OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 9 June 2005 [1]

I — Introduction

1. In these Treaty infringement proceedings, the Commission complains that the United Kingdom has failed to transpose adequately various provisions of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive'). [2]

2. The Commission therefore first carried out the pre-litigation procedure required under Article 226 EC, sending a reasoned opinion to the United Kingdom on 18 July 2001 in which it set a final deadline of two months for fulfilment of the obligations under the Habitats Directive.

3. Since the Commission does not consider the measures adopted in the United Kingdom in the meantime to be sufficient, it claims that the Court should:

— declare that, by failing correctly to transpose the requirements of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive; and

— order the United Kingdom to pay the costs.

4. The United Kingdom Government contends that the Court should:

— declare that the United Kingdom of Great Britain and Northern Ireland has fulfilled its obligations under Directive 92/43 on the conservation of natural habitats and of wild fauna and flora; and

— order the Commission to pay the costs.

1 — Original language: German.
2 — OJ 1992 L 206, p. 7.

5. The claim of the United Kingdom Government is to be construed as seeking dismissal of the action. Should the claim be seeking beyond that — in accordance with its wording — a declaration that the United Kingdom has acted in accordance with the directive, it would to that extent be inadmissible, since Community law makes no provision for such an action.

II — Examination of the pleas in law

6. The Commission finds fault with the transposition of various articles of the Habitats Directive. The United Kingdom Government on the one hand defends itself with arguments on the individual provisions but, on the other, submits that any lacunae are immaterial since a general clause ensures that the Habitats Directive is complied with.

A — *Transposition by a general clause*

7. The United Kingdom Government relies, first of all, generally on the Court's case-law relating to the necessary faithfulness of a directive's transposition. According to that case-law, the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. On the contrary, a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts. [3]

8. The United Kingdom Government submits that there is a general context of that kind under United Kingdom law. The relevant competent authorities are under a statutory obligation to exercise their functions so as to secure compliance with the Habitats Directive. This results, for England and Wales and for Scotland, from regulations 3(2) and (4) of the Conservation (Natural Habitats, &c.) Regulations 1994 ('the C(NH)R 1994'), for Northern Ireland from regulation 3(2) and (4) of the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 ('the C(NH)R(NI) 1995') and for Gibraltar from section 17A of the Nature Protection Ordinance 1991 as amended in 1995 ('the NPO'). In the view of the United Kingdom Government, this obligation ensures that any ambiguities or shortcomings in the specific implementing provisions do not jeopardise attainment of the directive's objectives. It states that the

3 — Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 18

High Court of England and Wales has expressly confirmed this interpretation. [4]

9. The Commission counters by stating that the Court has repeatedly insisted that 'the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty'. [5] It submits that precisely in the case of the Habitats Directive specific transposition is necessary, since the requisite measures relate to specific conservation objectives for a site, habitat or species; according to the logic of the United Kingdom Government, however, it would have sufficed to transpose the entire directive by a general clause of that kind.

10. The Court recently summarised its case-law on the necessary faithfulness of a directive's transposition as follows:

'While it is ... essential that the legal situation resulting from national implementing measures is sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations, it is none the less the case that, according to the very words of the third paragraph of Article 249 EC, Member States may choose the form and methods for implementing directives which best ensure the result to be achieved by the directives, and that provision shows that the transposition of a directive into national law does not necessarily require legislative action in each Member State. The Court has thus repeatedly held that it is not always necessary formally to enact the requirements of a directive in a specific express legal provision, since the general legal context may be sufficient for implementation of a directive, depending on its content.' [6]

11. The Court has, however, held specifically with regard to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [7] ('the Wild Birds Directive') that faithful transposition becomes particularly important where management of the common heritage is entrusted to the Member States in their respective territories. [8] This consideration equally applies to the Habitats Directive. [9]

4 — The United Kingdom Government relies on *Friends of the Earth* v *Environment Agency and Able* [2003] EWHC 3193, paragraphs 57 and 59.

5 — The Commission relies on *Commission* v *Germany*, cited in footnote 3, paragraphs 18 and 24, Case C-225/97 *Commission* v *France* [1999] ECR I-3011, paragraph 37, and Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32.

6 — Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 55.

7 — OJ 1979 L 103, p. 1.

8 — Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 9, Case 236/85 *Commission* v *Netherlands* [1987] ECR 3989, paragraph 5, and Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53.

9 — Opinions of Advocate General Fennelly in Case C-256/98 *Commission* v *France* [2000] ECR I-2487, point 20, and of Advocate General Tizzano in Case C-75/01 *Commission* v *Luxembourg* [2003] ECR I-1585, point 38.

12. The general clause can therefore be recognised as an adequate implementing measure only if there is no possible room for doubt as to the requirements of the Habitats Directive on the part of the national authorities applying the law and the persons affected. It cannot be determined in the abstract whether that is the case, but only on the basis of the individual implementing provisions.

B — *The individual pleas in law*

13. Specifically, the Commission finds fault with the transposition of Article 6(2), Article 6(3) and (4), Article 11, Article 12(1)(d), Article 12(4), Article 14(2), Article 15 and Article 16 of the Habitats Directive and with the absence of rules applying the Habitats Directive beyond territorial waters.

1. Article 6(2) of the Habitats Directive — Prohibition of deterioration

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

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

15. Both parties proceed on the basis that the United Kingdom has adopted the necessary provisions to transpose Article 6(2) of the Habitats Directive with regard to controlling potentially disturbing operations.

16. The Commission argues, however, that Article 6(2) requires in addition that impairment of a special area of conservation through neglect or inactivity be prevented. The competent authorities must therefore have powers to take measures to avoid the deterioration of a site. This is ensured by new rules in England and Wales, Northern Ireland and Scotland, but not in Gibraltar.

17. The United Kingdom Government agrees with the Commission, subject to the qualification that only 'non-natural' deterioration, resulting, for example, from poor husbandry, is to be avoided and not natural deterioration, for example climate change or

flooding due to a rise in sea level. It states that this obligation is adequately transposed in Gibraltar, in particular by means of the aforementioned general clause.

(a) The inclusion of neglect and inactivity

18. When interpreting Article 6(2) of the Habitats Directive, the case-law has hitherto for the most part not considered neglect and inactivity. In the view of Advocate General Fennelly, this provision contains a prohibition on activities which could lead to the deterioration of protected habitats or the disturbance of protected species. [10] The judgment on the Owenduff-Nephin Beg Complex also concerned activities which should have been prevented, namely overgrazing and afforestation. [11] In that case, only Advocate General Léger considered Article 6 (2) of the Habitats Directive also to have been infringed because no measures likely to remedy the damage caused by those activities were implemented. [12]

19. The wording of Article 6(2) of the Habitats Directive in fact points to an obligation to implement certain conservation measures. According to this provision, the Member States must avoid deterioration. It can be established only from the particular deterioration to be feared whether certain conduct must be prohibited or conservation measures adopted in order to avoid deterioration. [13] Therefore the Commission correctly proceeds on the basis that both protective measures — for example prohibitions [14] — against external man-caused impairment and disturbance may be necessary and measures to prevent natural developments that may cause the conservation status of species and habitats to deteriorate.

20. This also results from the requirements of individual protected habitat types. Thus, open-land habitats frequently lose their special characteristics through scrub growth if this is not prevented by human intervention. In the case of the habitat types 'Lowland hay meadows (*Alopecurus pratensis, Sanguisorba officinalis*)' (Natura 2000 Code 6510) and 'Mountain hay meadows' (Natura 2000

10 — Opinion in Case C-256/98, cited in footnote 9, point 25.

11 — Case C-117/00 *Commission* v *Ireland* [2002] ECR I-5335, paragraph 22 et seq.

12 — Opinion in Case C-117/00, cited in footnote 11, point 77.

