Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

26 April 2017 *

(Failure of a Member State to fulfil obligations — Environment — Directive 92/43/EEC — Article 6(3) — Conservation of natural habitats — Construction of a coal-fired power plant in Moorburg (Germany) — Natura 2000 areas situated upstream of that coal-fired power plant on the corridor of the Elbe river — Assessment of the implications of a plan or project for a protected site)

In Case C-142/16,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 9 March 2016,

European Commission, represented by C. Hermes and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by T. Henze and J. Möller, acting as Agents, assisted by W. Ewer, Rechtsanwalt,

defendant,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2017,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German

Judgment

1 By its application, the European Commission asks the Court to declare that, by authorising the construction of a coal-fired power station in Moorburg, near Hamburg (Germany), without conducting an appropriate and comprehensive assessment of its implications, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and (4) 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 Habitats Directive').

Legal context

2 The first, fourth and tenth recitals of the Habitats Directive are worded as follows:

'… the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the [Union], as stated in Article [191 TFEU];

… 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 [Union]'s natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at [Union] level in order to conserve them;

… 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.'

3 Article 2(2) of the Habitats Directive provides:

'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 [Union] interest.'

4 Article 6(3) and (4) of the Habitats Directive states:

'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.'

5 The Habitats Directive contains six annexes, including Annex II entitled 'Animal and plant species of [Union] interest whose conservation requires the designation of special areas of conservation'.

Background to the dispute and the pre-litigation procedure

6 The Moorburg coal-fired power plant is situated within the port of Hamburg, on the south bank of the southern section of the Elbe river which, as a migratory route for certain fish species listed in Annex II to the Habitats Directive, namely river lamprey (*Lampetra fluviatilis*), sea lamprey (*Petromyzon marinus*) and salmon (*Salmo salar*), plays an important role in a number of Natura 2000 areas situated upstream of the Geesthacht weir (Germany) whose conservation objectives cover those species. Those areas are situated in the Länder of Lower Saxony, Mecklenburg-Vorpommern, Saxony-Anhalt, Brandenburg and Saxony, up to a distance of approximately 600 km from the plant. The Geesthacht weir is situated on the Elbe corridor, in between the Moorburg power plant and the Natura 2000 areas.

7 Before authorisation for construction of the Moorburg plant was granted on 30 September 2008, an environmental impact assessment ('the impact assessment') was conducted under German water legislation. That assessment concluded that that authorisation was compatible with the conservation objectives of the Natura 2000 areas in view of the undertaking given by the operator to install a second fish ladder approximately 30 km from the plant, by the Geesthacht weir, intended to compensate for fish killed during the operation of the cooling mechanism, which draws large quantities of water from the river in order to cool the Moorburg plant ('the fish ladder'). In addition, the conclusion of the impact assessment prescribed multi-phase monitoring in order to verify the effectiveness of that measure.

8 Following two complaints concerning the impact assessment, the Commission, on 27 January 2014, sent a letter of formal notice to the Federal Republic of Germany in which it alleged infringement of Article 6(3) and (4) of the Habitats Directive.

9 The Commission took the view that the impact assessment had incompletely, or even incorrectly, determined the effects the Moorburg plant would have on the Natura 2000 areas situated upstream of the Geesthacht weir. It considered, first, that the Behörde für Stadtentwicklung und Umwelt der Freien und Hansestadt Hamburg (Urban Development and Environment Authority of the Free Hanseatic City of Hamburg, Germany) had wrongly classified the fish ladder as a mitigating measure, and, secondly, that the impact assessment had failed to take into account cumulative effects with other relevant projects.

10 By letter of 11 April 2014, the Federal Republic of Germany challenged the Commission's objections and maintained that the fish ladder should be classified as a mitigating measure.

11 On 17 October 2014, the Commission sent the Federal Republic of Germany a reasoned opinion in which it maintained its objections concerning infringement of Article 6(3) and (4) of the Habitats Directive.

