OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 19 April 2007 [1]

I — Introduction

1. In this action for failure to fulfil obligations the Commission takes issue with the application of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [2] ('the Birds Directive') and of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [3] ('the Habitats Directive') in connection with works on a ski run in the Stelvio National Park, which has been designated as a special protection area ('SPA') within the meaning of the Birds Directive.

2. The dispute concerns in particular whether prior to the authorisation and implementation of that project the competent Italian authorities conducted a sufficient assessment of its implications for the SPA and whether the SPA was adversely affected.

1 — Original language: German.
2 — OJ 1979 L 103, p. 1.
3 — OJ 1992 L 206, p. 7.

II — Legal framework

3. Natura 2000 is defined in Article 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.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.'

4. Article 4 of the Birds Directive contains provisions concerning which areas the Member States should designate as SPAs. The protection of those areas was also initially governed by the first sentence of Article 4(4):

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

In this connection, account shall be taken of:

(a) species in danger of extinction;

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

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

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

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

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

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

3. ...

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid

pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. ...'

5. Article 7 of the Habitats Directive amended the rules governing the protection of SPAs:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

6. That provision is elucidated in the following terms in the seventh recital in the preamble to the Habitats Directive:

'... all the areas designated, including those classified now or in the future as special protection areas pursuant to ... Directive 79/409/EEC ..., will have to be incorporated into the coherent European ecological network'.

7. Article 6(2) to (4) of the Habitats Directive, which are of relevance here, read as follows:

'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 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.

...'

8. The 10th recital in the preamble to the Habitats Directive states the following in this regard:

'... an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'.

III — Facts, pre-litigation procedure and forms of order sought

9. In 1998[4] Italy designated the Stelvio National Park as an SPA within the meaning of the Birds Directive. The SPA covers an area of 59 809 hectares and lies in the Alps. According to the standard data form submitted by Italy in November 1998, it hosts a number of birds referred to in Annex I to the Birds Directive — the golden eagle (*Aquila chrysaetos*), the peregrine (*Falco peregrinus*), the honey buzzard (*Pernis apivorus*), the hazel hen (*Bonasa bonasia*), the ptarmigan (*Lagopus mutus helveticus*), the black grouse (*Tetrao tetrix*), the capercaillie (*Tetrao urogallus*) and the black woodpecker (*Dryocopus martius*) — as well as the migratory birds the sparrowhawk (*Accipiter nisus*), the common buzzard (*Buteo buteo*) and the wallcreeper (*Tichodroma muraria*).

10. A further standard data form of 14 May 2004 mentions additional species referred to in Annex I, namely the bearded vulture (*Gypaetus barbatus*), the kite (*Milvus milvus*), the dotterel (*Charadrius morinellus*), the boreal owl (*Aegolius funereus*), the Eurasian pygmy owl (*Glaucidium passeri-*

4 — According to the standard data form completed by the Italian authorities, it was as early as 1988; see the annexes to the application, pp. 33 and 47.

num), the eagle owl (*Bubo bubo*), the grey-headed woodpecker (*Picus canus*) and the rock partridge (*Alectoris graeca saxatilis*).

11. The Commission takes issue with works carried out within the SPA. The National Park authorised those measures on 14 February 2003. The works comprised the modification of two ski runs and the construction of associated facilities in preparation for the 2005 World Alpine Ski Championships. As part of this project a corridor 50 metres wide and 500 metres long was cut through a forest. Around 2 500 trees — common spruce, Swiss pine and larch — were felled. According to a 2005 study submitted by Italy, however, only around 7 000 m^2 were reportedly affected. [5]

12. Before that authorisation was granted, two environmental impact assessments were conducted. The first assessment dates from 1999. Following modifications to the proposal studied in that assessment, an institute from the Region of Lombardy, the Istituto di Ricerca per l'Ecologia e l'Economia Applicate alle Aree Alpine (the IREALP), submitted a further study, on the environmental impact of the modified proposal, in September 2002. That study related in particular to measures to compensate for and reduce environmental damage.

5 — Annex to the rejoinder, pp. 24 and 54.