13 — See, for the special situation of authorisation of a scheme which is not to be regarded as a plan or project, my Opinion in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* [2004] ECR I-7405 ('*Waddenzee*'), point 118.

14 — Article 6(2) of the Habitats Directive is interpreted in this way by Advocate General Fennelly in his Opinion in Case C-256/98, cited in footnote 9, point 25.

Code 6520), the need for human intervention — in this instance mowing — is already apparent directly or indirectly[15] from their appellation.

21. Nor, contrary to the view of the United Kingdom Government, is the concept of deterioration restricted to 'non-natural' deterioration. The scrub growth just mentioned would be natural deterioration. The United Kingdom Government's examples — changes in sea level, climate change — show that their concerns relate less to nature in general than to structural environmental changes that jeopardise the conditions for the continued existence of the protected habitats and species in the Natura 2000 sites concerned. Dealing with such changes is undoubtedly of great interest, but this question falls outside the scope of the present proceedings. The Commission does not allege in the slightest that the United Kingdom has failed to adopt rules for such an eventuality.

(b) Transposition

22. The only provision apparent that could concern positive measures to avoid deterioration in Gibraltar is section 17G of the NPO, which allows the competent authorities to enter into site management agreements with the owners or occupiers. This power is not, however, tied to the objective of avoiding deterioration. Nor is it apparent what measures could be taken where owners or occupiers are not prepared to enter into a necessary agreement.

23. These deficiencies can also not be made good by the general clause in section 17A(2) of the NPO. The obligation laid down in that provision to carry out all functions under the NPO so as to secure compliance with the Habitats Directive does not establish adequate powers for intervention by the competent authorities where there is a lack of cooperation on the part of owners or occupiers, and the latter are unable to make out their obligations arising from Article 6(2) of the Habitats Directive[16] with the necessary clarity.

24. Therefore, Article 6(2) of the Habitats Directive has not been adequately transposed in Gibraltar.

15 — The English and Dutch appellations for example (unlike the German 'Magere Flachland-Mahwiesen' and 'Berg Mahwiesen') refer not to the mowing but to hay, which, however, presupposes mowing

16 — This aspect is stressed by Advocate General Fennelly in the Opinion in Case C-256/98, cited in footnote 9, point 19

2. Article 6(3) and (4) of the Habitats Directive — Assessment of implications

25. Article 6(3) and (4) of the Habitats Directive provides as follows:

'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.'

26. The Commission complains that three specific matters are not subject to the requirements of Article 6(3) and (4) of the Habitats Directive, namely certain water abstraction plans and projects, land use plans and — in Gibraltar — the review of existing planning rights.

(a) Certain water abstraction proposals

27. This complaint on the part of the Commission does not concern all water abstraction plans and projects but only those licensed under Chapter 2 of Part II of the Water Resources Act 1991. The Commission does not find fault with the transposition relating to other (larger) water management projects.

28. The United Kingdom Government relies essentially on a system under which potentially damaging operations are determined on a site-by-site basis, in conjunction with the aforementioned general clauses. The system results in England and Wales and in Scotland from regulations 18 to 27 of the C (NH)R 1994, in Northern Ireland from regulations 15 to 18 of the C(NH)R(NI) 1995 and in Gibraltar from sections 17J, 17K, 17M, 17N and 17P of the NPO.

29. In essence, the basis of all those rules is that for each individual site the operations which appear to be likely to damage the fauna and flora to be protected there can be specified in advance. Such an operation can be carried out only if a procedure is first conducted which — so far as can be seen — meets the requirements of Article 6(3) and (4) of the Habitats Directive.

30. The United Kingdom rules are incompatible with Article 6(3) of the Habitats Directive if they exclude 'plans and projects' for the purposes of that provision from the procedure prescribed therein. It is clear that not all the water abstraction proposals at issue here are subjected to the procedure prescribed in Article 6(3), but only those which have been defined in advance as potentially damaging for the relevant site. It is therefore to be examined whether the water abstraction proposals in question — regardless of such specification as potentially damaging — are 'plans and projects' for the purposes of Article 6(3).

31. In the *Waddenzee* judgment, the definition of a project in the second indent of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [17] was decisive for the Court's interpretation of 'plans and projects' for the purposes of Article 6(3) of the Habitats Directive. [18] According to the former provision, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources are to be regarded as projects. Water abstraction too can constitute such an intervention. The fact that not entirely insignificant measures are involved here is apparent if only from the requirement under Chapter 2 of Part II of the Water Resources Act 1991 for a licence to be obtained in respect of the proposals at issue. Nor does the United Kingdom Government question that the proposals are to be classified as projects.

32. Under the first sentence of Article 6(3) of the Habitats Directive, these projects are to be subject to appropriate assessment of their implications for the relevant site in view of the site's conservation objectives if they are not directly connected with or necessary

17 — OJ 1985 L 175, p. 40

18 — The *Waddenzee* judgment, cited in footnote 13, paragraph 24 et seq

to the management of the site but are likely to have a significant effect thereon, either individually or in combination with other plans or projects. The United Kingdom's defence is essentially that all water abstraction plans or projects which meet those conditions are specified in advance as being potentially damaging for the site. In laying down specific provisions to protect the site, the competent authorities accordingly forestall assessment on a project-by-project basis in so far as they exclude certain proposals therefrom by not specifying them as potentially damaging.

33. This system avoids unnecessary assessment of projects and informs site users at an early stage which proposals may be problematical. This kind of abstract advance assessment of potential risks can, however, be based on concrete facts only in respect of the site, and not in respect of projects. It is therefore by nature less precise than an assessment of an individual case, which can have regard to both the site and the proposals. The risk therefore exists that, in specifying potentially damaging operations in the abstract, projects which on the basis of their specific characteristics are likely to have a significant effect on the site are not covered.

34. In addition, the United Kingdom rules concerning the specifying of potentially damaging operations on a site-by-site basis lack clarity. Regulation 22 of the C(NH)R 1994, regulation 15 of the C(NH)R(NI) 1995 and section 17H of the NPO do not contain a duty, but only a power, to specify for each site whether potentially damaging operations are conceivable that do not in any case fall within the field of application of provisions transposing Article 6(3) and (4) of the Habitats Directive. It admittedly cannot be ruled out that the relevant general clause applicable requires the discretion thereby granted to be exercised so as to ensure compliance with the Habitats Directive. On a cursory reading, however, neither the existence of a duty nor its extent becomes apparent.[19] This is all the more serious because under the United Kingdom transposition the specifying of potentially damaging operations is crucially important for attaining the objectives of the Habitats Directive and can have considerable effects on the rights and obligations of individuals who use areas in the sites affected. If the competent authorities do not comply with their obligation in relation to every site and every potentially damaging operation, that leads to lacunae in site protection.

35. The United Kingdom Government's further argument that the requirements of

19 — In Germany a comparable system of protection exists for smaller plans and projects which outside areas of protection do not require approval. There, however, the third sentence of Paragraph 33(3) of the Bundesnaturschutzgesetz (Federal Law on Nature Conservation) contains an express obligation with regard to the content of the declaration of protection: 'Appropriate orders and prohibitions and management and development measures shall ensure that the requirements of Article 6 of Directive 92/43/EEC are met'.

Article 6(3) and (4) of the Habitats Directive are anyway met on the basis of the general clauses when granting licences in respect of water abstraction proposals is also not very persuasive. In view of the crucial importance of those provisions for site protection, general clauses are not an adequate means of transposition. On the contrary, clear rules governing the steps to be carried out in the assessment are required. Moreover, the safeguard claimed to be provided by means of the general clauses is also prejudiced because it will be assumed *a contrario* from the transposition of the assessment procedure for certain proposals that in the case of other proposals the procedure is not applicable.