12 By letter of 15 December 2014, the Federal Republic of Germany confirmed its previously stated position.

13 On the view that the Federal Republic of Germany had failed to fulfil its obligations under Article 6(3) and (4) of the Habitats Directive, the Commission decided, on 9 March 2016, to bring the present action.

The action

The first complaint, alleging infringement of the second sentence of Article 6(3) of the Habitats Directive

Arguments of the parties

14 By its first complaint, the Commission claims that the Federal Republic of Germany infringed the second sentence of Article 6(3) of the Habitats Directive in granting the authorisation of 30 September 2008. It claims that operation of the Moorburg plant has a negative impact on several Natura 2000 areas situated upstream of the Geesthacht weir and, more specifically, that a large number of fish pertaining to species listed in Annex II to the Habitats Directive are killed as a result of the drawing of cooling water by the Moorburg plant.

15 As a preliminary point, the Commission submits that it is irrelevant that the Moorburg plant is situated outside the Natura 2000 areas upstream of the Geesthacht weir. It argues that, even though the fish kills per se do not constitute a breach of the second sentence of Article 6(3) of the Habitats Directive, such a breach may nevertheless arise from the consequences of such fish kills for stocks in the Natura 2000 areas upstream of the Geesthacht weir.

16 The Commission disputes the conclusion of the impact assessment, which did not state that the fish ladder could prevent or reduce the adverse effects resulting from the operation of the Moorburg plant, but only that it could adequately compensate for those effects by enabling some fish to bypass the Geesthacht weir, even though others would be killed or injured.

17 Furthermore, the Commission considers that such an appraisal is incompatible with the Court's judgment of 15 May 2014 in *Briels and Others* (C-521/12, EU:C:2014:330). In its view, even if it were to be accepted that the fish ladder might increase stocks of migratory fish species, it could not be regarded as protecting the migrant or spawning fish population.

18 The Commission adds that the authorisation of 30 September 2008 expressly recognised that the effect of installing a second fish ladder along the Geesthacht weir would be uncertain.

19 Lastly, the Commission is of the opinion that the data and expert reports submitted by the Federal Republic of Germany for the years 2011 to 2014, in relation to the premises on which the impact assessment was based, are irrelevant since they date from after the impact assessment and the authorisation of 30 September 2008. It also notes that the Federal Republic of Germany has failed to provide evidence regarding the development of stocks in the Natura 2000 areas concerned in order to establish the effectiveness of the fish ladder.

20 The Federal Republic of Germany disputes the claim that it has failed to fulfil its obligations. It contends that there is no 'significant effect' on the protected sites, within the meaning of the first sentence of Article 6(3) of the Habitats Directive and that it had been determined, from as early as the preliminary impact assessment conducted as part of the procedure which resulted in the authorisation of 30 September 2008, that it was likely that only very few fish would be killed.

21 The Federal Republic of Germany considers that the death of a small number of fish belonging to different species due to the drawing of cooling water for the Moorburg plant is not contributing to the destruction of the habitats of Natura 2000 areas situated at hundreds of kilometres from the plant. It argues that it would be almost impossible for Member States to determine all the likely effects, over large distances, of specific measures on Natura 2000 areas.

22 As regards the effectiveness of the fish ladder, the Federal Republic of Germany contends that the authorisation of 30 September 2008 reliably ensured that the number of fish from species listed in Annex II to the Habitats Directive migrating upstream via the fish ladder is at least as high as the number of fish killed at the point where cooling water is drawn for the Moorburg plant. There is no difference in the biological characteristics of the fish that are killed and those that migrate upstream, so that there is no impact on the composition of the population in the Natura 2000 areas upstream of the Geesthacht weir.

23 As regards the fish species listed in Annex II to the Habitats Directive, that Member State submits that they do not fall within the ambit of Article 6 of the directive. It maintains that the only determinative factors, in relation to the protection of habitats provided for in that article, are the conservation objectives of the Natura 2000 areas, thus the decisive consideration is that the composition of the population in the conservation area must remain unchanged.

