OPINION OF ADVOCATE GENERAL LÉGER

delivered on 7 March 2000 *

1. The High Court of Justice of England and Wales, Queen's Bench Division, [1] has referred a question to the Court for a preliminary ruling on the interpretation of Article 4(1) in conjunction with Article 2(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [2] (hereinafter 'the Habitats Directive' [3]).

2. The Habitats Directive aims to create a coherent European ecological network in order to promote the maintenance or restoration at a favourable conservation status of natural habitats and of wild fauna and flora on the territory of the Member States. [4] To attain that objective, the directive provides *inter alia* for the designation of special areas of conservation [5] (SACs) by means of a procedure which, under Article 4 of the directive, consists of three stages.

3. The High Court asks the Court to define the extent of the Member States' powers *in the first stage of the procedure for designating SACs* under Article 4(1) of the Habitats Directive, and, more precisely, to state whether, in drawing up the list of sites eligible for selection as sites of Community importance (SCIs), a Member State is obliged or merely entitled to take account of the requirements, in particular economic requirements, set out in Article 2(3) of that directive.

I — The relevant Community law background

4. The Habitats Directive, adopted on the basis of Articles 130r and 130s of the EC Treaty (now, after amendment, Articles 174 EC and 175 EC), proceeds from the following assessment:

'In the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened;... given that the threatened habitats and species form part of the Community's

* Original language: French.

1 — Hereinafter 'the High Court'.

2 — OJ 1992 L 206, p. 7.

3 — This directive is also commonly known as 'Natura 2000'.

4 — First, third, fourth, fifth and sixth recitals in the preamble.

5 — Sixth and seventh recitals in the preamble.

natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them'. [6]

5. The main aim of the Habitats Directive is to 'promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements', [7] by creating a coherent European ecological network according to a specified timetable. [8] By using that formulation, the Community legislature indicates that its intention is to comply with the objective of 'sustainable development' in Article 2 of the EC Treaty (now, after amendment, Article 2 EC) and the principle of 'integration' in Article 130r(2) *in fine* of the EC Treaty. [9] The principle of integration now appears in Article 6 EC (formerly Article 3c of the EC Treaty). [10] That article expressly states that the principle of integration must be capable of 'promoting sustainable development'.

6. Article 1 of the Habitats Directive defines the principal terms used.

7. Article 2(2) and (3) sets out the measures to be taken in order to attain the objective of the directive. Those paragraphs provide:

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

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

8. Articles 4 and 6 regulate in more detail the measures defined in Article 2.

9. First, under Article 4, the SACs are designated; second, under Article 6, the rules governing the SACs are adopted.

10. The procedure for designating SACs comprises three stages.

6 — Fourth recital in the preamble.
7 — Third recital in the preamble.
8 — Sixth recital in the preamble.
9 — See points 54 to 57 below.
10 — Inserted by Article 2(4) of the Treaty of Amsterdam and renumbered Article 6 EC (OJ 1997 C 340, p. 25).

11. The first stage is described in Article 4(1) of the Habitats Directive.

12. The first subparagraph of Article 4(1) prescribes that the first stage is for the Member States and consists of *drawing up a list*, on the basis of the criteria set out in Annex III (Stage 1), of sites which host the natural habitat types in Annex I and the native species in Annex II. For 'animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction'. In addition, for 'aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction'.

13. The second subparagraph of Article 4(1) of the Habitats Directive indicates that the lists drawn up by Member States must 'show the sites containing the priority natural habitat types and priority species'. [11] 'Priority' means species and natural habitats in danger of disappearance, for the conservation of which the Community has particular responsibility. [12] The second subparagraph of Article 4(1) further states that the list is to be 'transmitted to the Commission... together with [certain information and] data... provided in a format established by the Commission'. That format was adopted on 18 December 1996. [13]

14. The second stage is set out in Article 4(2) and (3) of the Habitats Directive.

15. It follows a two-part procedure. The first part is to enable the Commission 'on the basis of the criteria set out in Annex III (Stage 2)... [to] establish, in agreement with each Member State, a *draft list of sites of Community importance* drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species'. [14]

16. Following that first part, 'the *list of sites* selected as sites *of Community importance*, identifying those which host one or

11 — Annex III, Stage 1, point D.

12 — Article 1(d) and (h) of the Habitats Directive. They are marked with an asterisk in Annexes I and II.

