JUDGMENT OF THE COURT (FOURTH CHAMBER)

24 November 2011 *

In Case C-404/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 October 2009,

European Commission, represented by D. Recchia and by F. Castillo de la Torre and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal (Rapporteur), K. Schiemann, C. Toader and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2011

gives the following

Judgment

1 By its action the European Commission seeks a declaration from the Court that:

— by authorising the open-cast mines 'Fonfría', 'Nueva Julia' and 'Ladrones' but failing to subject that authorisation to an assessment in order to identify, describe and assess in an appropriate manner the direct, indirect and cumulative effects of the existing open-cast mining projects,

the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3 and 5(1) and (3) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5, 'Directive 85/337, as amended'),

— from 2000, the date of designation of the 'Alto Sil' as a special protection area ('SPA') under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) as amended by Commission Directive 97/49/EC of 29 July 1997 (OJ 1997 L 223, p. 9, the Birds Directive),

— by authorising the 'Nueva Julia' and 'Ladrones' open-cast mining operations but failing to subject that authorisation to an appropriate assessment of the possible effects of those projects; and in any event failing to comply with the conditions under which the execution of a project is permitted, in spite of the risk which those projects represented for the capercaillie, which is one of the natural assets which justified the classification of the 'Alto Sil' SPA, namely that there are no alternative solutions, that there are imperative reasons of overriding public interest and only after having notified the Commission of the necessary compensatory measures to ensure that the overall coherence of the Natura 2000 network is protected, and

— by failing to adopt the necessary measures to prevent the deterioration of habitats, including the habitats of species, and to prevent significant disturbance of the capercaillie, the presence of which on the 'Alto Sil' site was the reason for the designation of that area as an SPA, caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Ampliación de Feixolín' and 'Nueva Julia' mines,

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' SPA under Article 6(2) to (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) in conjunction with Article 7 of that directive;

— from January 1998, by failing in relation to the mining operations at the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines to adopt the necessary measures to safeguard the ecological interest which the proposed 'Alto Sil' site had at national level, and which was proposed as a site of Community importance ('the SCI') under the Habitats Directive, the Kingdom of Spain has, in relation to that site, failed to fulfil its obligations under that directive, as interpreted in Case C-117/03 *Dragaggi and Others* [2005] ECR I-167 and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445;

— from December 2004,

— by permitting open-cast mining (in the case of the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines) likely to have a significant impact on the natural assets which determined the designation of the 'Alto Sil' area as an SCI but failing to make an appropriate assessment of the possible impact of those mines, and in any event failing to comply with the conditions under which the execution of those projects would be permitted, in spite of the risk which they represented to those natural assets, namely that there are no alternative solutions, that there are imperative reasons of overriding public interest and only after having notified the Commission of the necessary compensatory measures to ensure that the overall coherence of the Natura 2000 network is protected, and

— by having failed to adopt, in relation to the above projects, the necessary measures to prevent the deterioration of natural habitats and the habitats of species, and the disturbances of species caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Nueva Julia' and 'Ampliación de Feixolín' mines,

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' SCI under Article 6(2), (3) and (4) of the Habitats Directive.

Legal context

Directive 85/337, as amended

2 Under Article 2(1) of Directive 85/337, as amended:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.'

3 Article 3 of that directive provides:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora;

— soil, water, air, climate and the landscape;

— material assets and the cultural heritage;

— the interaction between the factors mentioned in the first, second and third indents.'

4 Article 4(1) of Directive 85/337, as amended, states that '[s]ubject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10'.

5 Annex I to Directive 85/337, as amended, contains the list of projects referred to in Article 4(1). Accordingly, paragraph 19 of that annex refers to 'quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares'.

6 With regard to other types of projects, Article 4(2) of that directive, as amended, provides:

'Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State, whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

...'

7 In respect of the projects covered by Article 4(2) of that directive, paragraph 13 of Annex II thereto refers to 'any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.'

8 Article 5 of Directive 85/337, as amended, provides:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

...

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

— a description of the project comprising information on the site, design and size of the project,

— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

— the data required to identify and assess the main effects which the project is likely to have on the environment,

— an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,

— a non-technical summary of the information mentioned in the previous indents.

...'

9 Annex IV to Directive 85/337, as amended, sets out the information that must be supplied pursuant to Article 5(1) of that directive:

'1. Description of the project, including in particular:

— a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases,

— a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used,

— an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

2. An outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description of the likely significant effects of the proposed project on the environment resulting from:

— the existence of the project,

— the use of natural resources,

— the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the developer of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

6. A non-technical summary of the information provided under the above headings.

7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information.'

10 With regard to the term 'description' appearing in paragraph 4 of Annex IV, that paragraph states that '[this] description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.'

The Birds Directive

11 Article 4(1) and (2) of the Birds Directive provides that Member States shall classify as SPAs those territories that are most suitable for the conservation of the bird species referred to in Annex I to that directive and of migratory birds.