36. The United Kingdom Government further submits that in relation to certain protected areas under national law, namely Sites of Special Scientific Interest (SSSIs), sections 28E and 28H of the Wildlife and Countryside Act 1981 give rise to an obligation to carry out impact assessments that is comparable to Article 6(3) and (4) of the Habitats Directive. Those sections appear to be applicable to England and Wales. The Commission rightly objects, however, that — as the United Kingdom Government also discloses — not all areas protected under the directive are designated as SSSIs. As regards its content, this system of protection too is based on the optional prior specification of potentially damaging operations and is therefore subject to the objections set out above. It also falls short of the system already discussed because it contains no express provisions which could be understood as a transposition of Article 6 (3) and (4) of the Habitats Directive. It is therefore even less appropriate than the aforementioned provisions for ensuring transposition thereof.

37. For Scotland and Northern Ireland, the United Kingdom Government relies in addition on provisions that were not enacted until after 18 September 2001. These cannot be taken into account here, however. The Commission's complaint is to be assessed by reference to the situation prevailing at the end of the period which it laid down in the reasoned opinion. [20] This period expired on 18 September 2001.

38. Accordingly, the United Kingdom has not adequately transposed Article 6(3) and (4) of the Habitats Directive in relation to certain water abstraction plans and projects.

20 — See, for example, Case C-384/97 *Commission* v *Greece* [2000] ECR I-3823, paragraph 35, Case C-63/02 *Commission* v *United Kingdom* [2003] ECR I-821, paragraph 11, and Case C-417/02 *Commission* v *Greece* [2004] ECR I-7973, paragraph 22.

(b) Land use plans

39. Land use plans (or development plans) are not treated in the United Kingdom as a plan or project within the meaning of Article 6(3) of the Habitats Directive. They are not sufficient to enable a proposal to be implemented. Rather, a further separate permission is required for that. Such permission is to be granted in accordance with the plan, but only in so far as no material considerations preclude the grant of permission.

40. The parties are in agreement that the legal instruments at issue are plans within the meaning of the first sentence of Article 6 (3) of the Habitats Directive. They disagree, however, as to whether they are likely to have significant effects on the sites to be protected under the Habitats Directive. The United Kingdom Government submits that only a subsequent permission is likely to affect areas of conservation. Permission must be refused if it conflicts with the Habitats Directive. It is therefore sufficient to make only that permission subject to the procedure for plans and projects. The United Kingdom Government further submits that the aforementioned general clauses and the relevant guidance will oblige planning authorities to have regard to the requirements of the Habitats Directive when drawing up the plans.

41. In my view, the reference to plans in the first sentence of Article 6(3) of the Habitats Directive shows that any need for an assessment of implications is already to be taken into account during the initial plan formulation. The plan is by nature more distant from the carrying out of specific measures than the project. In the context of Article 6(3) of the Habitats Directive, the term 'plan' would have no substantial function of its own alongside the term 'project' if only the final agreement of the authority to specific measures were covered.

42. The case-law of the Court of Justice indicates this interpretation. The Court has held that under the first sentence of Article 6 (3) of the Habitats Directive the requirement for an appropriate assessment of the implications of a plan or project is dependent on there being a probability or a risk that the latter will have significant effects on the site concerned. [21] Certainty that there will be effects is not required. [22] In the light of the precautionary principle, the necessary degree of probability is reached if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. [23]

21 — The *Waddenzee* judgment, cited in footnote 13, paragraph 43.

22 — The *Waddenzee* judgment, cited in footnote 13, paragraph 41.

23 — The *Waddenzee* judgment, cited in footnote 13, paragraph 44.

43. Those statements on the necessary degree of probability related to scientific uncertainty regarding the effects of measures whose implementation was certain. In the case of the plans at issue here, which require further permissions, there is, on the other hand, already uncertainty as to whether they will be implemented at all. It is appropriate, however, to apply comparable criteria in this regard too. Accordingly, the decisive test is whether it cannot be excluded on the basis of objective information that a plan which still requires further permissions in order to be put into effect will have significant effects on the site concerned. That is in any event so if — as laid down in United Kingdom law for the plans at issue here — subsequent decisions are in principle to be in accordance with the plans.

44. It is true that United Kingdom law provides in principle, following a negative assessment of implications, for refusal of permission in the face of the plan or for implementation of the procedure for exceptional cases under Article 6(4). However, the objectives of the Habitats Directive would be jeopardised if the requirements of site protection could in principle prevail over an opposing plan only at the last moment as an exception to the normal course of procedure. Where there are procedural arrangements of that kind, it would have to be feared that an assessment of implications subsequent to the plan formulation would no longer be carried out with the outcome being open but with the objective of putting the plan into effect.

45. Narrowing the perspective to the final permission furthermore fails to take into account that plans whose implementation presupposes further permissions can have *indirect* effects on sites. Plans regularly determine, through the coordination of various individual proposals, the implementation of those proposals. This affects in particular the assessment of alternatives, which is sometimes necessary.

46. In this connection, the blocking of potential alternatives — to which regard has not, however, been had in formulating the plan in the absence of an assessment of implications — by other components of the plan is to be mentioned first of all. If adverse effects cannot yet be taken into account at the stage of formulating the plan, the implementation of parts of the plan, which do not themselves have any direct effects on the site, can thwart possible alternatives for components of the plan which do have adverse effects. For example, a plan could envisage a residential development that does not harm areas of conservation and simultaneously an urgently required by-pass which, in the location envisaged, would adversely affect the integrity of areas of conservation, whereas it could also be built instead of the housing without adversely affecting areas of conservation. If the housing is constructed first, there is a lack of an alternative when making the subsequent decision concerning the road. Site protection under the Habitats Directive demands, on the other hand, that account already be taken in formulating the plan of the fact that the putting into effect of *both* subproposals would necessarily have an adverse effect on the area of conservation and would therefore require justification.

47. Furthermore, particularly in the case of proposals for sections of highway or railway, but in principle also in the case of all proposals under which extensions are intended to be constructed, the first stages of a proposal regularly determine the realisation of the subsequent stages. If the effects of the entire proposal on areas of conservation not at issue until later are examined neither within the framework of the plan nor at the time of the first stages, each stage restricts the number of possible alternatives for subsequent stages, without an appropriate assessment of alternatives being carried out. Such a course of action is often derogatorily described as salami tactics.

48. In addition, the early taking into account of the interests of site protection prevents faulty planning that may have to be remedied, if it does not become apparent until the time of the specific permission that the proposal cannot be implemented in that form because areas of conservation are adversely affected. Therefore, the idea developed in respect of Directive 85/337 on the assessment of environmental effects that an impact assessment should be carried out at the earliest possible stage [24] also applies in the context of the Habitats Directive.

49. The United Kingdom Government is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure.

50. In summary, therefore, the plans at issue must in principle be subjected to the procedure under Article 6(3) and (4) of the Habitats Directive if the measures envisaged are capable of having a significant effect on areas of conservation. Since United Kingdom law does not ensure this, the transposition of Article 6(3) and (4) of the Habitats Directive is inadequate in that respect.

(c) Review of existing planning rights in Gibraltar

51. The Commission complains that the competent Gibraltar authorities are not obliged to review existing planning rights

24 — See, to this effect, Case C-201/02 *Wells* [2004] ECR I-723, paragraph 49 et seq.

to ascertain whether they would have an adverse effect on areas of conservation. The United Kingdom Government relies in response on section 34 of the Town and Planning Ordinance which grants the competent authorities the power to modify existing permits, stating that, in this context, regard is to be had to the requirements of Article 6(3) of the Habitats Directive either as a consequence of the scheme to be taken into account or as material considerations.

52. It must be stated first of all that the rules applicable in Gibraltar set out by the United Kingdom Government do not contain an *obligation* to review existing planning rights, which the Commission demands, but only a power to review. In contrast to Gibraltar, the obligations demanded by the Commission exist in England and Wales and in Scotland (regulation 50 of the C(NH)R 1994) and also in Northern Ireland (regulation 45 of the C(NH)R(NI) 1995).