13 — Commission Decision 97/266/EC concerning a site information format for proposed Natura 2000 sites (OJ 1997 L 107, p. 1, at p. 20, hereinafter 'the data form').

14 — Article 4(2), first subparagraph, emphasis added.

more priority natural habitat types or priority species, *shall be adopted by the Commission*', [15] in accordance with a procedure involving an *ad hoc* committee [16] consisting of representatives of the Member States and chaired by a representative of the Commission. [17]

17. The third stage is described in Article 4(4). It concludes the procedure for designation of SACs and is within the exclusive competence of the Member States. Under that provision, once a site has been selected as an SCI and is on the list adopted by the Commission in the second stage, 'the Member State concerned shall designate that site as a *special area of conservation...*'. [18]

18. Annex III to the Habitats Directive sets out the criteria to be used by the Member States for assessing the sites which are to appear on the list drawn up at the end of the first stage [19] and the criteria which must be taken into account by the Member States and the Commission for selecting the SCIs in the second stage. [20]

19. Article 6 prescribes that Member States are to establish the system for ensuring the management and conservation of SACs. The measures adopted for that purpose are in principle adopted after the third stage has been completed. However, the directive states that measures intended to prevent deterioration of SCIs [21] must be taken following the second stage. [22]

II — Factual and procedural background

20. First Corporate Shipping Ltd (hereinafter 'FCS'), the statutory authority for the port of Bristol, on the Severn Estuary, is the owner of a substantial amount of land in the neighbourhood of the port. Since acquiring that land FCS has invested, together with partners, about GBP 220 000 000 in capital on developing the port facilities. It employs 495 permanent full-time employees. The High Court also

15 — Article 4(2), third subparagraph, emphasis added.

16 — Article 21 of the Habitats Directive.

17 — Article 20 of the Habitats Directive.

18 — Article 4(4), emphasis added.

19 — Among the selection criteria applied are the 'degree of representativity of the natural habitat type on the site' (Annex III, Stage 1, point A(a)), the 'degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities' (Annex III, Stage 1, point A(c)), and the 'value of the site' (Annex III, Stage 1, point A(d)).

20 — Among the selection criteria applied are the 'geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers' (Annex III, Stage 2, point 2(b)) and the 'ecological value' of the site (Annex III, Stage 2, point 2(e)).

21 — For example, certain plans or projects likely to have a significant effect on an SCI are to be subject to an assessment of their implications for the site (Article 6(3) of the Habitats Directive).

22 — Article 4(5).

notes that the number of workers employed in the port, including FCS's own employees, is estimated at 3 000 to 5 000.

21. The Secretary of State for the Environment, Transport and the Regions (hereinafter 'the Secretary of State') indicated that he had in mind to propose the Severn Estuary to the Commission of the European Communities under Article 4(1) of the Habitats Directive. The majority of the intertidal part of the estuary had already been classified as a special protection area [23] (SPA) pursuant to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds. [24]

22. FCS considered that its rights as owner of the land were infringed by the Secretary of State's decision and applied to the High Court for leave to seek judicial review.

23. In the High Court, FCS argued that Article 2(3) of the Habitats Directive imposes an obligation on the Secretary of State to take account of economic, social and cultural requirements when deciding which sites to propose to the Commission pursuant to Article 4(1) of that directive.

24. The Secretary of State contended that, in the light of the Court's reasoning in *R* v *Secretary of State for the Environment ex parte Royal Society for the Protection of Birds*, [25] a Member State may not take such requirements into account in the context of Article 4(1) of the Habitats Directive.

25. Since the High Court was uncertain as the correctness of those arguments and considered that the outcome of the case before it depended on the interpretation of Article 4(1) in conjunction with Article 2(3) of the Habitats Directive, by order of 15 September 1998 it stayed the proceedings pending a ruling by the Court on the following question:

'Is a Member State entitled or obliged to take account of the considerations laid down in Article 2(3) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), namely, economic, social and cultural requirements and regional and local characteristics, when deciding which sites to propose to the Commission pursuant to Article 4(1) of that Directive and/or in defining the boundaries of such sites?'

23 — See paragraph 8 of the order for reference.

24 — OJ 1979 L 103, p. 1, hereinafter 'the Birds Directive'.

25 — Case C-44/95 [1996] ECR I-3805, hereinafter 'the *Lappel Bank* judgment'.