12 Annex I to the Birds Directive refers in particular to the capercaillie (*Tetrao urogallus*).

13 Article 4(4), first sentence, of the Birds Directive specifies the protection enjoyed by SPAs:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article.'

The Habitats Directive

14 In accordance with the sixth recital in the preamble to the Habitats 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'.

15 The seventh recital of that directive reads as follows:

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

16 The 10th recital in the preamble to the Habitats Directive notes that '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'.

17 Article 3 of the Habitats 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 [the Birds Directive].

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.

...'

18 Article 4 of that directive states:

‘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 [the SCIs] drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

...

The list of sites selected as [SCIs], 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.

...

4. Once [an SCI] 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...

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).'

19 Paragraphs 2, 3 and 4 of Article 6 of the Habitats Directive provide as follows:

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

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or

economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

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.'

20 Article 7 of the Habitats Directive provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of [the Birds Directive] 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 [the Birds Directive] where the latter date is later.'

21 Annex IV to the Habitats Directive, entitled 'animal and plant species of Community interest in need of strict protection', mentions under subparagraph (a) the brown bear (*Ursus arctos*) as a priority species.

Facts of the dispute and pre-litigation procedure

22 The 'Alto Sil' site, located in the north-west of the region of Castile- León, close to the regions of Galicia and Asturias, covers an area of over 43 000 hectares situated at the upper reaches of the river Sil.

23 In January 1998, the Kingdom of Spain proposed that site as an SCI under Article 4(1) of the Habitats Directive.

24 With effect from 1 January 2000, that Member State also designated that site as an SPA under the Birds Directive, due to the presence there of several bird species referred to in Annex I to that directive, including a breeding population of the capercaillie species.

25 On 7 December 2004, the Commission, by Decision 2004/813/EC adopting, pursuant to Directive 92/43, the list of sites of Community importance for the Atlantic biogeographical region (OJ 2004 L 387, p. 1), included the 'Alto Sil' site in that list under the code ES 0000210.

26 The standard data form relating to that site, sent by the Kingdom of Spain to the Commission when proposing the site as a SCI, makes reference, inter alia, to the presence of 10 to 15 specimens of the brown bear and 42 to 47 male specimens of the Cantabrian subspecies of the capercaillie (*Tetrao urogallus cantabricus*).

27 That form also mentions, in particular, the following habitat types:

— 4030 – European dry heaths (50 % of the site),

— 4090 – Endemic oro-Mediterranean heaths with gorse (6 % of the site),

— 6160 – Oro-Iberian *Festuca indigesta* grasslands (1 % of the site),

— 8230 – Siliceous rock with pioneer vegetation of the *Sedo Scleranthion* or of the *Sedo albi Veronicion dillenii* (13 % of the site) and

— 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica* (6 % of the site).

28 It is also indicated in the form that the population of the capercaillie species present on the site is of regional importance (50 % of the male specimens of the Autonomous Community of Castile-León) and of national importance (2 % of the male specimens present on Spanish territory).

29 According to the same form, the vulnerability of the site 'is due essentially to open-cast mining'.

30 In 2001, the Commission was informed of the existence of several open-cast coal mining projects managed by the company Minero Siderúrgica de Ponferrada SA, now called Coto Minero Cantábrico SA, located in or in the immediate vicinity of the 'Alto Sil' site.

31 It is clear from the documents before the Court that the open-cast mining operations involved in these proceedings can be divided into two groups.

32 The first group of operations is located north of the river Sil and the municipality of Villablino (together, 'the northern mines'). They all fall within the 'Alto Sil' SCI.

33 The first of these is the open-cast mine called 'Feixolín' which was authorised on 1 January 1986 in respect of an area of 95.86 hectares and which was operational between 2000 and 2008. It is currently undergoing 'renaturation'.

34 The open-cast mine known as 'Ampliación de Feixolín', a project covering a total area of 93.9 hectares, is also one of the northern mines.

35 In relation to that mine, on 9 November 2009 the Spanish authorities imposed a fine and ordered that specific measures be adopted as mining had already taken place on 35.24 hectares even though that mine had not yet been authorised.

36 However, authorisation to operate that mine over part of the project area, namely 39.62 hectares, had been given on 11 June 2009. On 7 October 2009, specific measures to limit and offset the mine's effects on the environment were ordered.

37 The third northern mine is called 'Fonfría'. It extends over 350 hectares and was authorised on 21 July 1999. Extraction of coal at this site began in January 2001 and ended in December 2010.

38 The other open-cast coal mines that are the subject of these proceedings are located to the south of the river Sil, south-west of the municipality of Villaseca de Laciana ('the southern mines').

39 The first of these is the group of mines called 'Salguero-Prégame-Valdesegadas', which covers 196 hectares. Those mines were authorised between 1984 and 2002. Most of them have ceased activity since 2002. They are now largely undergoing 'renaturation'.

40 Mention should also be made of the mine called 'Nueva Julia' which was authorised on 16 September 2003 in respect of a total area of 405 hectares and which has been operated since 2006.