53. It is true that an obligation to review existing planning rights can be of great benefit for site protection, by preventing sites from being adversely affected on the basis of old legal positions which have arisen without account being taken of the Habitats Directive. In this regard, the obligation corresponds to the objectives of the Habitats Directive. Article 6(3) and (4) of the Habitats Directive contains no indication, however, that the Member States are obliged to review existing planning rights subsequently. The procedure prescribed therein applies in principle *before* the Member States create planning rights whose exercise could adversely affect a site.

54. Nor does the view of Advocate General Fennelly relied upon by the Commission lead to a different result. Advocate General Fennelly rightly pointed out that all development activities are to be subjected to an assessment with the exception of those which are unlikely to have any significant effect, either individually or in combination with other development activities, on the site's conservation objectives. [25] That corresponds to the wording of the first sentence of Article 6(3) of the Habitats Directive. This does not mean, however, that existing planning rights must be reviewed subsequently.

55. It is not to be ruled out that such an obligation to carry out a subsequent assessment could be based on Article 6(2) of the Habitats Directive or on corresponding duties of protection prior to establishment of the Community list. In the *Waddenzee* judgment, the Court pointed out that Article 6(2) can be applicable where a plan authorised in accordance with Article 6(3) or such a project proves likely to give rise to deterioration or significant disturbance of an area of conservation. [26] Article 6(2) could therefore possibly also be applied where

25 — Opinion in Case C-256/98, cited in footnote 9, point 33.

26 — The *Waddenzee* judgment, cited in footnote 13, paragraph 37.

existing legal positions are liable to trigger such deterioration or significant disturbance. [27] However, the Commission has not put forward any arguments to this effect and, in particular, has pleaded no infringement of Article 6(2) in this context. Therefore, this possibility has not been debated in the proceedings and thus cannot warrant finding against the United Kingdom.

56. The action is therefore to be dismissed in this respect.

3. Articles 11, 12(4) and 14(2) of the Habitats Directive — Monitoring obligations

57. The provisions to be transposed read as follows:

'Article 11

Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.

Article 12

...

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

Article 13

...

Article 14

...

2. Where such measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11. ...'

27 — See my Opinion in *Waddenzee*, cited in footnote 13, point 58.

58. The Commission complains that the monitoring (or surveillance) obligations laid down in these provisions have not been transposed at all in United Kingdom law. It states that until these duties have, however, been clearly assigned to the competent authorities, it is unable to establish whether such monitoring is carried out.

59. The United Kingdom Government relies on the fact that sections 132 and 133 of the Environmental Protection Act 1990 and corresponding provisions for Scotland and Northern Ireland have conferred on certain statutory nature conservation agencies — English Nature, the Countryside Council for Wales, Scottish Natural Heritage and the Department for the Environment in Northern Ireland — functions which, in conjunction with the aforementioned general clauses, will ensure that the surveillance required under the directive is carried out. It states that these functions include in particular the management of national nature reserves, the provision of advice to Government on the development and implementation of policies, the establishment of common monitoring standards and the carrying out of research. Also, those agencies are, when discharging their functions, to take account of actual or possible ecological changes.

60. Articles 11, 12(4) and 14(2) of the Habitats Directive contain general obligations continuously to monitor certain situations and developments, in particular the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species. This obligation is not important, either directly or indirectly, for the rights and obligations of individuals. However, it is of crucial importance for the practical effectiveness of the directive, since almost all measures required under the directive can be implemented properly only on the basis of the knowledge acquired by that monitoring. The significance of a particular occurrence of a species can thus be assessed only when in possession of an overview regarding other occurrences of the species. Assessments of that kind are prerequisites for decisions concerning site protection, site management and adverse effects on the site and also for the application of the provisions for the protection of species. Transposition must therefore ensure that the surveillance obligations are fulfilled systematically and continuously.

61. The functions set out by the United Kingdom Government that are discharged by certain agencies cannot, even in conjunction with the aforementioned general clauses, be understood as providing for the surveillance demanded by the directive. On the contrary, the fact that the agencies referred to are to lay down common monitoring standards leads to the converse conclusion that the actual surveillance is to be carried out by other bodies. However, these bodies are not specified.

62. The example, given by the United Kingdom Government, of the review of certain schedules to the Wildlife and Countryside Act 1981 pursuant to section 24 of that Act, also does not provide for the undertaking of surveillance but only for the making of proposals that animals and plants be added to or removed from those schedules. It is admittedly to be assumed that the proposals are based on the results of surveillance of the populations in question, but there is no indication whatsoever as to which body undertakes that surveillance. If no United Kingdom body is, however, entrusted with the task of surveillance, the aforementioned general clauses designed to make the Habitats Directive binding grasp at thin air.

63. It is to be feared, with this legal position, that surveillance measures carried out are not orientated to the Habitats Directive but pursue other objectives and thus meet the objectives of those provisions only by chance. The systematic and continuous surveillance required cannot be ensured in that way.

64. The situation set out with regard to Gibraltar is even less capable of constituting transposition of Articles 11, 12(4) and 14(2) of the Habitats Directive. There surveillance is supposed to be ensured by not allowing operations likely to damage the flora and fauna of areas of conservation to be proceeded with until there has been an assessment of their impact. The surveillance required pursuant to Articles 11 and 14(2) of the Habitats Directive does not, however, simply amount to nothing more than specific studies when definite proposals are made, but is intended to document generally the conservation status of species and habitat types, so that, inter alia, it is possible to assess the results of specific studies in individual cases.

65. Consequently, the United Kingdom has not adequately transposed Articles 11, 12(4) and 14(2) of the Habitats Directive.

4. Article 12(1)(d) of the Habitats Directive — Protection of breeding sites and resting places

66. Article 12(1) of the Habitats Directive provides as follows:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in

Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

67. The Commission objects to the transposition of Article 12(1)(d) of the Habitats Directive in two respects. It submits, first, that there is a divergence between the text of this provision and that of the implementing rules. Where the directive uses the term 'deterioration', the United Kingdom rules contain the verb 'to damage'. Second, in Gibraltar only the deliberate damaging or destruction of breeding sites and resting places is prohibited.

(a) Transposition of the term 'deterioration'

68. The Commission bases this objection on the fact that the directive uses the term 'deterioration' but the United Kingdom rules use the verb 'to damage'. In the course of the procedure the Commission has attached three complaints to this difference.

69. The *first complaint* is contained in the reasoned opinion. There the Commission stressed that the result of the use of 'to damage' instead of 'deterioration' is that the effects of neglect are not covered. On the other hand, the Commission explicitly specified in its reply that, in its view, Article 12 (1)(d) does not require breeding sites and resting places to be protected from deterioration due to neglect or inactivity. Therefore the Commission did object to the treatment of neglect in the pre-litigation procedure, but withdrew this objection in its reply. It is consequently no longer necessary for the Court to rule on this point.

70. The *second complaint* is first made by the Commission in its application and then dealt with in greater detail in its reply. It complains that the transposition of Article 12(1)(d) of the Habitats Directive in the United Kingdom as a whole is limited to deliberate and intentional acts. The action is

of course admissible in this regard only if this objection has already been raised in the pre-litigation procedure. The Court cannot examine a complaint which was not contained in the reasoned opinion. [28]

71. The only element in the pre-litigation procedure that could have covered this objection is the statement that 'deterioration' also encompasses neglect but 'to damage' does not. 'Neglect' can denote both a lack of attention to something and breach of a duty to take due care. The latter is a standard of fault. In relation to Gibraltar the Commission therefore also uses the term 'neglect' in contrast to 'deliberately'. [29] Had the Commission, however, wanted in the reasoned opinion to raise the complaint that use of the term 'to damage' entails a standard of fault that is too stringent, it should have expressed this more clearly — as occurred in relation to Gibraltar. The terms 'deterioration' and 'to damage' do not, in accordance with their lexical meaning, differ as regards the standard of fault. A further indication that this complaint was inadequately set out in the pre-litigation procedure and possibly even in the application is that the United Kingdom Government first defends itself in this regard in the rejoinder. Therefore the complaint that only deliberate and intentional conduct is covered, in relation to the United Kingdom as a whole, was not made in the pre-litigation procedure. The objection in respect of the standard of fault is therefore to be dismissed as inadmissible.