24 Accordingly, the Federal Republic of Germany contends that the authority which assessed the authorisation application proceeded on the assumption of the worst case, by making the operation of the continuous cooling mechanism conditional on proof of the effectiveness of the fish ladder. It adds that that proof was adduced between 2011 and 2014 and claims that the expert report of 15 January 2014 confirms that even though a very small number of fish from the relevant species are killed, others succeed in migrating upstream to the protected areas via the fish ladder.

25 As regards risk management, the Federal Republic of Germany submits that the authorisation of 30 September 2008 combined estimates with preventative evidence by including procedures enabling the drawing of cooling water to be limited in future to the extent necessary to protect the fish species concerned.

26 The Federal Republic of Germany submits that the data and expert reports for the years 2011 to 2014 must be taken into account in the assessment of the present action for failure to fulfil obligations, because the period fixed in the reasoned opinion expired on 16 December 2014. It maintains that that data is relevant because its collection was commissioned at the time of the granting of the authorisation of 30 September 2008, which makes it an integral part of the impact assessment.

27 Likewise, that Member State adds that the bringing into operation of the continuous cooling mechanism was made contingent on proof of the effectiveness of the fish ladder and that such proof was established by the expert reports for the years 2011 to 2014. It also notes that the estimates of the effectiveness of the fish ladder as a damage mitigation measure were based on a two-stage forecasting model, namely, estimates from the project planning and final approval stage, and data from monitoring.

28 Lastly, the Federal Republic of Germany states that the fish ladder has been in operation since August 2010, but that regular water withdrawal began only after successful completion of the monitoring in March 2015.

Findings of the Court

29 It should be noted at the outset that the fact that the project to which the environmental assessment being challenged relates is not situated in the Natura 2000 areas concerned, but rather at a considerable distance from them, upstream of the Elbe, in no way precludes the applicability of the requirements laid down in Article 6(3) of the Habitats Directive. It is clear from the wording of that provision that ‘any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon’ is subject to the environmental protection mechanism it prescribes.

30 In the present case, it is apparent from the file submitted to the Court that the cooling mechanism of the Moorburg plant is likely to have a significant effect on certain fish species listed in Annex II to the Habitats Directive and protected in the Natura 2000 areas concerned.

31 The impact assessment carried out by the German authorities showed that the death of fish pertaining to three species listed in Annex II to the Habitats Directive, on account of the Moorburg plant drawing cooling water from their migratory corridor, would affect the reproduction of those species in the relevant protected areas. In particular, that assessment indicated a high risk for highly migratory species such as river lamprey, sea lamprey and salmon.

32 In the light of that impact assessment, the German authorities could not, pursuant to the second sentence of Article 6(3) of the Habitats Directive, agree to the construction of the Moorburg power station until they had 'ascertained that it [would] not adversely affect the integrity of the site[s] concerned'.

33 As the Court has previously held, competent national authorities may authorise an activity subject to an assessment only if they have made certain that it will not adversely affect the integrity of the protected site. This is so when there is no reasonable doubt from a scientific point of view as to the absence of such adverse effects (see, to that effect, judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 42 and the case-law cited).

34 In order to ensure that the construction of the Moorburg plant would not adversely affect the integrity of the Natura 2000 areas concerned, it was the responsibility of the German authorities to take account of the protective measures included in that construction project. In that regard, it is settled case-law that the application of the precautionary principle in the context of the implementation of Article 6(3) of the Habitats Directive requires the competent national authority to take into account, inter alia, the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects on the site, in order to ensure that it does not adversely affect the integrity of the protected site (judgments of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 28, and 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 54).

35 In the present case, it is clear from the file submitted to the Court that, in addition to other measures designed to prevent the negative effects of drawing water from the river, such as the installation of a trap and truck system and the reduction of the plant's activity when oxygen levels drop below a critical point for fish, a fish ladder was installed next to the Geesthacht weir.

36 That fish ladder was intended to increase migratory fish stocks by allowing those species to reach their breeding areas, along the middle and upper reaches of the Elbe, more quickly. Increasing stocks in this manner was expected to compensate for the fish deaths near the Moorburg plant so that the conservation objectives of the Natura 2000 areas upstream of the plant would not be significantly affected.

