# JUDGMENT OF THE COURT (Second Chamber)

14 September 2006 *

In Case C-244/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Bayerischer Verwaltungsgerichtshof (Germany), made by decision of 19 April 2005, received at the Court on 7 June 2005, in the proceedings

**Bund Naturschutz in Bayern eV,**

**Johann Märkl and Others,**

**Angelika Graubner-Riedelsheimer and Others,**

**Friederike Nischwitz and Others,**

v

**Freistaat Bayern,**

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), P. Kūris, G. Arestis and J. Klučka, Judges,

Advocate General: L.A. Geelhoed,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 April 2006,

after considering the observations submitted on behalf of:

— Bund Naturschutz in Bayern eV, by U. Kaltenegger and P. Rottner, Rechtsanwälte,

— J. Märkl and Others, by C. Deißler and A. Schwemer, Rechtsanwälte,

— F. Nischwitz and Others, by A. Lehners and E. Schönefelder, Rechtsanwälte,

— Freistaat Bayern, by Professors A. Brigola and M. Dauses, and by G. Schlapp and M. Wiget, acting as Agents,

— the Commission of the European Communities, by M. Van Beek and M. Heller, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2006,

gives the following

## Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 3 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Directive').

2 This reference was made in the course of proceedings between Bund Naturschutz in Bayern eV and 23 other persons ('the applicants') and Freistaat Bayern regarding a decision to approve a motorway project.

### The Directive

3 Under the sixth recital in the preamble to the Directive, 'in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable'.

4 Article 3 of the Directive provides:

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

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

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1. ... .'

5 Article 4 of the Directive is worded as follows:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host ...

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. ...

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which lost one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible ... .

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

6 In accordance with Article 6(1) of the Directive, Member States are to establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

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

'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.

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.'

8 Article 7 of the Directive provides that obligations arising under Article 6(2), (3) and (4) of the Directive shall replace any obligations arising under the first sentence of Article 4(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.

9 In accordance with Article 11 of the Directive, 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.

## National legislation

10 The law on federal roads (Bundesfernstraßengesetz) lays down, inter alia, the conditions necessary for the construction of that category of roads.

11 Paragraph 17 of that law provides:

'1. The construction or modification of federal roads is subject to the prior approval of a plan. In that context, all the public and private interests concerned by the project must be taken into consideration, including the impact of the project on the environment.

...'

12 Article 10(1)(5) of the Federal Law on Nature protection and countryside conservation (Gesetz über Naturschutz und Landschaftspflege) is worded as follows:

'Within the meaning of the present law, sites of Community importance means sites placed on the list prescribed in the third subparagraph of Article 4(2) of Directive 92/43/EEC, even if they have not yet been declared as protected sites within the meaning of the present law.'

13 That law provides in Articles 32 to 38 measures intended to protect the European ecological network 'Natura 2000'.

14 To that end, Article 33 of the same law establishes the selection procedure for sites which can then be accepted by the Commission. The first sentence of subparagraph 5(1) of that Article states:

'If a site has been published ...

1. all the projects, measures, amendments or disturbances which can adversely affect that site in its essential elements which are necessary for the conservation objectives shall be prohibited on a site of Community importance until the implementation of protective measures.'

15 The first sentence of Paragraph 13(b)(1) of the Bavarian law on the protection of nature, countryside conservation and outdoor leisure (Gesetz über den Schutz der Natur, die Pflege der Landschaft und die Erholung in der freien Natur) is worded as follows:

'Sites of Community importance shall be protected as special areas of conservation under Article 4(4) of Directive 92/43/EEC ... .'

16 Paragraph 13c of that law provides:

'1. Changes or disturbances which may, appreciably or in the long term, adversely affect the integrity of areas which are part of sites of Community importance or European ornithological reserves which have a determining importance with regard to the conservation objectives pursued by those sites or reserves shall be prohibited. The actions referred to in the previous sentence shall be forbidden on sites which are the subject of consultation since they risk adversely affecting, appreciably or in the long term, the biotypes or priority species which they host.