13. Subsequently, in 2003, after the contested authorisation had been granted, two further studies were submitted by the Municipality of Valfurva, one of which, dated 1 December 2003, also concerned the zone at issue. Lastly, Italy submitted a further study, dating from 2005, with the rejoinder.

14. The Commission became aware of the measures following a complaint. It took the view that by authorising and implementing them Italy had infringed Article 4(1) and (2) of the Birds Directive and Articles 6 and 7 of the Habitats Directive.

15. By letter of 19 December 2003, the Commission gave Italy formal notice to submit its observations. Since the Italian Government failed to reply within the prescribed period of two months, on 9 July 2004 the Commission sent a reasoned opinion to Italy, in which it set a further period of two months for compliance with the requirements of Community law.

16. The Italian Government replied by letters of 8 September 2004 and 15 September 2004. Despite those replies the Commission adhered to its earlier view and brought the present action.

17. The Commission claims that the Court should:

— declare that, in relation to the project for the extension and improvement of the Santa Caterina Valfurva skiing area (the 'Bucaneve' and 'Edelweiss' runs) and for the provision of the corresponding ski facilities with a view to the holding of the 2005 World Alpine Ski Championships in SPA IT 2040044 Stelvio National Park, by having

— allowed measures to be taken which have a significant impact on SPA IT 2040044 Stelvio National Park without making them subject to an appropriate assessment of the impact on the site in the light of the site's conservation objectives and, in any event, without complying with the provisions which allow a project to be carried out, in the event of the impact assessment being negative, only in the absence of alternative solutions and only after the adoption and communication to the Commission of all the compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected;

— failed to adopt measures to avoid the deterioration of natural habitats and habitats of species and the disturbance of species for which SPA IT 2040044 Stelvio National Park has been designated;

— failed to endow SPA IT 2040044 Stelvio National Park with a protective legal status capable of ensuring, in particular, the survival and reproduction of the species of birds mentioned in Annex I to Directive 79/409 and the breeding, moulting and wintering of the regularly occurring migratory species not listed in Annex I,

the Italian Republic has failed to fulfil its obligations under Article 6(2) to (4), in conjunction with Article 7, of Directive 92/43 and under Article 4(1) and (2) of Directive 79/409;

— order the Italian Republic to pay the costs.

18. The Italian Republic does not set out a form of order sought by it, but suggests that the Commission should consider withdrawing the action.

IV — Legal assessment

19. First of all, it is necessary to clarify the subject-matter of the action. The Commission takes issue with a project for the

extension and improvement of the Santa Caterina Valfurva skiing area (the 'Bucaneve' and 'Edelweiss' runs) and for the provision of corresponding ski facilities with a view to the holding of the 2005 World Alpine Ski Championships.

20. According to the Italian studies submitted, a whole series of measures were planned in this connection, including the construction of a ski-jump stadium, a cable-car route, a chair lift and a refuge, and works to modify two ski runs (Bucaneve and Edelweiss) which adjoin one another.

21. However, as Italy rightly points out in the defence, the Commission actually describes only the works to modify the second ski run ('Edelweiss'), which necessitated the felling of around 2 500 trees. [6] The Commission confirms this in the reply, restricting the action to the measures authorised on 14 February 2003. The present action therefore concerns only that subproject.

22. The Commission raises three pleas in law in relation to the works to modify the ski run, the first of which consists of two separate complaints.

23. By the first plea in law, the Commission alleges that in authorising the project Italy infringed Article 6(3) and (4) of the Habitats Directive. Article 6(3) was infringed because authorisation was granted without a sufficient assessment of the project's impact on the SPA (see A below). Secondly, Article 6(4) was infringed because the requirements relating to authorisation in the event of a negative assessment were not observed (see B below).

24. By the second plea in law, the Commission alleges that as a result of the project Italy infringed Article 6(2) of the Habitats Directive. It failed to take all necessary steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of species for which the SPA was designated (see C below).

25. Lastly, the third plea in law concerns the legal conservation measures for the SPA required under Article 4(1) and (2) of the Birds Directive. The Commission concludes from the implementation of the contested project that the existing legal conservation measures are not sufficient (see D below).

6 — See point 11 above.

