*339 Stadt Papenburg v Bundesrepublik Deutschland

(C-226/08)

European Court of Justice (Second Chamber)

14 January 2010

[2010] Env. L.R. 19

J.-C. Bonichot , acting for the President of the Second Chamber , C.W.A. Timmermans , K. Schiemann , P. K#ris and L. Bay Larsen (Rapporteur), JJ. ; E. Sharpston , A.G. :

January 14, 2010

Conservation; Dredging; EU law; Germany; Habitats; Sites of Community Importance

H1 *Nature conservation—Habitats Directive—permission granted for dredging operations—adjacent area considered as possible Site of Community Interest—whether Member State able to refuse agreement to draft list of "SCIs" on grounds other than nature conservation—whether ongoing dredging works authorised before transposition of the Directive required to undergo assessment of their effects pursuant to art.6(3) or (4) where continued after inclusion of site in the list of SCIs*

H2 A local authority (P) issued a consent to a shipyard to carry out dredging of the River Ems to allow access from the shipyard out to sea in 1994. That decision was definitive and had the effect of granting permission to future dredging operations. In 2006, the German government (D) indicated to the Commission (C) that parts of the Ems situated downriver from P's area, could be accepted as a possible Site of Community Interest (SCI) within the meaning of Directive 92/43 (Habitats Directive) [1992] OJ L206/7 . C then included those parts of the Ems in its draft list of SCIs and requested that D give its agreement. P then brought proceedings seeking to prevent D giving its agreement, claiming that an agreement on the part of that Member State would amount to a breach of the administrative autonomy which it had under German constitutional law. P was concerned that, if parts of the River Ems were included in the list of SCIs, the dredging operations required for the shipyard and local seaport would in future, and in every case, have to undergo the assessment provided for in art.6(3) and (4) of the Directive. D considered that taking into account those interests when deciding whether to give the agreement at issue in the main proceedings would contravene Community law. Under art.4(2) of the Directive, the Member State was permitted to take the decision whether to give agreement only on the basis of nature conservation criteria. In domestic proceedings, the following questions were referred to the ECJ: ***340**

"(1) Does the first subparagraph of Article 4(2) of [the Habitats Directive] allow a Member State to refuse to agree to the Commission's draft list of [SCIs], in relation to one or more sites, on grounds other than nature conservation?

(2) If Question 1 is answered in the affirmative: Do those grounds include the interests of municipalities and associations of municipalities, in particular their plans, planning intentions and other interests with regard to the further development of their area?

(3) If Questions 1 and 2 are answered in the affirmative: Do the third recital in the preamble to [the Habitats Directive], Article 2(3) of the directive or other provisions of Community law even require that such grounds be taken into account by the Member States and the Commission when giving agreement and establishing the list of [SCIs]?

(4) If Question 3 is answered in the affirmative: Would it be possible – under Community law – for a municipality which is affected by the inclusion of a particular site in the list to claim in legal proceedings after final adoption of the list that the list infringes Community law, because its interests were not, or not sufficiently, taken into account?

(5) Must ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of [the Habitats Directive], undergo an assessment of their implications pursuant to Article 6(3) or (4) of the directive where they are continued after inclusion of the site in the list of [SCIs]?"

H3 **Held:**

H4 (1) The answer to the first question was that art.4(2) had to be interpreted as not allowing a Member State to refuse to agree to the inclusion of one or more sites in the draft list of SCIs drawn up by C on grounds other than environmental protection. That meant that the second, third and fourth questions did not require answering.

H5 (2) In response to the fifth question, under art.6(3) , a plan or project likely to have a significant effect on the site concerned could not be authorised without a prior assessment of its implications for the site (Landelijke Verenigung (C-127/02) [2004] E.C.R. I-7405). An activity consisting of dredging works in respect of a navigable channel could be covered by the concept of "project" within the meaning of art.1(2) of Directive 85/337 , which referred to "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources". As the definition of "project" in that Directive was relevant to defining the concept of a "plan or project"; in the Habitats Directive , such an activity might be considered to be covered by the concept of "project" in art.6(3) .

H6 (3) Article 6(3) and (4) had to be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which were not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive , had, to the extent that they constituted a project and were likely to have a significant effect on the site concerned, to undergo an assessment of their implications for that site pursuant to those provisions where they were continued after inclusion of the site in the list of SCIs pursuant to art.4(2) . ***341** If they could be regarded as constituting a single operation, the works could be considered to be one and the same project for the purposes of art.6(3) . In that case, as such a project had been authorised before the expiry of the time-limit for transposing the Habitats Directive , it would not be subject to the requirements relating to the procedure for prior assessment. Nevertheless, if the site concerned were included in the list of SCIs, the implementation of such a project would be covered by art.6(2) of the Habitats Directive . Before C adopted that list, a site already included in a national list transmitted to it could not, by virtue of art.4(1) , be subject to interventions which risked seriously compromising its ecological characteristics.

H7 **Cases referred to:**

Aklagaren v Mickelsson (C-142/05) [2009] All E.R. (EC) 842

Bund Naturschutz in Bayern eV v Freistaat Bayern (C-244/05) [2006] E.C.R. I-8445

Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED) (C-60/98) [1999] E.C.R. I-3939; [2000] 1 C.M.L.R. 587; [2000] E.C.D.R. 1

Commission v Austria (C-209/04) [2006] E.C.R. I-2755; [2006] Env. L.R. 39

Commission v Belgium (247/85) [1987] E.C.R. 3029

Commission v Finland (C-342/05) [2007] E.C.R. I-4713; [2008] Env. L.R. D1

Commission v Ireland (C-418/04) [2007] E.C.R. I-10947

Commission v Italy (C-388/05) [2007] E.C.R. I-7555

Eckelkamp v Belgium (C-11/07) [2008] E.C.R. I-6845; [2008] 3 C.M.L.R. 44

Finanzamt Hamburg-Am Tierpark v Burda GmbH (formerly Burda Verlagsbeteiligungen GmbH) (C-284/06) [2008] E.C.R. I-4571; [2009] 2 C.M.L.R. 12

Firma Wolfgang Oehlschlager v Hauptzollamt Emmerich (104/77) [1978] E.C.R. 791 ECJ

Germany v Commission (278/84) [1987] E.C.R. 1; [1988] 1 C.M.L.R. 632 ECJ

Germany v Commission (C-512/99) [2003] E.C.R. I-845

Kühne & Heitz NV v Productschap voor Pluimvee en Eiren (C-453/00) [2004] E.C.R. I-837; [2006] 2 C.M.L.R. 17

Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (C-127/02) [2004] E.C.R. I-7405; [2005] 2 C.M.L.R. 31; [2005] Env. L.R. 14

Liga Portuguesa de Futebol Profissional (C-42/07) [2010] 1 C.M.L.R. 1

Pokrzeptowicz-Meyer (C-162/00) [2002] E.C.R. I-1049; [2002] 2 C.M.L.R. 1

R. v Secretary of State for the Environment Ex p. Royal Society for the Protection of Birds (RSPB) (C-44/95) [1996] E.C.R. I-3805; [1996] 3 C.M.L.R. 411; [1997] Env. L.R. 442

R. v Secretary of State for the Environment, Transport and the Regions Ex p. First Corporate Shipping Ltd (C-371/98) [2000] E.C.R. I-9235; [2001] 1 C.M.L.R. 19; [2001] Env. L.R. 34