72. Should the Court, on the other hand, hold this complaint to be admissible, it is in any event unfounded. It is true that Article 12(1)(d) of the Habitats Directive requires all acts resulting in deterioration or destruction of breeding sites or resting places to be prohibited irrespective of whether they are deliberate or intentional. However, the Commission has not proved that the offences in the United Kingdom are by their definitions limited to deliberate or intentional conduct. While the Commission maintains that intent is required for criminal liability, the United Kingdom Government submits that the offence is a strict liability offence and therefore requires neither intent nor negligence. [30] Also, irrespective of the United Kingdom Government's submission, there

28 — Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213, paragraph 20, with further references. This admissibility condition for an action for failure to fulfil obligations may be considered by the Court of its own motion: Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 8, and Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 8.

29 — With regard to this complaint see below, point 77.

30 — This interpretation is confirmed by guidance of the Scottish Environment Department 'European Protected Species, Development Sites and the Planning System' (October 2001), at http://www.scotland.gov.uk/library3/environment/epsg.pdf, p. 2, paragraph 12, visited on 27 May 2005. On the other hand, the question whether a strict liability offence is involved is expressly left open in *R* v *Secretary of State for Trade and Industry ex parte Greenpeace Ltd* 2000 [CMLR] 2000, p. 94 (at p. 122). See also 'Environmental Audit — Sixth Report' of 5 May 2004, http://www.publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/12602.htm (visited on 27 May 2005), paragraph 9, according to which the majority of environmental offences are strict liability offences.

are strong hints that criminal liability is in any event not restricted to intentional acts. [31] The burden of this lack of clarity rests on the Commission, which must prove that an obligation under the Treaty has not been fulfilled. [32] In the present case, therefore, it should at least have adduced convincing evidence supporting its interpretation of United Kingdom law.

73. Finally, in its reply the Commission specifies as the *third complaint* the difference which in its view exists between 'deterioration' and 'to damage', stating that the term 'to damage' in the United Kingdom rules would cover only direct damage whereas the term 'deterioration' used in the Habitats Directive also includes indirect adverse effects. This complaint can be understood as a development from the starting point in the pre-litigation procedure, since it relates to the alleged difference between the two terms and the proposition advanced by the Commission is not, at any rate manifestly, in conflict with the lexical meaning of both terms. The action is therefore admissible so far as this complaint is concerned.

74. The Commission is right in stating that Article 12(1)(d) of the Habitats Directive prohibits not only direct damage but also acts which lead only indirectly to adverse effects on breeding sites and resting places. According to Article 12(1)(d), any deterioration or destruction of breeding sites and resting places is to be prohibited. No distinction is drawn between direct and indirect adverse effects.

75. The Commission has however, despite the contesting of its arguments by the United Kingdom Government, adduced no evidence that the interpretation of the term 'to damage' in the United Kingdom does in fact diverge from the interpretation of the term 'deterioration' which it proposes. In this respect too, the Commission has therefore not shown a failure to fulfil obligations.

76. With regard to the transposition of Article 12(1)(d) of the Habitats Directive in the United Kingdom as a whole, the action is therefore partially inadmissible and unfounded as to the remainder.

(b) The restriction to deliberate acts in Gibraltar

77. In relation to Gibraltar, the Commission has objected throughout that section 17T(1)

31 — See two consultation papers, namely the 'Consultation Paper on Legislative Proposals for Integration of the Habitats Directive Provisions on Conservation of European Protected Species into the Land-Use Planning Regime' of the Welsh Assembly Government of June 2002, http://www.wales.org.uk/subienvironment/content/consultations/landuseplan.doc (visited on 27 May 2005), Section 1, paragraph 4, and 'Technical Amendments to the Conservation (Natural Habitats &c.) Regulations 1994, A Consultation Paper on Amendments to the Habitats Regulations' of the Scottish Executive of March 2003, http://www.scotland.gov.uk/consultations/environment/tacnh.pdf (visited on 27 May 2005), paragraph 20, and the judgment of the High Court of 4 February 2004 in *Newsum and Others* v *Welsh Assembly Government* [2004] EWHC 50 (Admin), paragraphs 17 and 101.

32 — Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21, with further references.

(d) of the NPO prohibits only the deliberate damaging or destruction of breeding sites and resting places. [33] As the United Kingdom Government acknowledges, this falls short of Article 12(1)(d) of the Habitats Directive. This provision has consequently not been transposed correctly as regards Gibraltar.

5. Articles 12(2) and 13(1) of the Habitats Directive

78. Article 12(2) of the Habitats Directive provides that, for the animal species in Annex IV(a), the Member States are to prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild. Specimens taken legally before implementation of the Habitats Directive are exempted from the prohibition.

79. Article 13(1) of the Habitats Directive reads as follows:

'Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV(b), prohibiting:

(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.'

80. The Commission complains that the United Kingdom provisions intended to transpose Article 12(2) of the Habitats Directive contain an exemption for specimens which have been lawfully taken, killed or sold. The provisions in question are regulation 39(4) of the C(NH)R 1994, regulation 34(4) of the C(NH)R(NI) 1995 and section 17T(4) of the NPO. The Commission states that an exemption also exists for plants protected under Article 13 (1) of the Habitats Directive where the relevant specimen has been lawfully sold. The provisions at issue here are regulation 43(5) of the C(NH)R 1994, regulation 38(5) of the C(NH)R(NI) 1995 and section 17X(5) of the NPO.

33 — This provision states: 'It is an offence ... (d) deliberately to damage or destroy a breeding site or resting place of any such animal.'

81. The United Kingdom Government accepts that the exemptions are incompatible with the Habitats Directive. It submits, however, that a licensing system is in place which ensures compliance with the objectives of Articles 12(2) and 13(1).

82. The Commission is right in stating that Articles 12(2) and 13(1) of the Habitats Directive do not allow an exemption for lawfully acquired specimens. This accords with the wording of the provisions, and precludes misuse, for the purpose of achieving commercial objectives, of the possibility of lawful detriment to the strictly protected species of fauna and flora.

83. In so far as the United Kingdom Government relies on its licensing system, this defence is, first, belated, since it was put forward for the first time in the rejoinder, and second, not sufficiently substantiated to counter the complaint of inadequate transposition.

84. Article 12(2) and Article 13(1) of the Habitats Directive have therefore not been adequately transposed in the United Kingdom.

6. Article 15 of the Habitats Directive — Indiscriminate means of capture and killing

85. Article 15 of the Habitats Directive provides as follows:

'In respect of the capture or killing of species of wild fauna listed in Annex V(a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV(a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI(a);

(b) any form of capture and killing from the modes of transport referred to in Annex VI(b).'

86. The Commission initially put forward two complaints in this connection. First, while it is true that the United Kingdom has prohibited the methods expressly listed in Annex VI(a) and (b), [34] it has not introduced a general prohibition on the use of indiscriminate means. Second, the Conservation of Seals Act 1970 prohibits only two methods of killing and allows licences to be granted under conditions which go beyond the derogations in the Habitats Directive.