III — The answer to the question referred

26. By its question the High Court seeks clarification on the powers of the Member States during the first stage of the procedure for designating SACs and defining their boundaries. More precisely, it wishes to know whether, in the first stage defined in Article 4(1) of the Habitats Directive, a Member State may or must, on the basis of Article 2(3) of that directive, refuse to include in the list of sites to be proposed to the Commission a site which, although satisfying the criteria set out in Annexes I and II, is the scene of economic and social interests which are considered to be important or even vital for the State or region concerned.

27. FCS submits that the Court should rule, in answer to that question, that Article 4(1) in conjunction with Article 2(3) of the Habitats Directive must be interpreted as requiring Member States to take account of economic, social and regional interests when deciding on sites to be proposed to the Commission as eligible for designation as SACs. It thus claims that in the first stage of the procedure for designating SACs a Member State must delete from the list of sites eligible for designation as SACs a site which hosts installations such as those of the port of Bristol.

28. Conversely, the Commission, World Wide Fund for Nature UK (WWF), Avon Wildlife Trust, the United Kingdom Government and the Finnish Government contest that argument. Most of those who argue against FCS [26] rely on the *Lappel Bank* judgment to support their position.

29. It was held in that judgment that the provisions of the Birds Directive are to be interpreted as authorising a Member State to take account of certain economic requirements at the stage of adopting measures for the conservation or management of SPAs, but not at the stage of the procedure for designating SPAs and defining their boundaries. [27]

30. In my opinion, the solution arrived at by the Court in the *Lappel Bank* judgment cannot be applied in the context of the Habitats Directive. I consider that it is not excluded [28] that economic, social or cultural considerations or regional and local characteristics may already be taken into account at the stage of designation of SACs and that they may allow a site hosting one of the natural habitat types in Annex I or native species in Annex II to be excluded from designation as an SAC. I shall explain this below. [29]

26 — With the exception of the Finnish Government.

27 — Paragraphs 31 and 41.

28 — Except where a site hosts priority species or priority natural habitat types (see point 47 below).

29 — See points 52 to 58 below.

31. I consider, however, that in the first stage of the procedure for designating SACs such considerations do not allow a site which hosts natural habitat types in Annex I or native species in Annex II to be removed from the list of sites selected by the Member States. I shall therefore propose that the Court answer the High Court's question in the negative.

32. In my opinion, *in the first stage* described in Article 4(1) of the Habitats Directive, *the role of the Member States* is not to draw up definitively the list of SACs, but consists only of:

— *establishing an exhaustive list of the sites* which, on the national territory of each of the Member States, host the natural habitat types in Annex I and the native species in Annex II, and

— *providing* the Commission with all the necessary scientific, ecological, economic and social *information* on the sites thus listed.

33. *Firstly*, the suggested interpretation follows clearly from the wording of Article 4(1) of the Habitats Directive.

34. The first subparagraph of Article 4(1) expressly states that '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', that list showing the sites containing priority habit types and priority species. [30]

35. Again, the second subparagraph of Article 4(1) specifies that 'the list shall be transmitted... together with information... [which] shall include a map of the site, its name, location, extent and the data... provided in a format established by the Commission...'.

36. According to the data form instructions, [31] the Member States must include with the list information not only of a scientific and ecological [32] and geographical [33] nature, but also of an economic and social nature.

30 — Annex III, Stage 1, point D.

31 — See point 13 above.

32 — Such as a classification of animal populations according to the ornithological criteria in Annex I to the Birds Directive, and also information on migratory birds normally present on the site and not listed in that annex, a classification of the mammals, amphibians and reptiles, fish and invertebrates and plants in Annex II to the Habitats Directive, and other important species of flora and fauna not listed in that annex.

33 — Such as site location and a map of the site.

37. Thus the Member States are recommended to communicate 'information on *impacts and activities* in and around the site', [34] which are understood as including 'all human activities and natural process that may have an influence, either positive or negative, on the conservation and management of the site (listed in Appendix E)'. [35] To that end, Member States are requested to supply information on activities connected with agriculture and forestry; fishing, hunting and collecting; mining and extraction of minerals; urbanisation, industrialisation and similar activities; and transportation and communication (relating *inter alia* to port areas [36] and shipping [37]).