Societe Italiana Dragaggi SpA v Ministero delle Infrastrutture e dei Trasporti (C-117/03) [2005] E.C.R. I-167; [2005] 2 C.M.L.R. 56; [2005] Env. L.R. 31

Verenigung voor Energie Milieu en Water v Directeur van de Dienst Uitvoering en Toezicht Energie (C-17/03) [2005] E.C.R. I-4983; [2005] 5 C.M.L.R. 8

World Wildlife Fund (WWF) v Autonome Provinz Bozen (C-435/97) [1999] E.C.R. I-5613; [2000] 1 C.M.L.R. 149; [2000] Env. L.R. D 14

***342**

H8 **Legislation referred to:**

Directive 79/409 (Wild Birds) [1979] OJ L103/1 art.4

Directive 85/337 (EIA) [1985] OJ L175/40 art.1

Directive 92/43 (Habitats) [1992] OJ L206/7 arts 1 , 2, 3, 4, and 6 and Annexes I–III

EC Treaty arts 2 , 10 and 234

H9 **Representation**

K. Füßer , Rechtsanwalt, appeared on behalf of Stadt Papenburg.

W. Ewer , Rechtsanwalt, appeared on behalf of Bundesrepublik Deutschland.

B. Eggers and D. Recchia , appeared on behalf of the Commission.

OPINION [1]

AG1 The municipality of Papenburg (Stadt Papenburg) is a port city on the river Ems in Lower Saxony, Germany. It is known for its large shipyard, the Meyer-Werft, which was founded in 1795 and currently specialises in building cruise liners. [2]

AG2 Each time before a ship with a deep draught is navigated from the shipyard to the North Sea, special dredging operations have to be carried out. Pursuant to a planning decision of the Wasser- und Schiffahrtsdirektion Nordwest (Waterways and Navigation Directorate for the North-West Region) of May 31, 1994, Stadt Papenburg, Landkreis Emsland (the district of Emsland), and the Wasser- und Schiffahrtsamt Emden (Emden Waterways and Navigation Office) were granted permission to dredge the Ems where required. The river is naturally suited only for ships with a draught of up to 6.3 metres. The dredging is designed to enable ships with a draught of 7.3 metres to reach the sea.

AG3 This planning decision replaces all necessary further authorisations required under German public law and cannot be legally contested. [3] The actual dredging operation in each individual case does not therefore require further permission or authorisation.

AG4 Parts of the river situated downriver from Stadt Papenburg's local authority area were notified by Germany to the Commission on February 17, 2006 under the description "Lower Ems and Outer Ems (DE 2507-331)" as a possible site of Community importance within the meaning of Directive 92/43 (the Habitats Directive). [4]

AG5 The Commission included the site in its draft list of sites of Community importance in the Atlantic region and requested the Federal Government to agree thereto pursuant to the first subparagraph of art.4(2) of the Habitats Directive . Germany wishes to give its agreement. Stadt Papenburg fears that, if the Lower Ems and Outer Ems were included in the list of site of Community importance, an assessment pursuant to art.6(3) and (4) of the Habitats Directive would in the future be required before every dredging operation. The outcome of such an assessment would be completely uncertain; and the expenditure and costs involved would increase considerably.

AG6 On February 20, 2008, Stadt Papenburg brought an action before the Verwaltungsgericht Oldenburg (Administrative Court, Oldenburg), requesting that the Bundesrepublik Deutschland (the Federal Government) be ordered not to give that agreement. In this reference for a preliminary ruling, the Administrative Court, ***343*** Oldenburg asks the court for clarification on the interpretation of arts 2(3) , 4(2) , and 6(3) and (4) of the Habitats Directive . [5]

Legal framework

The Habitats Directive

AG7 The third recital in the preamble to the Habitats Directive states:

> ‘‘… the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; … the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities.’’

AG8 Article 1 contains a number of definitions:

> “For the purpose of this Directive:
>
> …
>
> (k) *site of Community importance* [‘SCI’] means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned….
>
> (l) *special area of conservation* [‘SAC’] means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;
>
> …’’

AG9 Article 2(3) states:

> ‘‘Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.’’

AG10 Article 3 provides:

> ‘‘1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range. ***344*** The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC .
>
> 2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4 , sites as special areas of conservation taking account of the objectives set out in paragraph 1.

…''

AG11 Article 4 provides:

''1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host.…The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site.…

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the seven biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of [SCIs] drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5per cent of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the [SCIs] in their territory.The list of sites selected as [SCIs], identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21. [6] ''

…

4. 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 [SAC] 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. ***345***

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph2 it shall be subject to Article 6(2), (3) and (4).''

AG12 Article 6 provides:

''1. For [SACs], 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 [SACs], 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.

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.''

AG13 Annex III , Stage 2, entitled "Assessment of the Community importance of the sites included on the national lists", provides as follows:

''1. All the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as [SCIs].

2. The assessment of the Community importance of other sites on Member States' lists, i.e. their contribution to maintaining or re-establishing, ****346*** at a favourable conservation status, a natural habitat in Annex I or a species in Annex II and/or to the coherence of Natura 2000 will take account of the following criteria:

(a) relative value of the site at national level;

(b) geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

(c) total area of the site;

(d) number of natural habitat types in Annex I and species in Annex II present on the site;

(e) global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic or unique aspect of its features and the way they are combined.''

AG14 Article 28(2) of the Grundgesetz (Basic Law or GG) reads as follows [7] :

> ‘‘Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by … law, associations of municipalities shall also have the right [to administrative autonomy] according to the laws. The guarantee of [administrative autonomy] shall extend to the [basic elements] of financial autonomy; these [basic elements] shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.’’

AG15 As interpreted by the referring court, the right of local self-administration guaranteed under this provision also includes the right for municipalities to have their interests taken into account where measures going beyond the local level have a lasting effect upon the development of the municipality or cause lasting interference with plans of the municipality which are sufficiently concrete and established. That also applies to measures outside its local authority area, in so far as the municipality, notwithstanding the geographical distance, is clearly and particularly affected.

The main proceedings and the questions referred

AG16 Before the referring court, Stadt Papenburg argued that its right to self-government, which is protected under art.28(2) GG, would be infringed by Germany agreeing, pursuant to the first subparagraph of art.4(2) of the Habitats Directive , to the draft list of SCIs in the Atlantic region drawn up by the Commission.

AG17 It argued that, as a seaport and shipyard location, its planning and investments and its economic development depend on ensuring that the Ems remains navigable for large seagoing ships. ***347**

AG18 The Federal Government contends that the action should be dismissed. It is of the opinion that to take into account the interests asserted by the applicant when deciding whether to give its agreement to the draft list of SCIs would contravene Community law. Under the first subparagraph of art.4(2) of the Habitats Directive , a Member State is permitted to take the decision whether to give its agreement only on grounds of nature conservation. The Federal Government argues in the alternative that, if the Habitats Directive did allow local authority interests to be taken into account, the applicant could go to court to claim that they had been disregarded even after the list had been adopted. There would therefore be no need for “preventive” prohibition of the Federal Government’s agreement to the draft list.

AG19 The Administrative Court, Oldenburg, granted Stadt Papenburg interim relief by a decision of March 31, 2008. The Federal Government is thereby prohibited from giving its agreement until judgment is delivered on the action in the main proceedings.