(a) The prohibition of all indiscriminate means

87. Article 15 of the Habitats Directive requires the prohibition *in particular* of the methods expressly listed in Annex VI(a) and (b), but at the same time also the prohibition of the use of all indiscriminate means capable of resulting in the local disappearance of populations of the protected species or of causing serious disturbance to populations. It is therefore not sufficient to limit transposition to the methods expressly referred to. On the contrary, a general prohibition must be introduced.

88. The United Kingdom Government contends, however, that its listing of prohibited methods covers all the methods that would be forbidden even under a general prohibition for the United Kingdom. If new methods were discovered, the list would be added to. The competent authorities are already obliged to do so under the aforementioned general clauses. In the United Kingdom Government's submission, this approach ensures in practice that Article 15 of the Habitats Directive is transposed, while a general prohibition would conflict with the principle of legal certainty.

89. These arguments are not convincing. The possibility of updating a list of prohibited methods is less effective than a general prohibition. Delays in updating necessarily lead to lacunae in protection which are specifically supposed to be prevented by means of the general prohibition in Article 15 of the Directive.

90. The principle of legal certainty invoked by the United Kingdom Government requires inter alia that legislation be certain and its application foreseeable by those affected by it, in particular if it entails burdensome consequences. [35] A general prohibition on the capture or killing of protected species of animals by the use of indiscriminate means capable of resulting in the local disappearance of populations of the protected species or in serious disturbance accords, however, with those require-

34 — Regulation 41 of the C(NH)R 1994, regulation 36(2) of the C(NH)R(NI) 1995 und section 17V(2) of the NPO.

35 — Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24, Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 43, and Case C-17/01 *Sudholz* [2004] ECR I-4243, paragraph 34.

ments. The term 'indiscriminate means' is clear and is foreseeable in its application. It is restricted even further by the additional condition that use of the means be capable of resulting in the local disappearance of populations of the protected species or in serious disturbance. It is true that an express list of all prohibited methods would be even clearer, but that degree of clarity is not a precondition in order for a prohibition to be lawful. Nor are the United Kingdom authorities prevented from ensuring clarity by maintaining, alongside the general prohibition, a non-exhaustive list of prohibited methods that is constantly updated in the light of changing circumstances.

91. The United Kingdom has therefore not transposed Article 15 of the Habitats Directive adequately as regards the prohibition of all indiscriminate means.

(b) The Conservation of Seals Act 1970

92. Since the Commission withdrew the complaint concerning the Conservation of Seals Act in its reply, but then declared at the hearing that it wished however to maintain the complaint, the admissibility of the complaint must be examined first.

93. The Commission's conduct can be explained by the fact that the United Kingdom Government stated in its defence that it intended to amend the Conservation of Seals Act in accordance with the Commission's view. After the complaint was withdrawn, however, the United Kingdom Government made it clear in its rejoinder that it would await the outcome of the present proceedings and introduce amending legislation only in so far as that was necessary in accordance with the judgment of the Court of Justice. The Commission then stated at the hearing that it was maintaining this complaint after all since its withdrawal rested on a mistake. The United Kingdom Government did not comment on this submission.

94. For the purposes of procedural law, the Commission's actions are to be classified as follows. The statement that it was not pursuing the complaint is unambiguous and unconditional. It consequently involves *partial withdrawal* of the application. There is no legal basis for subsequently revoking this procedural act or disputing it on grounds of error. Therefore, the Commission's statement at the hearing that it was after all maintaining the complaint contains a new plea vis-à-vis the reply.

95. In proceedings before the Court, Article 42(2) of the Rules of Procedure governs the conditions under which the subject-matter of the proceedings may be amended by a new

plea. It states that 'no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'.

96. Such a matter of fact is present here. The withdrawal of the complaint rested on a commitment on the part of the United Kingdom Government which was subsequently withdrawn. It is true that this commitment was not legally binding as regards its content, but the Commission could, if only on the basis of the principle of cooperation in good faith, trust that the United Kingdom Government would at least endeavour to put it into effect. It was only after reading the rejoinder that the Commission was able to realise that the United Kingdom Government was not meeting this expectation. A matter of fact which has come to light in the course of the procedure is therefore involved.

97. There are of course additional restrictions on putting forward new pleas in Treaty infringement proceedings. The Commission may not extend the subject-matter of the dispute in the course of Treaty infringement proceedings. The Court has held that to be so in particular where a complaint has been referred to in the letter of formal notice but not in the reasoned opinion.[36] This is intended to ensure that the subject-matter of the dispute is clearly defined and that the Member State concerned can avail itself of its right to defend itself.

98. Since in proceedings before the Court the definiteness of the subject-matter of the dispute is already governed by Article 42(2) of the Rules of Procedure, which does not preclude the Commission's plea, the only question remaining is whether the United Kingdom's rights of defence are prejudiced if the complaint concerning the Conservation of Seals Act 1970 is admitted. Since the same complaint was, before being withdrawn in the interim, covered in the pre-litigation procedure and in the proceedings before the Court, the United Kingdom Government has been able to avail itself of its right to defend itself against all the Commission's complaints. Nor does the United Kingdom Government appear to have any objections to the examination of this complaint. Its silence regarding the reintroduction of the complaint at the hearing and its submissions in its rejoinder indicate rather that it tacitly agrees to the complaint's being taken up again, so that the dispute in relation to the Conservation of Seals Act is now decided.

99. It is therefore, exceptionally, justifiable to admit the complaint concerning the Conservation of Seals Act notwithstanding its withdrawal in the interim.

100. As regards the substance, it must be stated first that Article 15 of the Habitats Directive is applicable to the hunting of the seal species covered by Annex IV, that is to say the Mediterranean monk seal *Monachus monachus* and the Saimaa ringed seal *Phoca hispida saimensis*, but also, in accordance

36 — Case C-350/02, cited in fotnote 28, paragraph 18 et seq.

with Annex V, to the hunting of all other species of 'true seal' or 'earless seal' (the *Phocidae* family).[37] In the United Kingdom, the common or harbour seal (*Phoca vitulina*) and grey seal (*Halichoerus grypus*), for example, are to be found.

101. The Conservation of Seals Act 1970 relates to all seal species. It expressly prohibits the poisoning of seals and hunting with certain firearms. In addition, the competent authorities are given the power to grant licences under certain circumstances for the use of poison to kill seals.

102. The Commission complains that these requirements fall short of Article 15 of the Habitats Directive. It states that the Conservation of Seals Act 1970 prohibits only two methods of killing and enables licences to be granted under conditions which go beyond the derogations in the Habitats Directive.

103. The United Kingdom Government pleads that the requirements of this Act supplement the general rules implementing Article 15 of the Habitats Directive. Regulation 41 of the C(NH)R 1994 guarantees the protection required by the directive. Any licences under the Conservation of Seals Act must, by virtue of the aforementioned general clauses, be consistent with the Habitats Directive.

104. These submissions are not persuasive as regards permitted killing methods. The Conservation of Seals Act 1970 gives an innocent reader the impression that only the two methods expressly mentioned there are prohibited for the killing of seals. It may admittedly be correct that the prohibitions under regulation 41 of the C(NH)R apply in addition, but there is a substantial risk that those prohibitions will be overlooked given the manifest pertinence of the Conservation of Seals Act 1970. Consequently, the regulation of killing methods in the Conservation of Seals Act 1970 is incompatible with Article 15 of the Habitats Directive.

105. On the other hand, it is to be assumed that, when making decisions on licences under the Conservation of Seals Act 1970, the United Kingdom competent authorities are aware that they must also comply with the obligations imposed by the relevant provisions transposing Articles 15 and 16 of the Habitats Directive. While it would be welcome, an express statutory reference in this regard does not appear absolutely necessary in order to make the legal obliga-

37 — In addition to 'earless seals', there is also the 'eared seal' (*Otariidae*) family.

tions clear to a specialised authority. Therefore, no infringement of the Habitats Directive can be found in this regard.