2. Plans shall be prohibited which, individually or in combination with other plans or projects, risk adversely affecting, appreciably or in the long term, the integrity of areas which are part of sites of Community importance or European ornithological reserves which have a determining importance with regard to the objectives of protection or conservation pursued by the latter.

3. Plans which may, individually or in combination with other plans or projects, affect sites of Community importance or European ornithological reserves must take into account the objectives of protection and conservation of those sites and reserves.

...'

17 Paragraph 48 of the same law provides:

'1. The officials or agents of authorities entrusted with nature conservation, of the Bavarian office for the protection of the environment and of municipalities shall be authorised to enter any plot of land in order to carry out the investigations necessary to perform the duties imposed by the present law; that authorisation shall also extend to the members of consultative committees for the protection of the environment in the preparation and holding of meetings. The present provision shall apply in particular to the preparation of measures prescribed by this law and the carrying out of land surveying, soil sampling and similar operations. ...

2. Until implementing regulations shall have been adopted ... the bodies or authorities responsible for nature conservation ... may, by general or individual

order, prohibit changes ... for a period of up to two years, in order to guarantee the provisional protection of the areas and objects to be protected, when there are grounds for fearing that those changes may jeopardise the aim of the protective measures envisaged; if special circumstances so require, that period may be extended for a maximum of a year. That measure may not be adopted unless the authorities responsible for nature conservation or the competent bodies apply the definitive protection procedure at the same time or immediately afterwards.

3. From the notification of the zone to be protected ... until the entry into force of the protective regulation, any alteration shall be prohibited for a maximum of one year in the prescribed natural conservation areas, subject to contrary provisions pursuant to paragraph 2 in the general or individual order. The legal use to which the land is put shall remain as it was at the time of notification. That consequence must be mentioned in the notification.'

## The facts which gave rise to the dispute and the questions referred for a preliminary ruling

18 The applicants in the main proceedings object to the construction of the Forstinning-Pastetten section of the new Munich-Mühldorf-Simbach-Pocking A 94 motorway. In the development plans for national trunk roads, that link was classified as an 'absolute priority'.

19 In the planning of that work, the route to be taken, from the Forstinning area, is controversial. The existing national B 12 trunk road, in the corridor of which it is planned to construct the main part of the new A 94 motorway, passes through the village of Haag ('the Haag route').

20 By decision of 7 March 2002 the Upper Bavarian government approved the plan for the construction of the Forstinning-Pastetten section of the A 94 motorway, 6.2 kilometres long, and turned down the Haag route in favour of a route passing further to the north through the village of Dorfen ('the Dorfen route'). The choice of the Dorfen route means that the A 94 would cross, in particular, the Hammerbach and Isen rivers and their tributaries, the Lappach, Goldach and Rimbach.

21 These are parts of areas which have been identified by the German authorities, on 29 September 1994, as sites eligible to be considered sites of Community importance. Those sites are designated as follows:

— Strogn, Hammerbach, Kollinger Bach (DE 7637-371),

— The valley of the Isen and its tributaries (DE 7739-371)

— Colonies of long-eared bats in the Lower Bavarian hill country (DE 7839-371).

22 According to ecological data relating to those zones, in both site DE 7637-371 and site DE 7739-371 there is a priority natural habitat type which appears in Annex I to the Directive and is listed under the name 'alluvial forests with Alnus glutinosa and Fraxinus excelsior'.

23 In addition, in the vicinity of the Haag route, the German authorities have designated the following additional protection zone:

— Ebersberger and Großhaager forest (DE 7837-371).

24 The applicants in the main proceedings having brought an action before it, the referring court points out that it would be possible to set aside the decision of approval of 7 March 2002 in accordance with the applicants' application only if there were irreparable errors of examination or breaches of Community law, in particular if the view were to be taken that the disputed planning significantly affected the designated protection zones with a view to their recognition as sites of Community importance.