37 However, it is clear that the impact assessment itself did not contain definitive data regarding the effectiveness of the fish ladder, and merely stated that its effectiveness could only be confirmed following several years of monitoring.

38 It must therefore be held that, at the time the authorisation was granted, the fish ladder, even though it was intended to reduce direct significant effects on the Natura 2000 areas situated upstream of the Moorburg plant, could not guarantee beyond all reasonable doubt, together with the other measures referred to in paragraph 35 of the present judgment, that that plant would not adversely affect the integrity of the site, within the meaning of Article 6(3) of the Habitats Directive.

39 That conclusion cannot be called into question by the arguments of the Federal Republic of Germany concerning risk management and the data relating to the years 2011 to 2014.

40 According to the case-law, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of plans or projects. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 53 and the case-law cited).

41 As regards the estimates on which the impact assessment was based, it should be pointed out that the data relating to the years 2011 to 2014 was collected by the Federal Republic of Germany after the granting of the authorisation of 30 September 2008.

42 In that regard, it should be noted that it is at the date of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (judgment of 26 October 2006, *Commission* v *Portugal*, C-239/04, EU:C:2006:665, paragraph 24 and the case-law cited).

43 As regards multi-phase monitoring, such monitoring cannot be considered as sufficient to ensure performance of the obligation laid down in Article 6(3) of the Habitats Directive.

44 First, as the Commission argued at the hearing, without being challenged in that respect by the defendant Member State, the results of that monitoring may be irrelevant if the data was collected at times when the Moorburg plant was not using the continuous cooling mechanism. Secondly, the monitoring measures only the number of fish that manage to bypass the Geesthacht weir via the fish ladder. Accordingly, that monitoring is not capable of ensuring that the fish ladder will avoid any adverse effects on the integrity of the protected sites.

45 It follows that, by authorising the construction of the Moorburg plant on the Elbe on the basis of an impact assessment which concluded there would be no adverse effects on the integrity of the Natura 2000 areas, the Federal Republic of Germany has failed to fulfil its obligations under the second sentence of Article 6(3) of the Habitats Directive.

The second complaint, alleging infringement of the second sentence of Article 6(3) of the Habitats Directive by failing to examine cumulative effects with other projects

Arguments of the parties

46 The Commission claims that another infringement of the second sentence of Article 6(3) of the Habitats Directive has been committed, the city of Hamburg having granted the authorisation of 30 September 2008 without taking into account, in the impact assessment for the Moorburg plant, the potential cumulative effects with the Geesthacht pumped-storage power plant and a possible run-of-river hydroelectric power plant at the Geesthacht weir, in relation to which an application for authorisation for installation and operation had also been submitted.

47 As regards the Geesthacht pumped-storage power plant, the Commission notes that that plant dates from 1958 and does not have any specific fish protection mechanisms. It was not until the year 2014 that the Federal Republic of Germany submitted an expert report seeking to prove that that plant represented no danger to the relevant species of migratory fish.

48 According to the Commission, it is irrelevant that the Geesthacht pumped-storage power plant was constructed before the period for transposition of the Habitats Directive expired, for the provisions of Article 6(3) of that directive are not limited to plans and projects approved or completed after the deadline for transposition of that directive.

49 As regards the run-of-river hydroelectric power plant at the Geesthacht weir, for which an application for authorisation for installation and operation had been submitted on 22 May 2008, the Commission submits that that plant should also have been taken into account when the cumulative effects of the Moorburg plant were examined. According to the Commission, even though that application was withdrawn in 2010, the effects of such a run-of-river hydroelectric power plant on the migratory fish populations were foreseeable at the time the authorisation of 30 September 2008 was granted.

50 The Federal Republic of Germany contends, first, as regards the Geesthacht pumped-storage power plant, that it did not have to be taken into account in the impact assessment, since that plant was already in operation on the date of the adoption of the Habitats Directive. In support of that argument it refers to the Court's judgment of 14 January 2016 in *Grüne Liga Sachsen and Others* (C-399/14, EU:C:2016:10, paragraphs 58 and 59).