7. Article 16(1) of the Habitats Directive — Derogations from species protection

106. Article 16(1) of the Habitats Directive reads as follows:

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

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

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

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

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

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

107. The Commission puts forward two complaints relating to the transposition of this provision. First, the derogations in regulation 40 of the C(NH)R 1994, regulation 35 of the C(NH)R(NI) 1995 and section 17U of the NPO contain no reference to the fact that derogations are permissible only if, *first*, there is no satisfactory alternative and, *second*, the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. Second,

derogations incompatible with Article 16 exist where the acts forbidden in Articles 12 and 13 are committed in connection with a lawful operation.

(a) Lack of regard to alternatives and conservation status

108. The United Kingdom Government acknowledges that derogations from species protection are permissible only if, first, there is no satisfactory alternative and, second, the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. It pleads, however, that the competent authorities would apply both conditions, pursuant to the aforementioned general clauses. Moreover, both conditions are implicitly a precondition of both the specific derogations, for the taking of disabled animals for the purpose of tending them and for the killing of animals that cannot recover. In both cases no satisfactory alternative exists and the population's conservation status is not prejudiced.

109. In relation to the rules complained of here, the general clauses relied on by the United Kingdom Government are relevant at most in so far as they possibly preclude public authorities from having recourse to the derogations where one of the two conditions is not met. Private individuals, on the other hand, can invoke the derogations laid down in United Kingdom law, without having regard to those conditions. The general clauses are therefore not capable of repelling the Commission's complaint.

110. With regard to the specific derogations for the tending or killing of ill or disabled animals, it is not necessarily the case, contrary to the submissions of the United Kingdom Government, that they are applicable only where there are no satisfactory alternatives. Under United Kingdom law the tending of an animal is justified irrespective of whether it would be a satisfactory alternative to leave it in the wild so that it can recover by itself. So far as concerns the killing of incurably sick animals, the question, not raised by the Commission, arises as to whether Article 16(1) of the Habitats Directive contains a justification therefor in the first place. At least in some cases it will indeed be a satisfactory alternative to let matters take their natural course, instead of stepping in and taking charge in order, in the final analysis, to give effect to human conceptions concerning dealing with animal suffering.

111. Therefore, the failure to include in the United Kingdom rules specified by the Commission the conditions requiring the absence of alternatives and the maintenance of the conservation status of the population concerned is incompatible with Article 16(1) of the Habitats Directive.

(b) Harm in connection with lawful operations

112. Under regulations 40(3)(c) and 43(4) of the C(NH)R 1994, regulations 35(3)(c) and 38(4) of the C(NH)R(NI) 1995 and sections 17U(2)(c) and 17X(4) of the NPO, the prohibitions enacted in transposing Articles 12, 13 and 16 of the Habitats Directive do not apply if the act in question occurred in connection with a lawful operation and could not reasonably be avoided. [38]

113. Article 16(1) of the Habitats Directive does not provide for any derogations from the protective provisions for fauna and flora covered by Annex IV where they have been infringed in connection with a lawful operation. The United Kingdom Government stresses, however, that the derogations transpose not Article 16(1) but Article 12 in relation to animals and Article 13 in relation to plants. This view is justified in so far as any restriction on the provisions protecting species can be understood either as a delimitation of their field of application, which would constitute transposition of Article 12(1) or Article 13(1), or as a derogation, which would have to be assessed under Article 16(1). This shows, however, that Articles 12, 13 and 16 jointly form a closed system of protection, so that every derogation from the provisions protecting species that is incompatible with the directive would infringe both the prohibitions in Articles 12 and 13 and the derogating provision in Article 16. Consequently, the Commission can object to the derogating provisions at issue here as an infringement of Article 16.

114. The United Kingdom Government further invokes the fact that Articles 12 and 13 of the Habitats Directive have been transposed by criminal offences. It submits that it is therefore necessary to restrict their application where persons would be acting without knowledge of the risk to protected species. However, as soon as a person is aware of the risk, he can no longer rely on the derogations since he could reasonably have avoided the harm.

115. The United Kingdom Government's account of the derogating provisions to be dealt with here is, however, inconsistent with recent English case-law. Two judgments in *Newsum and Others* v *Welsh Assembly Government* indicate that the derogating provision in regulation 40(3)(c) of the C(NH)R 1994 goes beyond the framework permissible under Article 16(1) of the Habitats Directive. The High Court explicitly expresses the view that regulation 40(3)(c) precludes application of the prohibitions

38 — Regulation 40(3)(c) of the C(NH)R 1994 provides: '... a person shall not be guilty of an offence by reason of ... any act made unlawful by that regulation if he shows that the act was the incidental result of a lawful operation and could not reasonably have been avoided.' The wording of the other provisions is basically identical.

enacted in transposition of Article 12 if the harm occurs in pursuing an operation which as such is lawful and the operation could not reasonably be pursued in another form. [39] The question at issue there was whether operating a quarry enjoying consent was permissible although it would destroy a population of great crested newts (*Triturus Cristatus*) and a pond, that is to say the population's breeding site and resting place. It is true that the Court of Appeal set aside that judgment, but it indicated in an *obiter dictum* that it inclines to the view that the derogation allows harm of that kind within the framework of a lawful operation. [40] In view of this case-law, which is closer than the United Kingdom Government's interpretation to the wording of regulation 40(3)(c) of the C(NH)R 1994, it is to be assumed that the derogation for lawful conduct allows acts which, with or without the knowledge of the person performing them, lead to the killing of specimens of protected species or to deterioration or destruction of their breeding sites and resting places, if those acts as such are lawful.

116. This derogation is not expressly provided for in the Habitats Directive. However, it would be compatible with the Habitats Directive if it correctly transposed either the prohibitions in Articles 12(1) and 13 in the sense of a delimitation or the derogations in Article 16.

117. It must be stated first, with regard to Article 12(1)(d), that the prohibition on deterioration or destruction of breeding sites or resting places does not allow such a derogation. This prohibition does not require intent, and applies even irrespective of knowledge on the part of the person committing the act.

118. The remaining prohibitions under Article 12(1)(a) to (c) and Article 13(1)(a) are, however, also not limited so as to exclude lawful operations. It can remain undecided in what particular way the term 'deliberate' which — in contrast to Article 12(1)(d) — is used there is to be interpreted. The judgment on the sea turtle *Caretta caretta* seems to interpret this term in the sense of conscious acceptance of consequences. [41] Even if 'deliberate' is interpreted restrictively, however, the term cannot be transposed by a derogation in favour of lawful operations, since

39 — Cited in footnote 31, paragraph 101.

40 — Judgment of 22 November 2004, [2004] EWCA Civ 1565, paragraphs 8, 15 and 16.

41 — Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraph 32 et seq.

lawful conduct does not necessarily preclude an intention to harm. [42]

119. Article 16(1) of the Habitats Directive also cannot justify such derogations. The derogations permissible under that provision cannot be founded on the lawfulness of the particular action, but only on quite specific grounds, for example imperative reasons of overriding public interest. Moreover, in order to have recourse to such a derogation, there must be no satisfactory alternative and the populations of the species concerned must be maintained at a favourable conservation status. [43]

120. Nor can the United Kingdom Government plead that the provisions of criminal law under discussion here should be limited by a derogation for lawful acts. These offences are almost all limited to intentional acts. In England, Wales, Scotland and Northern Ireland, only the protection of breeding sites and resting places is not tied to an intention to cause harm but — according to information provided by the United Kingdom Government [44] — is secured irrespective of fault. It can remain undecided here whether Article 12(1)(d) of the Habitats Directive in fact requires an offence regardless of fault. Under no circumstances is transposition adequate if an offence which might be too broad is limited by a derogation that is too broad.

121. Consequently, the derogations for harm in the event of lawful conduct are incompatible with Article 16 of the Habitats Directive.