38. The reading I favour is also, I think, supported by Annex III (Stage 1). The criteria which Member States must take into account undeniably include scientific, ecological and geographical elements. [38] However, they are also asked to make a global assessment of the 'value of the site', [39] and not only, as specified in Annex III (Stage 2), [40] a global assessment of the 'ecological value' of the site.

39. In my opinion, since it is not stated that the assessment relates only to the ecological value of the site, it may reasonably be supposed that in the first stage of designation of SACs the fullest information relating *inter alia* to human activities, which indisputably includes economic data, must be communicated to the Commission.

40. It also follows from the wording of Article 4(1) of the Habitats Directive that in this first stage the *discretion* of the Member States as to the choice of sites to propose to the Commission is very limited.

41. Thus the first subparagraph of Article 4(1) of the Habitats Directive authorises a Member State to leave off the list of sites to be communicated to the Commission only sites which do not host a natural habitat type in Annex I or a native species in Annex II, or sites within which no clearly identifiable areas can be defined which present the physical and biological factors essential to the life and reproduction of protected animal or plant species.

42. *Moreover*, the purpose of the task allotted to the Member States in this first stage militates in favour of this interpretation.

34 — See the data form, p. 37, point 6.1, emphasis added.
35 — Ibid., point 6.1, first indent.
36 — Ibid., Appendix E, code 504.
37 — Ibid., code 520.
38 — Points A and B, (a).
39 — Ibid., (d).
40 — Ibid., (e).

43. The purpose of Article 4(1) of the Habitats Directive is set out in Article 4(2) thereof and in the 'Introduction' section of the data form.

44. Thus the first subparagraph of Article 4(2) prescribes that 'the Commission shall establish, in agreement with each Member State, a *draft* list of sites of Community importance *drawn from* the Member States' lists'.[41] Again, the third subparagraph of Article 4(2) states that it is only after the second stage that the list of SCIs is to be definitively adopted by the Commission in accordance with a procedure of concertation between the Commission and the Member States.

45. Similarly, the data form expressly states that it 'will initially be used to supply the necessary information for sites *eligible* for identification as sites of Community importance'.[42]

46. The conclusion must be that the procedure laid down in Article 4(1) constitutes a preparatory phase in the taking of the final decision, relating to the determination and definition of the boundaries of SACs, with the intention of providing a complete 'panorama' of the site.

47. I note, however, that the sites identified as priority sites by the Member States in the first stage are *automatically* considered as SCIs in the second stage and will consequently be designated as SACs in the third stage of the procedure.[43] I do not know whether the sites at issue in the main proceedings fall into that category. That is in any event for the national court to ascertain. If that is the case, because of the priority nature of the sites as a consequence of the natural habitat types or species concerned, the Member State will not be able to take the requirements listed in Article 2(3) into account to delete a site hosting those natural habitat types or species from the list of SACs.[44]

48. It follows that the purpose of Article 4(1) of the Habitats Directive is to enable the Commission and the Member States, in the second stage of the procedure for designating SACs, to carry out the selection of the SCIs[45] and then, following the third stage,[46] to adopt the list of the SACs to be designated by the Member

41 — Emphasis added.

42 — Introduction, third paragraph, p. 21, emphasis added.

43 — See Annex III, Stage 2, point 1: 'All the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance.'

44 — In that the sites listed in the first stage as hosting priority natural habitats and native species are automatically considered as SCIs (see Annex III, Stage 2, point 1) and that my analysis tends to show that, in the first stage, economic considerations may not be used to delete from the list of sites to be transmitted to the Commission a site hosting non-priority natural habitat types and native species defined in Annexes I and II, this conclusion applies *a fortiori* where those sites host priority natural habitat types and native species.

45 — Regulated in Article 4(2) and (3).

46 — Regulated in Article 4(4).

States, no consideration of an economic or social nature being capable of influencing the eligibility of a site to appear on that list.

49. *Finally*, for the Member States and the Commission to be able to assess the interests concerned as accurately as possible in the second stage, it is essential that in the first stage the Member States do not proceed by 'elimination' but list as fully, objectively and descriptively as possible all the sites which satisfy the criteria in Annex III and correspond to the species and habitats defined in Annexes I and II.

50. The conclusion I draw is that Article 4(1) of the Habitats Directive must be interpreted as precluding a Member State, during the first stage, from deciding not to list as sites eligible for designation as SCIs in the second stage those which, while satisfying the criteria mentioned above, are the scene of important economic and social interests, such as the site formed by the Severn Estuary.