A — *Article 6(3) of the Habitats Directive*

26. Pursuant to Article 6(3) of the Habitats Directive, the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of the plan or project for the site, that it will not adversely affect the integrity of the site and, if appropriate, after having obtained the opinion of the general public. The Court has thus already held that that provision establishes a procedure intended to ensure, by means of a prior examination, that such a plan or project is authorised only to the extent that it will not adversely affect the integrity of the site. [7]

27. The parties in the present case agree that the works authorised by the decision of 14 February 2003 to modify the ski run required such an impact assessment.

The requirements governing an impact assessment

28. In this regard, the Court has also already held that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such effects. [8]

29. An impact assessment can therefore form the basis for an official authorisation for the purposes of Article 6(3) of the Habitats Directive only if it dispels all reasonable scientific doubt that the plan or project will not have adverse effects on the integrity of the site concerned.

30. Such an impact assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives must be identified in the light of the best scientific knowledge in the field. [9]

31. With regard to areas to be designated under the Habitats Directive, the Court has

7 — Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405 ('*Waddenzee*'), paragraph 34, and Case C-239/04 *Commission* v *Portugal* [2006] ECR I-10183 ('*Castro Verde*'), paragraph 19.

8 — *Waddenzee* (cited in footnote 7, paragraphs 56 and 59) and *Castro Verde* (cited in footnote 7, paragraph 20).

9 — *Waddenzee* (cited in footnote 7, paragraph 54).

already pointed out that, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), the conservation objectives are established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed. [10]

32. The abovementioned provisions are admittedly not directly applicable to SPAs under the Birds Directive. According to the case-law of the Court, however, Article 4(1) and (2) of that directive correspondingly requires the Member States to provide SPAs with a legal status protecting them that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I and the breeding, moulting and wintering of regularly occurring migratory species not listed in Annex I. [11]

33. The conservation objectives under the Birds Directive therefore relate to the survival and reproduction of the bird species for which the relevant area has been designated. The species for which an area has been designated can be determined in principle from the standard data form which the Member State sends to the Commission, [12] unless other documents, such as rules on the SPA, show further conservation objectives.

34. In the present case these species can be deduced the standard data form submitted to the Commission by the Italian authorities in November 1998. It mentions as species under Annex I the golden eagle, the peregrine, the honey buzzard, the hazel hen, the ptarmigan, the black grouse, the capercaillie and the black woodpecker. The migratory bird species the sparrowhawk, the common buzzard and the wallcreeper are also mentioned. However, the sparrowhawk and the wallcreeper are rated with D, that is to say as unimportant. It must therefore be assumed that they are not covered by the conservation objectives.

35. In principle the question arises whether it is also necessary to take into consideration the additional species which are included in a standard data form that Italy submitted to

10 — *Waddenzee* (cited in footnote 7, paragraph 54).

11 — Case C-166/97 *Commission* v *France* [1999] ECR I-1719 (Seine estuary), paragraph 21; Case C-415/01 *Commission* v *Belgium* [2003] ECR I-2081 (area maps), paragraph 15; Case C-240/00 *Commission* v *Finland* [2003] ECR I-2187 (bird conservation areas), paragraph 16; and Case C-209/04 *Commission* v *Austria* [2006] ECR I-2755 ('*Lauteracher Ried*'), paragraph 32.

12 — The standard data form is based on Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1997 L 107, p. 1).

the Commission on 14 May 2004. Those species are the bearded vulture, the kite, the dotterel, the boreal owl, the Eurasian pygmy owl, the eagle owl, the grey-headed woodpecker and the rock partridge.

36. However, there is nothing in the documents in the case to suggest that one year previously, when the contested authorisation was granted, those species were already included in the conservation objectives which Italy had recognised for the area. There was therefore no obligation to include them in the impact assessment.

37. This does not mean, however, that those species are unprotected. Rather, the new standard data form is an indication that they already occurred in the area when the project was being executed and that in principle their occurrence also required the area to be designated as a special protection area for the conservation of such species. Since the area was evidently not designated for these species until 14 May 2004, they were at least covered by the temporary protection regime for areas which required designation but had not yet been designated up to that point, that is to say the first sentence of Article 4(4) of the Birds Directive, [13] which is stricter as regards exceptions than the protective provisions under the Habitats Directive. [14] However, since the Commission has not put forward any complaint in this regard, it is not necessary to consider the point any further in the present case.