AG20 The Administrative Court, Oldenburg, has decided to stay the proceedings and refer the following questions to the court for a preliminary ruling:

> ‘‘(1) Does the first subparagraph of Article 4(2) of [the Habitats Directive] allow a Member State to refuse to agree to the Commission’s draft list of [SCIs], in relation to one or more sites, on grounds other than nature conservation?
>
> (2) If Question 1 is answered in the affirmative: Do those grounds include the interests of municipalities and associations of municipalities, in particular their plans, planning intentions and other interests with regard to the further development of their area?
>
> (3) If Questions 1 and 2 are answered in the affirmative: Do the third recital in the preamble to Directive 92/43/EEC , Article 2(3) of the directive or other provisions of Community law even require that such grounds be taken into account by the Member

States and the Commission when giving agreement and establishing the list of [SCIs]?

(4) If Question 3 is answered in the affirmative: Would it be possible – under Community law – for a municipality which is affected by the inclusion of a particular site in the list to claim in legal proceedings after final adoption of the list that the list infringes Community law, because its interests were not, or not sufficiently, taken into account?

(5) Must ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of Directive 92/43/EEC , undergo an assessment of their implications pursuant to Article 6(3) or (4) of the directive where they are continued after inclusion of the site in the list of [SCIs]?''

AG21 Written observations have been submitted by Stadt Papenburg and by the Commission.

AG22 A hearing was held on March 26, 2009 at which Stadt Papenburg, the Federal Government, and the Commission made oral submissions. ***348**

Analysis

First question

AG23 Article 4 of the Habitats Directive sets out the procedure for classifying natural sites as SACs, divided into several stages with corresponding legal effects, which is intended in particular to enable the Natura 2000 network to be realised, as provided for by art.3(2) of the Directive. [8]

AG24 Under Stage 1 of that procedure, on the basis of the applicable criteria set out in Annex III to the Habitats Directive together with relevant scientific information, each Member State is to propose and transmit to the Commission a list of sites, indicating which natural habitat types in Annex I and native species in Annex II are to be found there (art.4(1)). Under Stage 2, the Commission is to establish, on the basis of the applicable criteria set out in Annex III and in agreement with each Member State, a draft list of SCIs drawn from the Member States' lists. The list of sites selected as SCIs, identifying those which host one or more priority natural habitat types or priority species, is adopted by the Commission (art.4(2)). Once a SCI has been so adopted, the Member State concerned must designate that site as a SAC (art.4(4)). As soon as a site is placed on the list adopted by the Commission in accordance with the third subparagraph of art.4(2) , it is subject to arts 6(2), (3) and (4) (art.4(5)).

AG25 The first question seeks to ascertain whether grounds other than nature conservation can be relied on by Germany in Stage 2 of that procedure to refuse its agreement to the Commission's draft list of SCIs.

AG26 In First Corporate Shipping , [9] the court was asked whether a Member State was entitled or obliged to take account of economic, social and cultural requirements and regional and local characteristics when deciding which sites to propose to the Commission under Stage 1. The court noted that the criteria as regards Stage 1 set out in Annex III are "defined exclusively in relation to the objective of conserving the natural habitats or the wild fauna and flora listed in Annexes I and II respectively. It follows that Article 4(1) of the Habitats Directive does not as such provide for requirements other than those relating to the conservation of natural habitats and of wild fauna and flora to be taken into account when choosing, and defining the boundaries of, the sites to be proposed to the Commission as eligible for identification as [SCIs]". [10]

AG27 The court further held that to produce a draft list of SCIs capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available "an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Habitats Directive's objective of conservation of natural habitats and

wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive". The court stressed that only in that way "is it possible to realise the objective, in the first subparagraph of Article 3(1) of the Habitats Directive , of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which ***349*** may lie across one or more frontiers inside the Community". When a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States. It cannot therefore "of its own accord, whether because of economic, social or cultural requirements or because of regional or local characteristics, delete sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level". If the Member States were allowed to do so, "the Commission could not be sure of having available an exhaustive list of sites eligible as SACs, with the risk that the objective of bringing them together into a coherent European ecological network might not be achieved". [11]

AG28 The court therefore concluded that "on a proper construction of Article 4(1) of the Habitats Directive , a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as [SCIs]". [12]

AG29 Does the same reasoning apply to Stage 2 of the procedure?

AG30 In his Opinion in First Corporate Shipping , A.G. Léger considered "that it is not excluded that in the second stage, at the time of concertation between the Member States and the Commission on the selection of the SCIs, economic and social requirements may justify a site which hosts one of the natural habitat types in Annex I or native species in Annex II not being selected as an SCI, and consequently not being designated as an SAC". [13]

AG31 Contrary to what Stadt Papenburg submits, I do not believe that the judgment in First Corporate Shipping adopted that point of view. [14] Be that as it may, the question remains whether what the court held as regards Stage 1 applies equally to Stage 2.

AG32 I believe that it does.

AG33 With respect to Stage 2 of the procedure, art.4(2) of the Habitats Directive provides for the Commission to establish, in agreement with each Member State, a draft list of SCIs *on the basis of the criteria set out in Annex III (Stage 2)* . The assessment criteria set out for Stage 2, like those for Stage 1, are defined exclusively in relation to the objective of conserving the natural habitats or the wild fauna and flora listed in Annexes I and II respectively. [15] The only exception the Habitats Directive provides for is that Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5 per cent of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) *be applied more flexibly* in selecting all the SCIs in their territory (second subparagraph of art.4(2)). That exception has not been relied on here. Moreover, even if a Member State falls into this category, the Habitats Directive still does not provide for *other* criteria (for example, economic ***350*** and social) to be applied at this stage. It merely provides for the purely ecological criteria of Annex III to be applied more flexibly.

AG34 A parallel can also be drawn here with Directive 79/409 (the Birds Directive). [16] Article 4(1) and (2) of that Directive requires the Member States to take special conservation measures for certain species, and in particular to designate as Special Protection Areas (SPAs) the most suitable territories for their conservation. Article 3(1) of the Habitats Directive provides for a coherent European ecological network of SACs to be set up under the title Natura 2000, which is to include the SPAs classified by the Member States pursuant to the Birds Directive . There is therefore a close link between the two Directives. [17]

AG35 In Royal Society for the Protection of Birds (RSPB) ([18] the court was asked whether those provisions are to be interpreted as meaning that a Member State may, when designating an SPA and defining its boundaries, take account of economic requirements to the extent that they reflect imperative reasons of overriding public interest of the kind referred to in art.6(4) of the Habitats Directive . The court held that the imperative reasons of overriding public interest which could, pursuant to art.6(4) of the Habitats Directive , justify a plan or project which would significantly

affect an SPA may, where appropriate, include grounds of a social or economic nature. However, the court pointed out that although arts 6(3) and (4) of the Habitats Directive , in so far as it amended the first sentence of art.4(4) of the Birds Directive , established a procedure enabling the Member States to adopt, for imperative reasons of overriding public interest and subject to certain conditions, a plan or a project adversely affecting an SPA and so made it possible to go back on a decision classifying such an area by reducing its extent, it nevertheless did *not* make any amendments regarding *the initial stage of classification* of an area as an SPA referred to in arts 4(1) and (2) of the Birds Directive . It follows that, even under the Habitats Directive , the classification of sites as SPAs must in all circumstances be carried out in accordance with the criteria permitted under art.4(1) and (2) of the Birds Directive and that economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. [19]

AG36 Both the Habitats and the Birds Directives belong to the system set up to contribute to the formation of Natura 2000. It seems to me that it would be both inconsistent and contrary to the objective of the Habitats Directive to allow Member States to rely on economic criteria in order to refuse their agreement to the draft list of SCIs under the Habitats Directive itself, when the court has made it clear that such criteria cannot enter into the equation when selecting sites under art.4(1) and (2) of the Birds Directive as amended by the Habitats Directive .