8. Application of the directive outside territorial waters

122. This final plea relates to maritime areas within which the United Kingdom admittedly does not exercise full sovereignty, but does exercise at least certain powers. Under the United Nations Convention on the Law of the Sea signed at Montego Bay on 10 December 1982 ('UNCLOS'), [45] to which the Community acceded in 1998, [46] full sovereignty of a coastal State extends to its territorial waters. Under UNCLOS, these waters are called 'the territorial sea'. Under

42 — See Case 412/85 *Commission* v *Germany* [1987] 3503, paragraphs 14 and 15: the intention to use land, for example for agricultural purposes, does not preclude the simultaneous deliberate killing or capture of birds, the deliberate destruction of, or damage to, their nests and eggs and their deliberate disturbance, within the meaning of Article 5 of the Wild Birds Directive.

43 — On this, see above, point 108 et seq.

44 — On this, see above, point 72.

45 — Third United Nations Conference on the Law of the Sea, Official Documents, vol. XVII, 1984, doc. A/Conf.62/122, pp. 157-231.

46 — Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ 1998 L 179, p. 1).

Article 3 of UNCLOS, the coastal State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the Convention.

123. In addition, the coastal State can claim an exclusive economic zone, which may not extend beyond 200 nautical miles from the baselines. Under Article 56(1)(a) of UNCLOS, in this zone the coastal State has in particular sovereign rights for the purpose of exploring and exploiting, managing and conserving the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil. It also has, under Article 56(1)(b)(iii), jurisdiction with regard to the protection and preservation of the marine environment as provided for in the relevant provisions of UNCLOS.

124. Finally, the continental shelf can extend to a maximum of 350 nautical miles from the baselines. Under Article 77 of UNCLOS, the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. This covers only immobile natural resources.

125. The Commission complains that the United Kingdom has limited application of the provisions intended to transpose the Habitats Directive to territorial waters. It takes the view that account is to be taken of the directive wherever the Member States exercise sovereign powers, in particular in the exclusive economic zone. It expressly pleads Article 56(1)(a) of UNCLOS in support of this submission. It states that in the exclusive economic zone the United Kingdom has in particular not complied with the obligations to propose sites of Community importance under Article 4 of the directive and to protect species under Article 12.

126. The United Kingdom Government in principle admits this complaint and states that appropriate rules were enacted for the oil industry in 2001 [47] and are being prepared as to the remainder.

127. Moreover, the High Court of England and Wales found the Habitats Directive to be applicable outside territorial waters back in 1999. [48] In so deciding, it relied in particular on the following considerations. First, while it is true that the concern of the directive is very much land-based, its protective objectives in relation to certain species and habitat types — in particular sea mammals and cold-

47 — The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001, which entered into force on 31 May 2001.

48 — Judgment cited in footnote 29, p. 102 et seq. (p. 114).

water coral reefs [49] — can be attained only if it is not limited to territorial waters. Second, this outcome follows in particular from the Court's case-law on the territorial scope of Community fisheries law, from the United Kingdom interpretation of Directive 85/337 on the assessment of environmental effects in relation to its territorial scope and from public statements by Government members on the scope of the Habitats Directive.

128. Although the United Kingdom does not dispute the applicability of the Habitats Directive outside territorial waters, it must be examined before giving judgment against it in this respect whether the directive does in fact apply there.

129. In *Kramer*, the Court deduced from a legal basis for regulating fishing with a view to ensuring protection of fishing grounds and conservation of the biological resources of the sea [50] and from the very nature of things that the rule-making authority of the Community *ratione materiae* also extends — in so far as the Member States have similar authority under public international law — to fishing on the high seas. It stated that the only way to ensure the conservation of the biological resources of the sea both effectively and equitably is through a system of rules binding on all the States concerned, including non-member countries. [51] In a further judgment, when determining the geographical area to which a regulation applied, the Court interpreted it in the light of the legal context in which it appeared and of its subject-matter and purpose. The Court thereby reached the conclusion that its territorial scope coincided with that of Community law in its entirety at any given time. Therefore, any extension of Member States' maritime zones automatically entailed the same extension of the regulation's field of application. [52]

130. The Habitats Directive is consequently applicable outside the territorial waters of the United Kingdom if two conditions are met. First, the United Kingdom must have extended sovereign rights to the area outside territorial waters and, second, the Habitats Directive must require to be interpreted as extending to that area.

131. It is common ground between the parties that the United Kingdom exercises sovereign rights in the area of the exclusive economic zone and on the continental shelf. Relevant Community law can therefore also apply there.

49 — According to the High Court, this type of coral is covered by protected habitat type 'reefs' (Natura 2000 Code 1170).

50 — Article 102 of the Act of Accession of 22 January 1972.

51 — Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279, paragraphs 30/33.

52 — Case 61/77 *Commission* v *Ireland* [1978] ECR 417, paragraphs 45 to 51.

132. While the Habitats Directive admittedly contains no express rule concerning its territorial scope, it is consonant with its objectives to apply it beyond coastal waters. In accordance with Article 2(1), the directive is meant to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies. This objective supports the conclusion that the area within which the directive applies coincides with that of the Treaty. In accordance with the aforementioned case-law, the area within which the Treaty applies is not limited to the territorial waters. Also, the directive protects habitats such as reefs and species such as sea mammals which are frequently, in part even predominantly, to be found outside territorial waters.

133. The Community legislature too has thus been concerning itself meanwhile with the transposition of the Habitats Directive beyond the coastal sea. Council Regulation (EC) No 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98 [53] transposes for fisheries the requirements for protection of cetaceans pursuant to Articles 12 and 16 of the Habitats Directive and Annex IV(a) thereto. Areas outside territorial waters are affected in particular.

134. Nor is any reason apparent why the Member States should be freed from the obligations of the Habitats Directive when exercising sovereign powers outside territorial waters. UNCLOS admittedly imposes limits on their powers, but it obliges them in principle to protect the marine environment — including in the exclusive economic zone and on the continental shelf. The Convention on Biological Diversity (Rio Convention), to which the Community and the Member States have acceded, [54] strengthens this obligation. In accordance with Article 4(b) of this Convention, its provisions apply, in relation to each Contracting Party, in the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction. This relates in particular to activities in the exclusive economic zone and on the continental shelf.

135. The Habitats Directive is therefore also to be transposed in respect of areas outside territorial waters, in so far as the Member States or the Community exercise sovereign rights there.

53 — OJ 2004 L 150, p. 12.

54 — OJ 1993 L 309, p. 3

136. It is of course to be noted that the provisions for the oil industry entered into force before the period set in the reasoned opinion expired and the United Kingdom therefore, to this extent at least, fulfilled in time its obligation to transpose outside territorial waters. However, since these rules cover only the oil industry, the United Kingdom has not fully transposed the directive outside territorial waters.

III — Costs

137. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission is largely successful here, the fact that it withdrew some subsidiary complaints and was unsuccessful on other points can be disregarded for the purposes of costs. The United Kingdom is therefore to be ordered to bear the costs.

IV — Conclusion

138. I therefore suggest that the Court:

(1) declares that, by failing to transpose correctly the following provisions:

— Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in relation to Gibraltar,

— Article 6(3) and (4), in relation to certain water abstraction plans and projects and in relation to land use plans,

— Article 11,

— Article 12(1)(d), in relation to Gibraltar,

— Article 12(2),

— Article 12(4),

— Article 13(1),

— Article 14(2),

— Article 15,

— Article 16(1) and

— the entire directive in respect of maritime areas outside territorial waters and in which the United Kingdom of Great Britain and Northern Ireland exercises sovereign rights, with the exception of the oil industry,

the United Kingdom of Great Britain and Northern Ireland has infringed Articles 10 and 249 of the Treaty and Article 23 of the directive;

(2) dismisses the action as to the remainder;

(3) orders the United Kingdom to pay the costs.