51 Next, as regards the run-of-river hydroelectric power plant at the Geesthacht weir, that Member State maintains that it did not have to be taken into account as 'another project' given that, from the outset, it was unlikely to be granted authorisation.

52 In that regard, the Federal Republic of Germany states that such a project could not have been authorised without the intervention of Vattenfall Europe AG, now Vattenfall GmbH. Under German law, the operator of a future run-of-river hydroelectric power plant must necessarily obtain the approval of the owner of the water concerned, in this instance the German Federal State.

53 The application of 22 May 2008 for authorisation for the construction of a run-of-river hydroelectric power plant was submitted, not by Vattenfall Europe or a third party beneficiary, but by Wirtschaftsbetriebe Geesthacht GmbH, which, unlike Vattenfall Europe, had no right to use the land and structures of the Geesthacht weir necessary for the construction of such a power plant.

54 Thus, by letter of 26 May 2008, the district plan approval authority of Herzogtum Lauenburg (Germany) stated that, because Wirtschaftsbetriebe Geesthacht had no interest in seeking a decision on the substance, the authority would not initiate an approval procedure for the project unless Vattenfall Europe gave its approval to the construction of the run-of-river hydroelectric power plant. On 20 June 2008, Vattenfall Europe indicated that it would not assign any right of use to the applicant. Subsequently, the approval authority never initiated an approval procedure for that run-of-river hydroelectric power plant.

55 The Federal Republic of Germany adds that the application for authorisation for the installation and operation of that plant was not withdrawn until 2010, because the approval authority wished to avoid issuing a refusal and so negotiated for Wirtschaftsbetriebe Geesthacht itself to withdraw the application.

Findings of the Court

56 By its second complaint, divided into two parts, the Commission alleges that the German authorities failed to assess how the cumulative effects resulting from the Moorburg plant together with those of the Geesthacht pumped-storage power plant and the potential run-of-river hydroelectric power plant at the Geesthacht weir would adversely affect fish species such as river lamprey, sea lamprey and salmon in the protected sites.

57 According to settled case-law, the appropriate assessment of the implications of the plan or project for the site concerned that must be carried out pursuant to Article 6(3) of the Habitats Directive requires that all the aspects of the plan or project which could, either individually or in combination with other

plans or projects, affect the conservation objectives of that site must be identified in the light of the best scientific knowledge in the field (judgment of 14 January 2016, *Grüne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 49 and the case-law cited).

58 The first part of the second complaint concerns the Geesthacht pumped-storage power plant which, according to the file submitted to the Court, dates from 1958 and is situated upstream, in the neighbourhood of the Geesthacht weir.

59 On the one hand, as was stated in paragraph 42 above, it is the date of adoption of the decision authorising implementation of a project that must be taken into account when the cumulative effects resulting from that project in combination with another project which is likely to have a significant effect on a site are assessed (see, to that effect, judgment of 26 October 2006, *Commission* v *Portugal*, C-239/04, EU:C:2006:665, paragraph 24 and the case-law cited).

60 On the other hand, it should also be noted that, by contrast with the case which gave rise to the judgment of 14 January 2016 in *Grüne Liga Sachsen and Others* (C-399/14, EU:C:2016:10), the present case does not concern an examination *ex post facto* of the effects of the Geesthacht pumped-storage power plant dating from 1958, but rather concerns the taking into account of that plant in the impact assessment of another project, the Moorburg plant in this instance.

61 Under Article 6(3) of the Habitats Directive, national authorities are required, when assessing cumulative effects, to take into account all projects which, in combination with the project for which an authorisation is sought, are likely to have a significant effect on a protected site in the light of the objectives pursued by that directive, even where those projects precede the date of transposition of that directive.