38. It must therefore be examined whether, before the authorisation was granted on 14 February 2003, all the aspects of the project which could, either individually or in combination with other plans or projects, prejudice the conservation of the species mentioned in the standard data form of 1998 were examined in the light of the best scientific knowledge in the field.

The environmental impact assessment published in 2000

39. The Italian Government takes the view that the implications of the project were the

13 — See Case C-374/98 *Commission* v *France* [2000] ECR I-10799 (*'Basses Corbières'*), paragraphs 47 and 57. In the case of habitat types and species which are to be protected under the Habitats Directive, but of which due account was not taken when the conservation objectives were defined, the question arises whether the temporary protection regime for proposed areas is applicable; see Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 26, and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, paragraph 35. In both instances, in order for the protective provision to be infringed the existence of the interests to be protected and harm to them must be proved, whilst under Article 6(3) of the Habitats Directive only the possibility of harm to conservation objectives must be proved in order for an assessment of the implications for the site to be required.

14 — *Basses Corbières* (cited in footnote 13, paragraph 50 et seq.).

subject of an appropriate assessment even before the positive environmental impact decision in 2000. As evidence it submits the annex to that decision.[15] This is clearly a summary and evaluation of the actual scientific investigations of the impact on the environment.

40. A whole series of projects are described and studied but, with the exception of the modifications to the ski run, they are not the subject of the present proceedings. The modifications to the ski run are described briefly on p. 12.

41. The implications, for fauna, vegetation, flora and ecosystems, of all the projects assessed are discussed together on pp. 27 to 29. The authority responsible takes the view that there will be neither substantial changes to the habitats of animal species present nor fundamental changes in the availability of food and shelter for small birds and mammals.

42. As the Commission rightly points out, in this section the authors of the document took issue, however, with significant deficiencies in the investigations. They stated that, overall, account was hardly taken of the effects. The actual works were not described in full. Not all relevant species were covered. This applied in particular to the ptarmigan, whose reproduction and nesting areas had not been studied. In other respects too, the data on the animal kingdom was of low quality. For example, mention was made of the capercaillie, which no longer occurred in the area, but not of the wallcreeper, the black woodpecker, the sparrowhawk or the eagle owl.

43. On p. 38 of the document, moreover, it is stated that the modifications to the ski run should not be executed within a corridor more than 40 metres wide. Instead the corridor should be restricted to 20 metres in width. That restriction was not observed when the project was subsequently executed. Also, on p. 40 further avifauna studies were recommended, in particular in connection with felling in the forest.

44. While the Italian Government may refer to a 1994 biological study which is mentioned in the document's sources, to other documents consulted and to opinions issued by authorities involved in the procedure, it is not clear how they contribute to the impact assessment. The assessment of alternatives

15 — Annex 1 to the defence.

which is also expressly referred to is of interest in the context of the EIA directive [16] and may also be relevant in connection with an authorisation under Article 6(4) of the Habitats Directive, but it is of no importance for the impact assessment.

45. Therefore, in the studies on the basis of which the positive environmental impact decision was made in 2000, neither all the aspects of the project nor their implications for the various protected bird species were investigated. In view of those objections, they did not allow the view to be taken that the measures to modify the ski run would not adversely affect the integrity of the SPA. They are not therefore an appropriate basis for authorisation of those works under Article 6(3) of the Habitats Directive.

The study by the IREALP published in 2002

46. The study by the IREALP published in 2002 also describes the project and its effects on the environment. It deals relatively thoroughly with the implications for the hydrological regime and geomorphology and with vegetation. As regards the birds for which the SPA was designated, it simply states that the black woodpecker occurs in the area of forest concerned. [17] In connection with another subproject which is not at issue in these proceedings, mention is made of the dotterel which is listed in the standard data form from 2004. [18]

47. It could be inferred from this that other species are not affected and the study therefore dealt fully with the species affected by the various projects. Assuming that to be the case, it would, however, have been necessary to set out and evaluate the implications of the project for the black woodpecker. There is no evidence that this was done, however.