AG37 Moreover, as the court held in Royal Society for the Protection of Birds , art.6(3) and (4) of the Habitats Directive does provide for such interests to be taken into account at a later stage. [20] Indeed, art.2(3) of the Habitats Directive announces as ***351** much by providing that measures taken pursuant to that Directive are to take account of economic, social and cultural requirements and regional and local characteristics.

AG38 However, as the Commission rightly points out, art.2(3) is not a general derogation from the rules of the Habitats Directive . Similar wording can be found in art.2 of the Birds Directive . [21] The court has held that that provision does not constitute an autonomous derogation from the general system of protection under the Birds Directive, but that it none the less shows that the Directive takes into consideration both the necessity for effective protection of birds and, among other things, the requirements of the economy. [22] That statement seems to me to be equally applicable, mutatis mutandis, to art.2(3) of the Habitats Directive .

AG39 Substantively, the provision in the Habitats Directive that allows economic interests to be taken into account is therefore art.6(4) .

AG40 Article 6 of the Habitats Directive obliges the Member States to establish the necessary conservation measures for SACs (art.6(1)), to avoid, in SACs, the deterioration of natural habitats and the habitats of species and disturbance of listed species (art.6(2)) and to subject “any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon” to an *ex ante* assessment of its likely impact on the SAC (art.6(3)). Article 6(4) provides (limited) scope for a Member State to override a negative *ex ante* assessment and authorise the plan or project in question for imperative reasons of overriding public interest, *including those of a social and economic nature* . The Member State is, however, then required to take the necessary compensatory measures to ensure that the overall coherence of Natura 2000 is protected and must inform the Commission of those measures. [23]

AG41 Article 6(4) of the Habitats Directive therefore provides, explicitly, a point in the procedure at which economic interests may be taken into account. In my view, in order not to jeopardise the objective of the Habitats Directive , it is imperative that during the selection of SCIs only nature conservation criteria are taken into account. As and when the full list of SCIs has been established in accordance with those criteria, economic interests such as the one at issue in the main proceedings may be taken into account. Exceptionally, these may mean that a plan or project that could potentially have a negative impact on the site goes ahead none the less.

AG42 I therefore conclude that the first subparagraph of art.4(2) of the Habitats Directive does not allow a Member State to refuse to agree to the Commission’s draft list of SCIs on grounds other than nature conservation grounds.

AG43 The second, third and fourth questions posed by the national court are all premissed on an affirmative answer to the first question. In view of the way in which I propose that the court should answer the first question, there is no need to consider the second, third or fourth questions.

The fifth question

AG44 By its fifth question, the referring court asks whether ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of the ***352*** Habitats Directive , [24] must undergo an assessment of their implications pursuant to art.6(3) or (4) of the Directive where they are continued after inclusion of the site that they would potentially affect in the list of SCIs.

AG45 The answer to that question depends on whether the dredging operations at issue in the main proceedings constitute a “plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon”. Two cases may provide helpful indications in that regard.

AG46 In Landelijke Vereniging , [25] the court was asked whether mechanical cockle fishing which had been carried on for many years but for which a licence was granted annually for a limited period (with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may take place) fell within the concept of “plan” or “project” within the meaning of art.6(3) of the Habitats Directive . Noting that the Habitats Directive does not define the terms “plan” or “project”, the court referred to the definition of “project” in art.1(2) of the Environmental Impact Assessment Directive [26] and held that mechanical cockle fishing fell within its scope. The court held the definition of “project” in the Environmental Impact Assessment Directive to be relevant to defining the concept of “plan or project” in the Habitats Directive , as these Directives seek to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment. An activity such as mechanical cockle fishing was therefore covered by the concept of “plan or project” in art.6(3) of the Habitats Directive .

AG47 The court went on to rule that the fact that the activity had been carried on periodically for several years on the site concerned and that a licence had to be obtained for it every year, each new issuance of which required an assessment both of the possibility of carrying on that activity and of the site where it might be carried on, did not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive . [27]

AG48 In infringement proceedings against Ireland, the Commission argued that, contrary to art.6(3) and (4) of the Habitats Directive , Ireland had permitted drainage work likely to have a significant effect on the Glen Lough SPA without having previously required an appropriate assessment of that project or employed an adequate decision-making procedure. [28] In her Opinion in that case, A.G. Kokott recalled that, for a definition of “project” the court had already based itself on the definition set out in Article 1(2) of the Environmental Impact Assessment Directive in Landelijke Verenigung . [29] The Advocate General therefore considered that maintenance measures can also constitute interventions in the natural surroundings ***353*** and landscape, in particular where they give rise to deterioration of a habitat most suitable for the conservation of birds. [30] That approach was adopted by the court. [31]

AG49 In the light of those judgments, it seems to me that the dredging at issue in the main proceedings clearly falls within the definition of “plan or project” within the meaning of art.6(3) of the Habitats Directive . The court’s approach seems to be to “cast the net wide” in defining the scope of art.6(3) of the Habitats Directive . [32]

AG50 However, the order for reference indicates that the dredging was definitively approved by the local authorities before the expiry of the time-limit for transposition of the Habitats Directive without the need for any other future permission. Does that imply that all the dredging operations in the Ems (past and future) are to be considered as one single “plan or project”, which was definitively authorised before the expiry of the time-limit for transposition of the Habitats Directive and which therefore remains outside the scope of art.6(3) ?

AG51 It is clear that art.6(3) and (4) of the Habitats Directive cannot logically be applied retrospectively. In respect of the dredging that had already been both authorised and implemented before the expiry of the time-limit for transposition of the Habitats Directive , no *ex ante* assessment could therefore have been required. [33]

AG52 However, as I suggested in my Opinion in Commission v Italy (C-388/05) , it seems to me

that “[i]f and to the extent that there are *further* projects, or further stages of the same global project that may be distinguished from earlier stages without artificiality, those would … be subject to the obligation in Article 6(3) . They would also be able (potentially, at least) to benefit from the override provisions of Article 6(4) .” [34]

AG53 I therefore take the view that any further dredging or maintenance works on the river Ems need to be subjected to the *ex ante* assessment under art.6(3) of the Habitats Directive .

AG54 In her Opinion in Landelijke Verenigung , A.G. Kokott argued that, in order effectively to avoid unintentional damage to Natura 2000 sites, all potentially harmful measures must, where possible, be subject to the procedure in art.6(3) of the Habitats Directive ; and that the terms “plan” and “project” should therefore be interpreted broadly. She took account of the fact that cockle fishing had already been carried on in its present form for many years, but took the view that neither the term “plan” nor the term “project” would preclude a measure renewed at regular intervals from being regarded on each occasion as a separate plan or project. Significantly, A.G. Kokott noted that, precisely *because* the measures in question are repeated, such an interpretation of the terms “plan” and “project” does not lead to disproportionate harm. If the effects remain the same from year to year, it can easily be determined in the next assessment that no significant effect is likely by referring to previous assessments. Where circumstances change, the need to carry out more comprehensive new assessments cannot be ruled out and is moreover justified. [35]

AG55 That approach is sensible. ***354**

AG56 I add that it seems to me that the definition of “plan or project” in art.6(3) of the Habitats Directive must be an autonomous Community definition. It cannot depend on the nature of the administrative decision authorising an activity under national law without jeopardising that Directive’s objective. Suppose, for example, that long before the expiry of the time-limit for transposition of the Habitats Directive , a Member State had taken a definitive administrative decision allowing its citizens freely to shoot wolves. [36] Such blanket permission to kill wolves would not be exempt from scrutiny under the Habitats Directive merely because of the definitive nature of the national administrative decision.