25 In those circumstances, the Bayerischer Verwaltungsgerichtshof (Administrative Court, Bavaria) (Germany) firstly ruled that the claims should have suspensory effect and, secondly, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) What protection regime is required under Article 3(1) of Directive 92/43 in conjunction with the sixth recital in the preamble to that Directive in the light of the prohibition of any measure that might jeopardise the attainment of the objectives of the Treaty laid down in the second paragraph of Article 10 EC, as a result of the judgment of the Court of 13 January 2005 in Case C-117/03 in respect of sites which could be designated sites of Community importance, particularly those with priority natural habitat types or priority species, before

they appear in the list of sites of Community importance adopted by the Commission of the European Communities under the procedure provided for in Article 21 of the Directive?

(2) What is the effect on that protection regime if those sites already appear in the national list submitted to the Commission under Article 4(1) of Directive 92/43?

(3) Is a national protection scheme for those sites under Article 48(2) ... (the Bavarian Law on the protection of nature and countryside conservation) sufficient to satisfy the requirements of Community law under Article 3(1) of Directive 92/43 in conjunction with the sixth recital in the preamble to that Directive in the light of the prohibition of any measure that might jeopardise the attainment of the Treaty laid down in the second paragraph of Article 10 EC?'

26 In its assessments relating to the proceedings before it, the Verwaltungsgerichtshof wonders whether the protection scheme which must be determined is a protection scheme under Community law or whether the Member States must ensure the protection of the designated sites by means of measures within the scope of a national protection scheme alone. The response to that question will determine the legislation, criteria and also factual circumstances on the basis of which foreseeable damage linked to the planning at issue is to be assessed.

27 The Verwaltungsgerichtshof points out that it is not inconceivable that the planning might have significantly prejudicial consequences for the priority natural habitat type 'alluvial forests'. It finds that, in this case, the planned route crosses and, as it were,'criss-crosses' an integrated alluvial system (the Isen and its tributaries) several times. Consideration should also be given to the adverse effects on the area caused by noise, exhaust emissions, shadows cast by the bridges, land drying out under the bridges, harmful chemicals coming from the carriageway and also the emergence of atypical plant species during the construction period.

28 The Verwaltungsgerichtshof finally points out that a determination of the seriousness of the foreseeable damage to a designated zone with a view to its inclusion on the list of sites of Community importance depends also on whether the Directive requires the protection of such a zone to be strengthened before it is placed on that list.

## Concerning the questions referred for a preliminary ruling

*The first and second questions*

29 By those questions which may appropriately be dealt with together, the referring court raises the question of the protection scheme applicable to sites which have been designated by the national competent authorities with a view to their recognition as sites of Community importance, but whose inclusion on the list awaits a decision by the Commission.

30 More specifically, the referring court puts forward firstly the question of the legal nature of that protection scheme and, secondly, the question of its material characteristics.

31 It must first be remembered that the process of designating sites with a view to their inclusion on the list of sites of Community importance is governed by the provisions listed in Articles 3 and 4 of the Directive.

32 As is clear from Article 3(2) of the Directive, the decision of the national competent authorities relating to the designation of a site eligible to be considered as the element forming the European ecological network of special areas of conservation constitutes the first step of a process leading to the creation of the 'Natura 2000' network.

33 In that context, when scientific assessments and decisions identifying natural habitats and species are made, in particular those of a priority nature, account must be taken of the selection criteria established in Annex III of the Directive.

34 Following that process, it is the Commission's duty, on the basis of those criteria, to establish, in agreement with each of the Member States, a draft list of the sites of Community importance, showing in particular the sites which host one or more priority natural habitat types or one or more priority species.

35 As regards the level of protection applicable to the sites which appear on the national list transmitted to the Commission, it must be remembered that, in accordance with Article 4(5) of the Directive, the protection scheme for special areas of conservation laid down in Article 6(2), (3) and (4) thereof applies to a site once the latter is placed, in accordance with the third subparagraph of Article 4(2) of the Directive, on the list of sites selected as sites of Community importance, adopted by the Commission.