48. Furthermore, the other studies submitted by Italy, from 2003 and 2005, and a communication from Italy to the Commission in 2004 [19] raise doubts that all the relevant species affected by the project were actually covered. Mention is made there in particular of the black grouse as being affected.

49. Consequently, the study by the IREALP published in 2002 likewise did not allow the view to be taken that the measures to modify

16 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

17 — Annexes to the application, p. 304.

18 — Annexes to the application, p. 318.

19 — Annexes to the application, p. 80 et seq.

the ski run would not adversely affect the integrity of the SPA. It is therefore likewise not a sufficient basis for authorisation of those works pursuant to Article 6(3) of the Habitats Directive.

The subsequent studies

50. Both in the pre-litigation procedure and in the proceedings before the Court of Justice, Italy has submitted further documents concerning the environmental impact of the contested measures. These are a study dated 1 December 2003, [20] a communication from the Italian Ministry of the Environment dated 6 August 2004 [21] and a study dated 21 December 2005. [22] Only the latter study focuses, in terms of content, on the requirements for an impact assessment since it investigates the importance of the areas concerned for the relevant species and evaluates the implications of the project in this regard. Ultimately, however, it is not necessary to consider the extent to which, from the point of view of form and content, the individual documents satisfy the requirements for an impact assessment.

20 — Annexes to the application, p. 148 et seq.

21 — Annexes to the application, pp. 84 and 85.

22 — Annex to Italy's rejoinder.

51. As the Commission states, all those documents were completed *after* the authorisation of 14 February 2003. Under the second sentence of Article 6(3) of the Habitats Directive, however, authorisation is to be granted in the light of the impact assessment. That was not possible in this instance. For that reason alone, those documents are not an appropriate basis, for the purposes of Article 6(3) of the Habitats Directive, for the authorisation of 14 February 2003.

Interim conclusion

52. The authorisation of 14 February 2003 could not be granted pursuant to Article 6(3) of the Habitats Directive since, on the basis of the studies conducted by the Italian authorities which are available to the Court of Justice, it could not be ruled out at that time beyond any reasonable scientific doubt that the project would not affect the conservation objectives of the site concerned.

B — *Article 6(4) of the Habitats Directive*

53. However, the question arises whether the authorisation could have been granted under Article 6(4) of the Habitats Directive.

Under that provision a plan or project may, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, if the Member State takes all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

54. That provision is normally applicable only *after* the implications of the project have been studied pursuant to Article 6(3) of the Habitats Directive and have therefore been determined, at least in so far as such a finding is scientifically possible. Knowledge of the adverse effects on the conservation objectives is necessary for the application of Article 6(4) of the Habitats Directive, since otherwise no requirements under that derogating provision can be assessed. The assessment of imperative reasons of overriding public interest requires those interests to be weighed against the adverse effects on the area. Likewise it is possible to assess whether alternatives exist which have a lesser adverse effect on the area only by having regard to those adverse effects. Lastly, compensatory measures require knowledge of the damage to be compensated. [23]

55. Since the relevant knowledge was not available on 14 February 2003, it would not appear possible, at first sight, to base the authorisation granted on that date on Article 6(4) of the Habitats Directive.

56. However, it must also be possible, in cases of particular urgency, to authorise projects for imperative reasons of overriding public interest without previously conducting time-consuming scientific assessments. Otherwise it would be impossible, for example, to take measures to avert danger where there is an imminent threat to legal interests of paramount importance if those measures were likely to affect the conservation objectives for protection areas.

57. In such cases, for the purposes of the application of Article 6(4) of the Habitats Directive the maximum conceivable damage resulting from the action must be assumed and it must be assessed whether imperative reasons of overriding public interest — the imminent danger — require the implementation of specifically those protective measures or whether those interests can also be satisfied by alternative measures with less of an adverse effect on the SPA, for example by waiting for an impact assessment. [24] In this case the implications must be identified at least subsequently in order to be able to take the necessary compensatory measures.

23 — See my Opinion in *Lauteracher Ried* (cited in footnote 11, points 83 and 84).

24 — See my Opinion in *Castro Verde* (cited in footnote 7, point 46 with further references).