51. On the other hand, for the sake of completeness, I consider that it is not excluded that in the second stage, at the time of concertation between the Member States and the Commission on the selection of the SCIs, economic and social requirements may justify a site which hosts one of the natural habitat types in Annex I or native species in Annex II not being selected as an SCI, and consequently not being designated as an SAC. [47]

52. As FCS observes, Article 2(3) is worded in general terms and does not exclude account being taken of economic, social and regional requirements when measures are taken to designate SACs and define their boundaries. [48]

53. Similarly, the third recital in the preamble to the Habitats Directive expressly states that the directive, the aim of which is to 'promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements', makes 'a contribution to the general objective of *sustainable development*'. [49]

54. The concept 'sustainable development' does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended

47 — With the exception, as seen above, of a site identified by a Member State as hosting priority species or priority natural habitat types.

48 — Unlike the wording of the Birds Directive (see, on this point, paragraphs 23 to 25 of the *Lappel Bank* judgment).

49 — Emphasis added. The same objective is noted in the introduction to the data form, in indent 2, which states that one of its 'main objectives' is 'to provide information which will assist the Commission in other decision-making capacities to ensure that the Natura 2000 network is fully considered in other policy areas and sectors of the Commission's activities, in particular regional, agricultural, energy, transport and tourism policies'.

in the context of the other policies pursued by the Community in accordance with Article 3 of the EC Treaty (now, after amendment, Article 3 EC). On the contrary, it emphasises the necessary balance between various interests which sometimes clash, but which must be reconciled.

55. The concept originates in a communication of the Commission to the Council of 24 March 1972 on an environmental programme of the European Communities, [50] in which it stated that the proposals made on 22 July 1971 on the policy of the Community in this respect [51] should henceforth be implemented in accordance with the principle of 'integration': 'Implementation of these proposals must not constitute a new common policy separate from the others. Rather, all Community activities aimed at promoting throughout the Community harmonious development of economic activities, accelerated raising of the standard of living and closer relations between Member States under Article 2 of the EEC Treaty must now take into consideration the protection of the environment.' [52]

56. 'Sustainable development', a fundamental concept of environment law, was taken up and defined in 1987 in the Brundtland Report. [53] According to that report, sustainable development is development which meets the needs of the present without compromising the capacity of future generations to meet their needs. [54] It states that the concept means that the conduct of the various policies must, at the very least, not endanger the natural systems which give us life, the atmosphere, water, earth and living creatures. [55] The report stresses that it is necessary not to set development against the environment but on the contrary to let them evolve in coordinated fashion.

57. To reconcile these diverse interests in the context of 'sustainable development', the Treaty on European Union introduced the *principle of 'integration'* in Article 130r(2) *in fine*. That principle requires the Community legislature to conform with environmental protection requirements in the definition and implementation of other policies and actions. Integration of the environmental dimension is thus the basis of the strategy of sustainable development enshrined in both the Treaty on European Union and the Fifth Environment Programme, entitled 'Towards Sustainability'. [56] The Fifth Programme expressly states, moreover, that the success of that undertaking depends on the five key sectors of the economy — industry, energy, trans-

50 — OJ 1972 C 52, p. 1.

51 — Doc. SEC (71) 2616 final.

52 — Communication cited above, Introduction, eighth paragraph.

53 — So called after the chairperson of the World Commission on Environment and Development set up by the 38th session of the General Assembly of the United Nations, with the task *inter alia* of reconsidering the fundamental questions of the environment and development.

54 — P. 51.

55 — P. 53.

56 — OJ 1993 C 138, p. 5.

port, agriculture and tourism — making a full contribution to it. It is hoped that harmful trends and practices of those sectors may thus be modified.

58. So it seems that the approach of the Commission and the Member States in the second stage of the procedure for designating SACs must, observing the objective of 'sustainable development' and the principle of 'integration', consist of assessing the interests concerned, ascertaining whether or not the maintenance of human activities in the area concerned may be reconciled with the objective of conservation or restoration of natural habitats and wild fauna and flora, and drawing the necessary consequences as regards setting up an SAC.

Conclusion

59. I therefore propose that the Court rule as follows:

Article 2(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as precluding a Member State from taking account of economic, social and cultural requirements or regional and local characteristics when deciding which sites to propose to the Commission or when defining the boundaries of those sites under Article 4(1) of that directive.