62 Projects which, like the Geesthacht pumped-storage power plant, are likely to cause, as a result of their combination with the project to which the impact assessment relates, deterioration or disturbance likely to affect the migratory fish present in the river and consequently result in the deterioration of the site concerned in the light of the objectives pursued by the Habitats Directive, are not to be excluded from the impact assessment required under Article 6(3) of the Habitats Directive.

63 It follows from the foregoing considerations that, by failing to assess appropriately the cumulative effects resulting from the Moorburg plant together with the Geesthacht pumped-storage power plant, the Federal Republic of Germany has failed to fulfil its obligations under Under Article 6(3) of the Habitats Directive.

64 In the second part of the second complaint, the Commission criticises the Federal Republic of Germany for failing to take into account, when assessing the cumulative effects at issue in the present case, the run-of-river hydroelectric power plant at the Geesthacht weir, on the ground that, under German law, the application for authorisation for the installation and operation of that plant had no prospect of succeeding. Indeed, pursuant to German legislation, having right of use of the water and land at the weir in question is a necessary condition for such a project to be approved.

65 In that regard, it is apparent from the file submitted to the Court that the application for the construction of the run-of-river hydroelectric power plant at the Geesthacht weir was submitted by a company which did not enjoy right of use of the water, land or structures at the Geesthacht weir.

66 It is also clear from that file that, under German water legislation, a procedure for the approval of the plans could not have been initiated unless Vattenfall Europe, as the holder of the right of use of the water and the land at the Geesthacht weir, and the Federal Waterways and Shipping Administration had indicated that the project did not conflict with any other rights. Vattenfall Europe subsequently declared, however, that it would not give such consent for the construction of the run-of-river hydroelectric power plant.

67 In those circumstances, it must be held that the run-of-river hydroelectric power plant at the Geesthacht weir did not constitute 'another project' within the meaning of Article 6(3) of the Habitats Directive. Accordingly, the second part of the second complaint must be rejected.

The third complaint, alleging infringement of Article 6(4) of the Habitats Directive for failing to examine the conditions therein

Arguments of the parties

68 The Commission claims that the city of Hamburg failed to satisfy, in the procedure leading to the authorisation of 30 September 2008, the requirements laid down in Article 6(4) of the Habitats Directive, in that, on account of errors in the impact assessment, it wrongly granted an authorisation.

69 In that regard, it submits that the city of Hamburg should have sought alternative solutions to the continuous cooling mechanism. It maintains that the construction of a hybrid cooling tower at the Moorburg plant would have been an alternative to the continuous cooling mechanism and would have caused less adverse effects on the Natura 2000 areas in question. Such a construction would have been economically viable and the authorisation could have specifically imposed it as a requirement on the undertaking concerned.

70 The Federal Republic of Germany contends that there is no need to examine whether the conditions for authorisation of a project set out in Article 6(4) of the Habitats Directive were satisfied since the city of Hamburg had proceeded on the assumption that the Moorburg power plant would not significantly affect the integrity of the Natura 2000 areas upstream of the river.

Findings of the Court

71 Pursuant to Article 6(4) of the Habitats Directive, if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of that directive, and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

72 In the present case, in view of the fact that the competent authority concluded that the project would not adversely affect the integrity of the site, within the meaning of Article 6(3) of the Habitats Directive, there is no need to examine the Commission's third complaint alleging infringement of Article 6(4) of that directive.

73 Consequently, it must be held that, by authorising the construction of the Moorburg power station without conducting an appropriate and comprehensive assessment of its implications, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) of the Habitats Directive.

Costs

74 Under Article 138(1) 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. However, under the first sentence of Article 138(3) of the Rules of Procedure, the Court may order the parties to bear their own costs if each party succeeds on some and fails on other heads. As the Commission and the Federal Republic of Germany have each been unsuccessful in part, each must be ordered to bear its own costs.

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

1. **Declares that, by authorising the construction of the coal-fired power plant in Moorburg, near Hamburg (Germany), without conducting an appropriate and comprehensive assessment of its implications, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;**

2. **Dismisses the remainder of the action;**

3. **Orders each party to bear its own costs.**

[Signatures]