival and reproduction in its area of distribution (SPA Nízke Tatry SKCHVU018, SPA Tatry SKCHVU030, SPA Veľká Fatra SKCHVU033, SPA Muránska planina-Stolica SKCHVU017, SPA Volovské vrchy SKCHVU036, SPA Malá Fatra SKCHVU013 and SPA Levočské vrchy SKCHVU051), the Slovak Republic has failed to fulfil its obligations under Article 4(1) of the Birds Directive.

136 The action brought by the Commission must therefore be upheld in its entirety.

137 Having regard to the whole of the above considerations, it must be held that:

– by exempting FMPs and modifications thereto, emergency felling and measures to prevent threats to forests and to eliminate the consequences of damage caused by natural disasters from the obligation, in the event that they are likely to have a significant effect on Natura 2000 areas, that they be subject to an appropriate assessment of their implications for the relevant area in view of the conservation objectives of that area;

– by failing to take appropriate steps for the prevention of the deterioration of the habitats and of significant disturbance in the SPAs designated for the conservation of the capercaillie (*Tetrao urogallus*) (SPA Nízke Tatry SKCHVU018, SPA Tatry SKCHVU030, SPA Veľká Fatra SKCHVU033, SPA Muránska planina-Stolica SKCHVU017, SPA Chočské vrchy SKCHVU050, SPA Horná Orava SKCHVU008, SPA Volovské vrchy SKCHVU036, SPA Malá Fatra SKCHVU013, SPA Poľana SKCHVU022, SPA Slovenský Raj SKCHVU053, SPA Levočské vrchy SKCHVU051 and SPA Strážovské vrchy SKCHVU028);

– by failing to adopt the special conservation measures applicable to the habitat of the capercaillie (*Tetrao urogallus*) in the SPAs designated for its conservation in order to ensure its survival and reproduction in its area of distribution (SPA Nízke Tatry SKCHVU018, SPA Tatry SKCHVU030, SPA Veľká Fatra SKCHVU033, SPA Muránska planina-Stolica SKCHVU017, SPA Volovské vrchy SKCHVU036, SPA Malá Fatra SKCHVU013 and SPA Levočské vrchy SKCHVU051),

the Slovak Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive, read in conjunction with Article 7 thereof, Article 6(2) of the Habitats Directive, read in conjunction with Article 7 thereof, and Article 4(1) of the Birds Directive.

IV. Costs

138 Pursuant to Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Slovak Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Sixth Chamber) hereby:

1. Declares:

– **by exempting forest maintenance programmes and modifications thereto, emergency felling and measures to prevent threats to forests and to eliminate the consequences of damage caused by natural disasters from the obligation, in the event that they are likely to have a significant effect on Natura 2000 areas, that they be subject to an appropriate assessment of their implications for the relevant areas in view of the conservation objectives of those areas;**

– **by failing to take appropriate steps for the prevention of the deterioration of the habitats and of significant disturbance in the special protection areas (SPAs) designated for the conservation of the capercaillie (*Tetrao urogallus*) (SPA Nízke Tatry SKCHVU018, SPA Tatry SKCHVU030, SPA Veľká Fatra SKCHVU033, SPA Muránska planina-Stolica SKCHVU017, SPA Chočské vrchy SKCHVU050, SPA Horná Orava SKCHVU008, SPA Volovské vrchy SKCHVU036, SPA Malá Fatra SKCHVU013, SPA Poľana SKCHVU022, SPA Slovenský Raj SKCHVU053, SPA Levočské vrchy SKCHVU051 and SPA Strážovské vrchy SKCHVU028);**

– **by failing to adopt the special conservation measures applicable to the habitat of the capercaillie (*Tetrao urogallus*) in the SPAs designated for its conservation in order to ensure its survival and reproduction in its area of distribution (SPA Nízke Tatry SKCHVU018, SPA Tatry SKCHVU030, SPA Veľká Fatra SKCHVU033, SPA Muránska planina-Stolica SKCHVU017, SPA Volovské vrchy SKCHVU036, SPA Malá Fatra SKCHVU013 and SPA Levočské vrchy SKCHVU051);**

the Slovak Republic has failed to fulfil its obligations under Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, read in conjunction with Article 7 thereof, Article 6(2) of Directive 92/43, read in conjunction with Article 7 thereof, and Article 4(1) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds;

2. Orders the Slovak Republic to pay the costs.

[Signatures]