AG57 The Commission submits that the protection of legitimate expectations and of acquired rights precludes the application of procedural rules to situations that have already been authorised and that Stadt Papenburg and the Meyer-Werft have a legitimate expectation as to the navigability of the river Ems. The Commission therefore concludes that *ex ante* assessments under art.6(3) of the Habitats Directive cannot be applied to dredging operations that remain within the framework of the original authorisation under German administrative law. It suggests that art.6(2) of the Habitats Directive , which requires Member States to take appropriate steps to avoid, in SACs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated, affords adequate environmental protection.

AG58 Similarly, Stadt Papenburg relies on the judgment in Kühne & Heitz , [37] where the court held that (under specific conditions) [38] the principle of cooperation arising from art.10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the court.

AG59 That does not seem to me to be the correct approach.

AG60 In the present case, there is no question of the administrative body that took the decision permitting the dredging having to review that decision. Rather, the issue is whether a Community legislative act—here a Directive—can change a legal situation settled by an administrative decision under national law which was taken before the expiry of the time-limit for transposition of the Directive and which continues to have legal effects.

AG61 As the court stressed in Verenigung voor Energie Milieu en Water (VEMW) , the protection of legitimate expectations is unquestionably one of the fundamental principles of the Community and any trader in whom an institution has promoted reasonable expectations may rely on that principle. [39] In the present case, however, the Community institutions did nothing which suggested that the legislative situation in force before the adoption of the Habitats Directive would continue indefinitely. ***355**

AG62 It is true that the German local authorities did indeed adopt a measure authorising future dredging of the Ems. However, that decision was adopted on May 31, 1994, [40] just over two years after the Habitats Directive was adopted (on May 21, 1992), albeit 10 days before the expiry of the time-limit for transposition of the Directive (June 10, 1994). [41] The court has made it clear that if a prudent and circumspect trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead protection of legitimate expectations if the measure is adopted. Here, the measure in question had already been adopted. Moreover, a Member State cannot bind the Community so that the latter is unable to undertake or pursue its policy on the environment and its task, stated in art.2 EC , to promote a high level of protection and improvement of the quality of the environment. [42]

AG63 The principle of legal certainty requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. However, an individual cannot place reliance on there being no legislative amendment whatever, but can only call into question the arrangements for the implementation of such an amendment. Equally, the principle of legal certainty does not require that there be no legislative amendment. Rather, it requires that the legislature take account of the particular situations of traders and provide, where appropriate, adaptations to the application of the new legal rules. [43]

AG64 It is, moreover, settled case law that, in the absence of transitional provisions, new rules apply immediately to the future effects of a situation which arose under the old rules [44] and that the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules. [45]

AG65 I am of course sensitive to the legitimate interest of Stadt Papenburg and of its shipbuilders that the river Ems should be navigable so that the ships they build may reach the sea. However, it is important to stress that the Habitats Directive contains provisions which do allow account to be taken of the special situation of cities such as Stadt Papenburg, through the derogation in art.6(4) . [46]

AG66 The interests of Papenburg and its shipbuilders can thus be protected without interpreting art.6(3) of the Habitats Directive in a way that is too narrow and that risks jeopardising its nature conservation objective.

AG67 If dredging the Ems involves essentially the same operations that are repeated in the same manner over time, it is reasonable to suppose that the art.6(3) *ex ante* assessment should not be too burdensome. If, in a particular instance, the dredging required exceeds the bounds of those repeated operations, a more thorough assessment should be carried out. [47] If, in spite of a negative assessment of the ***356** implications for the site, the dredging must nevertheless be carried out, [48] art.6(4) allows Germany to override that negative *ex ante* assessment and authorise the dredging. Germany would, however, then be required to take the necessary compensatory measures to protect the overall coherence of Natura 2000 and would have to inform the Commission of the measures taken.

AG68 The Commission suggests that only art.6(2) should apply. However, I recall that art.6(2) and (3) have different functions within the Habitats Directive . As the court held in Landelijke Vereniging , [49] the fact that a plan or project has been authorised under art.6(3) of the Habitats Directive renders superfluous a concomitant application of the rule of general protection laid down in art.6(2) . That is because authorisation of a plan or project under art.6(3) necessarily means that it is considered *not* likely adversely to affect the integrity of the site concerned and, consequently, *not* likely to give rise to deterioration or significant disturbances within the meaning of art.6(2) .

AG69 The court added, however, that “it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error”. Under those conditions, application of art.6(2) makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora. [50]

AG70 I therefore consider that future dredging of the river Ems will have to be subject to ex ante

assessment pursuant to art.6(3) of the Habitats Directive . Article 6(2) has a limited role to play; albeit one that is both complementary and, ultimately, important.

AG71 In consequence, I conclude that ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of the Habitats Directive must undergo an assessment of their implications pursuant to art.6(3) or (4) of the Directive where they are continued after inclusion of the site in the list of SCIs.

Conclusion

AG72 For the reasons given above, I am of the view that the questions referred by the Verwaltungsgericht Oldenburg should be answered as follows:

• The first subparagraph of art.4(2) of Directive 92/43 of May 21 1992 on the conservation of natural habitats and of wild fauna and flora does not allow a Member State to refuse to agree to the Commission's draft list of sites of Community importance on grounds other than nature conservation.

• Ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of Directive 92/43 , must undergo an assessment of their implications pursuant to art.6(3) or (4) of that Directive where they are continued after inclusion of the site in the list of sites of Community importance. ***357**

JUDGMENT [51]

1 This reference for a preliminary ruling concerns the interpretation of arts 2(3) , 4(2) and 6(3) and (4) of Directive 92/43 ([1992] OJ L206/7), as amended by Directive 2006/105 (the Habitats Directive) ([2006] OJ L363/368) .

2 The reference was made in the course of proceedings between Stadt Papenburg (the municipality of Papenburg) and Bundesrepublik Deutschland (the Federal Republic of Germany), concerning the agreement that that State intends to give to the draft list of sites of Community importance (SCIs) drawn up by the Commission of the European Communities and including a site on the River Ems downriver from that municipality's local authority area.

Legal context

Community law

3 Article 2(3) of the Habitats Directive is worded as follows:

''Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.''

4 According to art.3(1) of the Habitats Directive , "a coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II , shall enable the natural habitat types and the species habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range."

5 Article 4(1) and (2) of that Directive provides:

‘‘1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. …The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. …

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the nine biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of [SCIs] drawn from the Member States’ lists identifying those which host one or more priority natural habitat types or priority species.Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5per cent of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the [SCIs] in their territory. ***358*** The list of sites selected as [SCIs] … shall be adopted by the Commission in accordance with the procedure laid down in Article 21.’’

6 Annex III to the Habitats Directive states in Stage 2, entitled “Assessment of the Community importance of the sites included on the national lists”:

‘‘1. All the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as [SCIs].