58. It is not necessary to examine here whether the approaching world ski championships were capable of justifying not conducting a proper impact assessment. In particular, there is nothing to suggest that sufficient consideration was given to alternatives to the modification of the ski run. Since it is for Italy to demonstrate that the requirements governing an exception under Article 6(4) of the Habitats Directive have been met, [25] it must bear the consequences.

59. The authorisation of 14 February 2003 could not therefore be based on Article 6(4) of the Habitats Directive.

60. In summary, it must therefore be found that by authorising, in connection with the project for the extension and improvement of the Santa Caterina Valfurva skiing area (the 'Edelweiss' run) and for the provision of the corresponding ski facilities with a view to the holding of the 2005 World Alpine Ski Championships in SPA IT 2040044 Stelvio National Park, measures which are liable to have a significant impact on the SPA without making them subject to an appropriate assessment of their implications for the site in light of the site's conservation objectives or assessing sufficiently the alternatives to those measures, the Italian Republic has failed to fulfil its obligations under Article 6(3) and (4), in conjunction with Article 7, of the Habitats Directive.

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

61. Under Article 6(2) of the Habitats Directive, Member States must 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 the directive.

62. This plea in law raises the question whether particular activities can infringe both Article 6(2) and Article 6(3) and (4) of the Habitats Directive. In this regard I have already stated [26] that, according to the judgment in *Waddenzee*, Article 6(2) and Article 6(3) are both aimed at preventing the conservation objectives for a protected area from being undermined. [27] The fact that a plan or project has been authorised in accordance with the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan

25 — *Castro Verde* (cited in footnote 7, paragraphs 36, 39 and 40) and my Opinions in *Castro Verde* (point 41) and in *Lauteracher Ried* (cited in footnote 11, point 68).

26 — Opinion in Case C-418/04 *Commission* v *Ireland* (IBA Inventory 2000) pending before the Court, point 173.

27 — *Waddenzee* (cited in footnote 7, paragraph 36).

or project, a concomitant application of the rule of general protection laid down in Article 6(2). [28] On the other hand, where the authorisation procedure has not been properly conducted, both the procedural provisions of Article 6(3) and (4) and the substantive requirements relating to site protection stemming from all three paragraphs can be infringed in relation to the project.

63. The Court of Justice may find an infringement of Article 6(2) of the Habitats Directive in relation to a special area of conservation only where deterioration or disturbance within the meaning of that provision is established. In principle the Commission must set out those effects and, if they are disputed, prove them.

64. In the present case the Commission submits that around 2 500 trees were felled within the Stelvio National Park SPA, but it is unclear whether that measure has adversely affected the conservation objectives of the area. Forests cannot as such be the subject of a special protection area under Article 4 of the Birds Directive, but only in so far as they are of importance as a habitat for protected bird species.

65. Evidence of possible use of the area of forest in question by protected bird species can be found in an atlas of European breeding birds, extracts from which are submitted by the Commission. [29] According to that atlas, the area may be used in particular by the honey buzzard, the ptarmigan and the black woodpecker. Such information can give rise to an obligation, which is not disputed here, to conduct an impact assessment. However, it is not sufficient in itself to prove actual harm.

66. The only document that contains specific information on the use of the areas in question by protected species is the study of 21 November 2005, which Italy submitted with the rejoinder. [30] According to that document, most of the project's effects are negligible or insignificant. Since the Commission has not disputed those findings, which would have been possible in the event of an oral procedure, they are to be regarded as accurate.

67. However, according to the same study, it is necessary to compensate for the loss of potential breeding grounds for the black grouse by improving habitats elsewhere. [31] It is to be concluded from the recognition of the need to compensate for the harm to the

28 — *Waddenzee* (cited in footnote 7, paragraph 35).

29 — Hagemeijer/Blair, *The EBCC Atlas of European Breeding Birds*, extracts from which form Annex 10 to the application.

30 — P. 6 et seq. of the annex to the rejoinder.

31 — Pp. 63 and 65 of the annex to the rejoinder.

black grouse caused by Italy that the conservation objectives of the Stelvio National Park SPA have been adversely affected as far as that species is concerned.