36 It follows, as the Court ruled in Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 25, that the protective measures prescribed in Article 6(2) to (4) of the Directive are required only as regards sites which are placed on the list of sites selected as sites of Community importance.

37 However, the Court pointed out at paragraph 26 of that judgment that that did not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission.

38 At paragraph 29 of that judgment, the Court held that, in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures 'appropriate' for the purpose of safeguarding that ecological interest.

39 As the national court raises the question of the interpretation to be given to the obligation to take such 'appropriate' protective measures, more precisely, the criteria

for the application of the protection scheme for sites designated by the national competent authorities, it must be remembered that, as the Court pointed out in Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraphs 22 and 23, to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of special sites of conservation, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Directive's objective of conservation of natural habitats and wild fauna and flora. Only in that way is it possible to realise the objective, in Article 3(1) of the Directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, in the entire European territory of the Member States.

40 The Court also pointed out, at paragraph 23 of that judgment, that, having regard to the fact that, when a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States, it cannot, of its own accord, exclude sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level.

41 Consequently, the Commission must be sure of having available an exhaustive list of sites eligible as special areas of conservation, the drawing up of which is aimed at a coherent European ecological network. It also follows from this that, at the time of the decision which the Commission is called upon to take, the sites identified by the Member States must reflect the situation on the basis of which the scientific evaluations of potential sites of Community importance have been carried out.

42 If that were not the case, the Community decision-making process which is not only based on the integrity of the sites as notified by the Member States, but is also characterised by the ecological comparisons between the different sites proposed by the Member States, would run the risk of being distorted and the Commission would no longer be in a position to fulfil its duties in the area concerned.

43 It must be added that, in accordance with Annexe III, Stage 2, paragraph 1 of the Directive, 'all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance'. It is therefore correct that those sites appear on the list which the Commission must draw up.

44 Having regard to the foregoing considerations, the Member States must, as regards the sites identified with a view to their inclusion on the Community list, take appropriate protective measures in order to maintain the ecological characteristics of those sites.

45 In that regard, it must be remembered that, in accordance with the first part of Annexe III to the Directive, the ecological characteristics of a site identified by the competent national authorities must reflect the assessment criteria which are listed there, namely, the degree of representativity of the habitat type, its area, its structure and functions, the size and density of the population of the species present on the site, the features of the habitat which are important for the species concerned, the degree of isolation of the population present on the site and the value of the site for conservation of the habitat type and species concerned.

46 Member States cannot therefore authorise interventions which may pose the risk of seriously compromising the ecological characteristics of a site, as defined by those

criteria. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics.

47 The answer to the first and second questions must therefore be that the appropriate protection scheme applicable to the sites which appear on a national list transmitted to the Commission under Article 4(1) of the Directive requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites.

*The third question*

48 By this question, the national court seeks an interpretation of Community law as regards the methods of implementation of the abovementioned protection scheme.

49 As regards the implementation of the protection scheme applicable to the sites concerned, it is for the Member States to take all the measures which are necessary.

50 In that regard, the detailed procedural rules applicable fall within the ambit of the domestic legal order of each Member State, provided that such rules are not less favourable than those governing similar domestic situations of an internal nature

and do not render impossible in practice or excessively difficult the exercise of rights conferred by Community law (see, to that effect, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31).

51 Consequently, the answer to the third question must be that Member States must, in accordance with the provisions of national law, take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission. It is for the national court to assess whether that is the case.

## Costs

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

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

1. **The appropriate protection regime applicable to sites which appear on a national list transmitted to the Commission, under Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, requires Member States not to**

**authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites.**

2. **Member States must, in accordance with the provisions of national law, take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission. It is for the national court to assess whether that is the case.**

[Signatures]