2. The assessment of the Community importance of other sites on Member States’ lists, i.e. their contribution to maintaining or re-establishing, at a favourable conservation status, a natural habitat in Annex I or a species in Annex II and/or to the coherence of Natura 2000 will take account of the following criteria:

(a) relative value of the site at national level;

(b) geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

(c) total area of the site;

(d) number of natural habitat types in Annex I and species in Annex II present on the site;

(e) global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic or unique aspect of its features and the way they are combined.’’

7 Article 6(2), (3) and (4) of the Habitats Directive provides:

‘‘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 could 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 ***359*** 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.’’

National law

8 Article 28(2) of the Basic Law (Grundgesetz) is worded as follows:

‘‘Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by law, associations of municipalities shall also have the right to administrative autonomy according to the laws. The guarantee of administrative autonomy shall extend to the basic elements of financial autonomy; these basic elements shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.’’

9 The referring court interprets that provision as meaning that the administrative autonomy which is constitutionally guaranteed to the municipalities grants them a right to have their interests taken into account where measures going beyond the level of the municipal territory have a lasting effect on their development or cause lasting interference with plans which are sufficiently concrete and established. That also applies to measures implemented outside the municipal territory, in so far as the municipality is clearly and particularly affected.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Papenburg is a port town in Lower Saxony on the river Ems, where there is a shipyard.

11 In order to enable ships with a draught of 7.3 metres to navigate between the shipyard and the North Sea, the Ems must be deepened by means of “required dredging operations”. By a decision of May 31, 1994 of the Wasser und Schifffahrtsdirektion Nordwest (Waterways and

Navigation Directorate for the North-West Region), Stadt Papenburg, Landkreis Emsland (the district of Emsland) and the Wasser und Schifffahrtsamt Emden (Emden Waterways and Navigation Office) were granted permission to dredge that river, where required. That decision is definitive and means, in accordance with German law, that future "required dredging operations" are considered to have been granted permission.

12 On February 17, 2006, the Federal Republic of Germany indicated to the Commission that parts of the Ems situated downriver from Stadt Papenburg's local authority area, under the description "Unterems und Außenems" (Lower Ems and Outer Ems), could be accepted as a possible SCI within the meaning of the Habitats Directive . ***360**

13 The Commission included those parts of the Ems in its draft list of SCIs. It requested the Federal Republic of Germany to give its agreement thereto, pursuant to the first subparagraph of art.4(2) of the Habitats Directive .

14 On February 20, 2008, Stadt Papenburg brought an action before the Verwaltungsgericht Oldenburg (Administrative Court, Oldenburg) seeking to prevent the Federal Republic of Germany from giving its agreement. It claimed that an agreement on the part of that Member State would amount to a breach of the administrative autonomy which it has under German constitutional law.

15 According to Stadt Papenburg, as a seaport with a shipyard its planning and investments and its economic development depend on the Ems remaining navigable for large seagoing ships. It fears that, if the Lower Ems and Outer Ems were included in the list of SCIs, the dredging operations required for that purpose would in future, and in every case, have to undergo the assessment provided for in art.6(3) and (4) of the Habitats Directive .

16 The Federal Republic of Germany contends that the action should be dismissed. It is of the opinion that to take into account the interests asserted by Stadt Papenburg when deciding whether to give the agreement at issue in the main proceedings would contravene Community law. Under the first subparagraph of art.4(2) of the Habitats Directive , the Member State is permitted to take the decision whether to give agreement only on the basis of nature conservation criteria.

17 By order of March 31, 2008, which has become definitive, the Verwaltungsgericht Oldenburg granted Stadt Papenburg interim relief and prohibited the Federal Republic of Germany from giving its agreement until judgment has been delivered in the main proceedings.

18 In those circumstances, the Verwaltungsgericht Oldenburg decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

> ''(1) Does the first subparagraph of Article 4(2) of [the Habitats Directive] allow a Member State to refuse to agree to the Commission's draft list of [SCIs], in relation to one or more sites, on grounds other than nature conservation?
>
> (2) If Question 1 is answered in the affirmative: Do those grounds include the interests of municipalities and associations of municipalities, in particular their plans, planning intentions and other interests with regard to the further development of their area?
>
> (3) If Questions 1 and 2 are answered in the affirmative: Do the third recital in the preamble to [the Habitats Directive], Article 2(3) of the directive or other provisions of Community law even require that such grounds be taken into account by the Member States and the Commission when giving agreement and establishing the list of [SCIs]?
>
> (4) If Question 3 is answered in the affirmative: Would it be possible – under Community law – for a municipality which is affected by the inclusion of a particular site in the list to claim in legal proceedings after final adoption of the list that the list infringes Community law, because its interests were not, or not sufficiently, taken into account?

(5) Must ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of [the Habitats Directive], ***361** undergo an assessment of their implications pursuant to Article 6(3) or (4) of the directive where they are continued after inclusion of the site in the list of [SCIs]?''

The request to have the oral procedure reopened

19 By document lodged at the Court Registry on September 17, 2009, Stadt Papenburg requested the court to order that the oral procedure be reopened, pursuant to art.61 of the Rules of Procedure.

20 In support of its request, Stadt Papenburg states that the Advocate General, in her Opinion, expressed the answer that she proposes the court should give to the fifth question on the basis of a description of the facts which in such as to mislead the court. In particular, Stadt Papenburg states that, contrary to what the Advocate General suggests, the approval of the Wasser- und Schifffahrstsdirektion Nordwest of May 31, 1994 by which Stadt Papenburg, Landkreis Emsland and the Wasser- und Schifffahrtsamt Emden were granted permission to dredge the Ems where required is not the first such decision concerning the navigability of the river Ems. Furthermore, the Ems cannot be considered to be a river which naturally enables ships with a draught of 6.3 metres to be navigated. Such a situation is the result of previously authorised dredging operations. Finally, Stadt Papenburg also disputes the arguments raised by the Advocate General in support of her reply to the first question referred.

21 The court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with art.61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Finanzamt Hamburg-Am Tierpark v Burda GmbH (formerly Burda Verlagsbeteiligungen GmbH) (C-284/06) [2008] E.C.R. I-4571 at [37], and Liga Portuguesa de Futebol Profissional (C-42/07) [2010] 1 C.M.L.R. 1 at [31]).

22 In the present case, it is evident that Stadt Papenburg is contending, in essence, first, that certain facts underlying the Advocate General's assessment are incorrect, and, secondly, that the view expressed by the Advocate General concerning the interpretation of the first subparagraph of art.4(2) of the Habitats Directive is incorrect.

23 As regards the first point, it should be noted that, under art.234 EC , which is based on a clear separation of functions between the national courts and the Court of Justice, the latter is empowered only to give rulings on the interpretation or the validity of a Community provision on the basis of the facts which the national court puts before it (see, inter alia, Firma Wolfgang Oehlschlager v Hauptzollamt Emmerich (104/77) [1978] E.C.R. 791 ECJ at [4], and World Wildlife Fund (WWF) v Autonome Provinz Bozen (C-435/97) [1999] E.C.R. I-5613 at [31]); those facts, in conjunction with the legal material provided by the referring court, are to enable the court to give a useful answer to the questions submitted to it (see, to that effect, inter alia, Eckelkamp v Belgium (C-11/07) [2008] E.C.R. I-6845 at [28]).