68. It must therefore be found that by implementing, in connection with the project for the extension and improvement of the Santa Caterina Valfurva skiing area (the 'Edelweiss' run) and for provision of the corresponding ski facilities with a view to the holding of the 2005 World Alpine Ski Championships in SPA IT 2040044 Stelvio National Park, measures which have resulted in a deterioration of the habitats of the black grouse and thereby have adversely affected the conservation objectives for the SPA, the Italian Republic has failed to fulfil its obligations under Article 6(2), in conjunction with Article 7, of the Habitats Directive.

D — *Article 4(1) and (2) of the Birds Directive*

69. The third plea in law concerns the legal conservation measures for the SPA required under Article 4(1) and (2) of the Birds Directive. Those provisions require, first of all, SPAs to be designated, [32] a matter which is not disputed in the present case.

70. In addition, according to the settled case-law of the Court, under those provisions the Member States must provide SPAs with a legal status protecting them that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the directive and the breeding, moulting and wintering of regularly occurring migratory species not listed in Annex I. [33]

71. Since Article 7 of the Habitats Directive provides that the obligations which arise, inter alia, under Article 6(2) of that directive are to replace those arising under the first sentence of Article 4(4) of the Birds Directive in respect of SPAs, the legal status protecting those areas must also guarantee the avoidance therein of the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been designated. [34]

72. Certain rules must therefore be adopted to guarantee sufficient protection of SPAs.

73. However, the Commission does not raise any specific objections to the general statutory provisions for the protection of SPAs in Italy or in Lombardy or to the specific

32 — Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221 (Santoña Marshes), paragraph 20.

33 — See the references in footnote 11.

34 — *Commission* v *Belgium* (cited in footnote 11, paragraph 16).

provisions adopted for the protection of the Stelvio National Park SPA. Instead, it concludes from the execution of the contested project that the existing legal conservation measures are not sufficient.

74. Italy contests that conclusion by stating that infringement of conservation duties does not prove that the rules of law to guarantee protection are deficient. However, it fails to recognise that the obligations under Article 4(1) and (2) of the Birds Directive are not limited to the adoption of certain rules. The conservation measures required under those provisions must also guarantee the protection of certain areas *in practice*.

75. In the present case the conservation objectives of the Stelvio National Park SPA have not been met at least with regard to the black grouse. That damage indicates that not all the necessary measures were taken to guarantee the protection of the area.

76. It is true that areas may be adversely affected even though a Member State has taken all reasonable measures to avoid the damage. In such a case the damage would not establish an infringement of Article 4(1) and (2) of the Birds Directive.

77. However, in the present case the contested measures were implemented with authorisation from the competent authorities even though such authorisation would not have been justified, as an exception, under Article 6(4) of the Habitats Directive. It is therefore possible to conclude from the damage that Article 4(1) and (2) of the Birds Directive have been infringed.

78. It must therefore be found that by authorising, in connection with the project for the extension and improvement of the Santa Caterina Valfurva skiing area (the 'Edelweiss' run) and for provision of the corresponding ski facilities with a view to the holding of the 2005 World Alpine Ski Championships in SPA IT 2040044 Stelvio National Park, measures which have resulted in a deterioration of the habitats of the black grouse and thereby have adversely affected the conservation objectives for the SPA, the Italian Republic has failed to fulfil its obligations under Articles 4(1) and (2) of the Birds Directive.

V — Costs

79. 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. In the present case, since the Commission is successful in respect of all the pleas in law, Italy must be ordered to pay the costs.

VI — Conclusion

80. I therefore propose that the Court should:

(1) declare that by authorising, in connection with the project for the extension and improvement of the Santa Caterina Valfurva skiing area (the 'Edelweiss' run) and for provision of the corresponding ski facilities with a view to the holding of the 2005 World Alpine Ski Championships in SPA IT 2040044 Stelvio National Park, measures

— which are liable to have a significant impact on the SPA without making them subject to an appropriate assessment of their implications for the site in light of the site's conservation objectives or assessing sufficiently the alternatives to those measures, and

— which have resulted in a deterioration of the habitats of the black grouse (*Tetrao tetrix*) and thereby have adversely affected the conservation objectives for the SPA,

the Italian Republic has failed to fulfil its obligations under Article 6(2), (3) and (4), in conjunction with Article 7, of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and under Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

(2) order Italy to pay the costs.