24 The order for reference contains all the information necessary to enable the court to give a useful answer to the questions submitted to it and, in particular, to the first question. ***362**

25 With regard to the second point, suffice it to state that Stadt Papenburg's request contains nothing to indicate that it would be useful or necessary to reopen the oral procedure.

26 Therefore, the court, after hearing the Advocate General, holds that there is no need to order that the oral procedure be reopened.

The questions referred for a preliminary ruling

The first question

27 The first subparagraph of art.4(2) of the Habitats Directive provides that, on the basis of the criteria set out in Annex III (Stage 2) to that Directive, the Commission is to establish, in agreement with each Member State, a draft list, drawn from the Member States' lists, of SCIs for each of the biogeographical regions referred to in art.1(c)(iii) of the Directive.

28 Annex III to the Habitats Directive , which relates to the criteria for selecting sites eligible for identification as SCIs and designation as special areas of conservation, lists, so far as concerns Stage 2 in that annex, criteria for assessing the Community importance of the sites included on the national lists.

29 Those assessment criteria were defined on the basis of the objective of conserving the natural habitats or the wild fauna and flora listed respectively in Annex I or Annex II to the Habitats Directive , and of the objective of coherence of Natura 2000, namely the European ecological network of special areas of conservation which is provided for in art.3(1) of the Habitats Directive .

30 It follows that the first subparagraph of art.4(2) of the Habitats Directive , as such, does not provide for requirements other than those relating to the conservation of natural habitats and wild fauna and flora or to the setting up of the Natura 2000 network to be taken into account when the Commission, in agreement with each of the Member States, draws up a draft list of SCIs.

31 If, in the phase of the classification procedure that is governed by the first subparagraph of art.4(2) of the Habitats Directive , the Member States were permitted to refuse to give their agreement on grounds other than environmental protection, the achievement of the objective referred to in art.3(1) of the Habitats Directive would be put in danger, namely the setting up of the Natura 2000 network, which is composed of sites hosting the natural habitat types listed in Annex I to the Directive and habitats of the species listed in Annex II and which must enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

32 That would, in particular, be the case were the Member States able to refuse to give their agreement on the basis of economic, social and cultural grounds and regional and local characteristics as referred to in art.2(3) of the Habitats Directive , a provision which, moreover, as was stated by the Advocate General in AG38 of her Opinion, does not constitute an autonomous derogation from the general system of protection put in place by that Directive.

33 The answer to the first question is therefore that the first subparagraph of art.4(2) of the Habitats Directive must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of SCIs drawn up by the Commission. ***363**

The second, third and fourth questions

34 In the light of the answer given to the first question, it is not necessary to reply to the second, third and fourth questions.

The fifth question

35 By its fifth question, the referring court asks, in essence, whether ongoing maintenance works in respect of the navigable channel of the estuary at issue in the main proceedings, which are not directly connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive , must, to the extent that they are likely to have a significant effect on the site concerned, undergo an assessment of their implications for the site pursuant to art.6(3) and (4) of the Habitats Directive where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of art.4(2) of that Directive.

36 Under the first sentence of art.6(3) of the Habitats Directive , a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications for the site (Landelijke Vereniging (C-127/02) [2004] E.C.R. I-7405 at [22]).

37 Therefore, it is necessary, first, to assess whether the dredging works at issue in the main

proceedings are covered by the concept of “plan” or “project” referred to in the first sentence of art.6(3) of the Habitats Directive .

38 It should be recalled that the court, after noting that the Habitats Directive does not define the terms “plan” and “project”, has stated that the definition of “project” in the second indent of art.1(2) of Directive 85/337 is relevant to defining the concept of “plan” or “project” as provided for in the Habitats Directive (Landelijke Vereniging (C-127/02) [2004] E.C.R. I-7405 at [23], [24] and [26]).

39 An activity consisting of dredging works in respect of a navigable channel may be covered by the concept of “project” within the meaning of the second indent of art.1(2) of Directive 85/337 , which refers to “other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources”.

40 Therefore, such an activity may be considered to be covered by the concept of “project” in art.6(3) of the Habitats Directive .

41 Next, the fact that that activity has been definitively authorised under national law before the expiry of the time-limit for transposition of the Habitats Directive does not constitute, in itself, an obstacle to regarding it, at the time of each intervention in the navigable channel, as a distinct project for the purposes of the Habitats Directive .

42 If it were otherwise, those dredging works in respect of the channel concerned, which are not directly connected with or necessary to the management of the site, would, in so far as they are likely to have a significant effect on the latter, automatically be excluded from any prior assessment of their implications for that site within the meaning of art.6(3) of the Habitats Directive , and from the procedure provided for in art.6(4) .

43 Furthermore, the objective of the conservation of natural habitats and of wild fauna and flora pursued by the Habitats Directive would be at risk of not being fully achieved. ***364**

44 Contrary to what Stadt Papenburg and the Commission claim, no reason based on the principle of legal certainty or the principle of protection of legitimate expectations precludes the dredging works at issue in the main proceedings, although they have been permanently authorised under national law, from being subject to the procedure provided for in arts 6(3) and (4) of the Habitats Directive as distinct and successive projects.

45 With regard to the principle of legal certainty, this requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (VEMW (C-17/03) [2005] E.C.R. I-4983 at [80]). The Habitats Directive fulfils those requirements with regard to the situation in the main proceedings.

46 With regard to the principle of the protection of legitimate expectations, it follows from settled case law that a new rule applies immediately to the future effects of a situation which arose under the old rule and that the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules (see, inter alia, Pokrzeptowicz-Meyer (C-162/00) [2002] E.C.R. I-1049 at [50] and [55]).

47 Finally, if, having regard in particular to the regularity or nature of the maintenance works at issue in the main proceedings or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, those maintenance works can be considered to be one and the same project for the purposes of art.6(3) of the Habitats Directive .

48 In that case, as such a project has been authorised before the expiry of the time-limit for transposing the Habitats Directive , it would not be subject to the requirements relating to the procedure for prior assessment of the implications of the project for the site concerned, set out in that Directive (see, to that effect, Commission v Austria (C-209/04) [2006] E.C.R. I-2755 at [53]–[62]).

49 Nevertheless, if the site concerned were, pursuant to the third subparagraph of art.4(2) of the Habitats Directive , included in the list adopted by the Commission of sites chosen as SCIs, the implementation of such a project would be covered by art.6(2) of that Directive , a provision

which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the Directive's objectives (see Landelijke Vereniging (C-127/02) [2004] E.C.R. I-7405 at [37] and [38], and Societe Italiana Dragaggi SpA v Ministero delle Infrastrutture e dei Trasporti (C-117/03) [2005] E.C.R. I-167 at [25]). Before the Commission adopts that list, in so far as such a site is already included in a national list transmitted to the Commission for the purpose of being included in the Community list, it must not, by virtue of art.4(1) of the Habitats Directive , be subject to interventions which risk seriously compromising its ecological characteristics (Bund Naturschutz in Bayern eV v Freistaat Bayern (C-244/05) [2006] E.C.R. I-8445 at [44] and [47]).

50 In the light of the above, the answer to the fifth question is that art.6(3) and (4) of the Habitats Directive must be interpreted as meaning that ongoing maintenance ***365*** works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of art.4(2) of that Directive .

51 If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of art.6(3) of the Habitats Directive .

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

Order

On those grounds, the Court (Second Chamber) hereby rules:

1. The first subparagraph of art.4(2) of Directive 92/43 , as amended by Directive 2006/105 , must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of sites of Community importance drawn up by the European Commission.

2. Article 6(3) and (4) of Directive 92/43 , as amended by Directive 2006/105 , must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing Directive 92/43 , as amended by Directive 2006/105 , must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of sites of Community importance pursuant to the third subparagraph of art.4(2) of that Directive.

3. If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of art.6(3) of Directive 92/43 , as amended by Directive 2006/105 . ***366***

1. Opinion of E. Sharpston delivered on July 9, 2009.

2. See http://www.meyerwerft.de.

3. See para.75(1) VwVfG (Verwaltungsverfahrensgesetz—Law on administrative procedures).

4. Directive 92/43 on the conservation of natural habitats and of wild fauna and flora ([1992] OJ L206/7).

5. See below, at AG20, for the questions referred.

6. Article 21 refers to a regulatory "comitology" procedure in accordance with arts 5 and 7 of Decision 1999/468 laying down the procedures for the exercise of implementing powers conferred on the Commission ([1999] OJ L184/23).

7. Translation by the German Bundestag, available at http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf.

8. R. v Secretary of State for the Environment, Transport and the Regions Ex p. First Corporate Shipping Ltd (C-371/98) [2000] E.C.R. I-9235 at [20].

9. First Corporate Shipping Ltd (C-371/98) [2000] E.C.R. I-9235 .

10. First Corporate Shipping Ltd (C-371/98) [2000] E.C.R. I-9235 at [14]–[16].

11. First Corporate Shipping Ltd (C-371/98) [2000] E.C.R. I-9235 at [22]–[24].

12. First Corporate Shipping Ltd (C-371/98) [2000] E.C.R. I-9235 at [25].

13. See Opinion of A.G. Léger in First Corporate Shipping Ltd (C-371/98) [2000] E.C.R. I-9235 point 51.

14. Stadt Papenburg specifically refers to First Corporate Shipping Ltd (C-371/98) [2000] E.C.R. I-9235 at [20]: "Moreover, Article 4 of the Habitats Directive sets out the procedure for classifying natural sites as SACs, divided into several stages with corresponding legal effects, which is intended in particular to enable the Natura 2000 network to be realised, as provided for by Article 3(2) of the directive." I fail to see how that paragraph can be read as saying anything at all about the Advocate General's position.

15. See, as regards Stage 1, First Corporate Shipping Ltd (C-371/98) [2000] E.C.R. I-9235 at [15]. The criteria for Stage 2 are set out in AG13 above.

16. Directive 79/409 on the conservation of wild birds ([1979] OJ L103/1).

17. See also Article 7 of the Habitats Directive which forms a link between that Directive and the Birds Directive by providing that the obligations under arts 6(2), (3) and (4) of the Habitats Directive replace those under art.4(4) of the Birds Directive in respect of areas classified as SPAs pursuant to art.4(1) or similarly recognised under art.4(2) of the Birds Directive . See further my Opinion in Commission v Italy (C-388/05) [2007] E.C.R. I-7555 at point 40.

18. R. v Secretary of State for the Environment Ex p. Royal Society for the Protection of Birds (RSPB) (C-44/95) [1996] E.C.R. I-3805 .

19. RSPB (C-44/95) [1996] E.C.R. I-3805 at [38]–[41].

20. RSPB (C-44/95) [1996] E.C.R. I-3805 at [41].

21. "Member States shall take the requisite measures to maintain the population of the species referred to in art.1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level."

22. Commission v Belgium (247/85) [1987] E.C.R. 3029 at [8].

23. See my Opinion in Commission v Italy (C-388/05) [2007] E.C.R. I-7555 at points 44 and 45.

24. As I noted in my Opinion in Commission v Italy (C-388/05) [2007] E.C.R. I-7555 at point 16, fn.7, determining the exact date is not as straightforward as one might assume. The court has now determined that June 10, 1994 is the correct date: see Commission v Ireland (C-418/04) [2007] E.C.R. I-10947 at [32].

25. Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (C-127/02) [2004] E.C.R. I-7405 .

26. Council Directive 85/337 of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment ([1985] OJ L175/40). Article 1(2) provides that “the execution of construction works or of other installations or schemes” and “other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources” are to be considered as “projects”.

27. Landelijke Verenigung (C-127/02) [2004] E.C.R. I-7405 at [21]–[28].

28. Commission v Ireland (C-418/04) [2007] E.C.R. I-10947 at [248].

29. Landelijke Verenigung(C-127/02) [2004] E.C.R. I-7405 at [24].

30. Opinion in Commission v Ireland (C-418/04) [2007] E.C.R. I-10947 at point 175.

31. Commission v Ireland (C-418/04) [2007] E.C.R. I-10947 at [248]–[257].

32. A parallel may perhaps be drawn with art.28 EC , for which the court similarly casts the net wide. See, for example, Aklagaren v Mickelsson (C-142/05) [2009] All E.R. (EC) 842 at [24], and the case law cited there.

33. See, by analogy, my Opinion in Commission v Italy (C-388/05) [2007] E.C.R. I-7555 at point 51.

34. Commission v Italy (C-388/05) at point 52.

35. Opinion of A.G. Kokott in Landelijke Verenigung (C-127/02) [2004] E.C.R. I-7405 at points 30–38.

36. Hunting of wolves was at issue in Commission v Finland (C-342/05) [2007] E.C.R. I-4713 .

37. Kühne & Heitz NV v Productschap voor Pluimvee en Eiren (C-453/00) [2004] E.C.R. I-837 .

38. Namely, “where under national law, it has the power to reopen that decision; the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC ; and the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court” (Kühne & Heitz (C-453/00) [2004] E.C.R. I-837 at [28]).

39. Verenigung voor Energie Milieu en Water v Directeur van de Dienst Uitvoering en Toezicht Energie (C-17/03) [2005] E.C.R. I-4983; [2005] 5 C.M.L.R. 8 at [73] and [74] and the case law cited there.

40. See AG2 above.

41. See footnote 24 above.

42. See further arts 3(1)(l) , 6 , and 174–176 EC . See, by analogy, VEMW (C-17/03) [2005] E.C.R. I-4983 at [74]–[75] and [79] and the case law cited there.

43. VEMW (C-17/03) [2005] E.C.R. I-4983 at [80] and [81].

44. See, inter alia, Pokrzeptowicz-Meyer (C-162/00) [2002] E.C.R. I-1049 at [50]; and Germany v Commission (C-512/99) [2003] E.C.R. I-845 at [46].

45.

See, inter alia, Germany v Commission (278/84) [1987] E.C.R. 1 at [36]; Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED) (C-60/98) [1999] E.C.R. I-3939 at [25]; and Pokrzeptowicz-Meyer (C-162/00) [2002] E.C.R. I-1049 at [55].

46. See, by analogy, VEMW (C-17/03) [2005] E.C.R. I-4983; [2005] 5 C.M.L.R. 8 at [82].

47. See also the Opinion of A.G. Kokott in Landelijke Vereniging (C-127/02) [2004] E.C.R. I-7405 at point 38.

48. There are almost certainly no “alternative solutions” for getting vessels from the shipyard to the sea; and “imperative reasons of overriding public interest” include those of a social or economic character.

49. Landelijke Vereniging (C-127/02) [2004] E.C.R. I-7405 at [35] and [36].

50. Landelijke Vereniging (C-127/02) [2004] E.C.R. I-7405 at [37].

51. Language of the case: German.