41 Finally, the mine known as 'Ladrones' was authorised on 24 December 2003 in respect of a total area of 117 hectares. It is not yet operational.

42 Those southern mines are all adjacent to each other. Of those mines, only the 'Ladrones' mine falls within the limits of the 'Alto Sil' SIC, the others being located on the external border of that SCI.

43 Believing that, in relation to those mines, the Spanish authorities had failed to fulfil their obligations under Directive 85/337, as amended, and under the Habitats Directive, the Commission, after examining the information forwarded by those authorities, sent a letter of formal notice to the Kingdom of Spain on 18 July 2003.

44 Taking the view, in particular, that the environmental impact assessment did not give sufficient consideration to the possible disturbances caused to the brown bear and that the cumulative effects of the mining were not sufficiently taken into account, the Commission, having examined the observations made by the Kingdom of Spain in reply to the letter of formal notice, sent a reasoned opinion to that Member State on 22 December 2004.

45 In reply, the Kingdom of Spain submitted, inter alia, a report examining the impact of the various projects and proposing measures to protect the site ('the 2005 report').

46 In order to take account, in particular, of the judgments in *Dragaggi and Others* and in *Bund Naturschutz in Bayern and Others*, the Commission sent a supplementary letter of formal notice to the Kingdom of Spain on 29 February 2008.

47 The Kingdom of Spain replied by letter of 7 May 2008 invoking, in particular, the absence of significant disturbances to the environment attributable to the open-cast mining, while declaring its intention to draw up a strategic plan to make the open-cast

mining activity within the 'Alto Sil' area compatible with the system of protecting natural assets established by Community law.

48 On 1 December 2008 the Commission issued a supplementary reasoned opinion in which it reiterated the complaints set out in its supplementary letter of formal notice and called upon the Kingdom of Spain to comply with the reasoned opinion within two months of receipt thereof.

49 Having taken account, in particular, of the observations and documents provided by the Kingdom of Spain in reply to that supplementary reasoned opinion, and taking the view that the situation remained unsatisfactory, the Commission brought the present action.

The request for the adoption of a measure of inquiry and, alternatively, to have the oral procedure reopened

50 By act lodged at the Court Registry on 15 July 2011, the Kingdom of Spain requested the Court to order a measure of inquiry in accordance with Article 60 of the Rules of Procedure of the Court and, alternatively, to have the oral procedure reopened under Article 61 of those rules.

51 In support of its request, the Kingdom of Spain argues that, contrary to the view taken by the Advocate General in her Opinion, it is not clear from the documents before the Court, as that Member State has already indicated, moreover, in its defence and in its rejoinder, that the open-cast coal mines 'Ampliación de Feixolín' and 'Ladrones' have already been the subject of mining activities.

52 According to the Kingdom of Spain, the analysis of the Advocate General is based on inaccurate factual premises.

53 The Kingdom of Spain applies to the Court seeking leave to produce new evidence concerning the factual situation of the open-cast mines 'Ampliación de Feixolín' and 'Ladrones' and, alternatively, to have the oral procedure reopened.

54 In that regard, it should be noted, first, that it is clear from the documents before the Court, and in particular from the table entitled 'Active mines' which appears on page 50 of the 2005 report, that the open-cast mine 'Ampliación de Feixolín' had indeed been the subject of certain mining activities that had led to the destruction of habitats, and particularly 19.9 hectares of habitat 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*. Although it is clear from the documents before the Court that, by a decision of 9 November 2009, the operator of that mine was required to cease operations there and was sanctioned for having commenced without obtaining prior authorisation to that effect, nevertheless those operations actually took place in an area of 35.24 hectares. That is confirmed, moreover, by a site visit report produced by the Kingdom of Spain in the annex to its reply which confirms that, although coal extraction activities do not seem to have taken place on that site, other activities have led to the destruction of vegetation there.

55 Second, contrary to what the Kingdom of Spain maintains, it is not apparent from the Opinion of the Advocate General that this Opinion is based on the premise that the open-cast mine 'Ladrones' has already been operated. On the contrary, the complaints made by the Commission with regard to that mine, examined by the Advocate General, concern the shortcomings that undermine the environmental impact assessment of the mining project. Unlike other complaints, those complaints relate,

therefore, to the authorisation procedure for that mine and not to any mining activity on the site of that mine carried out after it was authorised.

56 Consequently, there is no need to order the measure of inquiry requested by the Kingdom of Spain.

57 With regard to the request, which is framed in the alternative, to have the oral procedure reopened, it is appropriate to note that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 46, and Case C-306/08 *Commission* v *Spain* [2011] ECR I-4541, paragraph 60).

58 However, neither the Statute of the Court of Justice of the European Union nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see, in particular, *Commission* v *Spain*, paragraph 61).

59 In the present case, the Court considers, having heard the Advocate General, that it has all the material necessary for it to decide the dispute before it and that the case does not have to be examined in the light of arguments that have not been the subject of discussion before it. Therefore, there is no need to order the reopening of the oral procedure.

The action

The first complaint, alleging non-compliance with Articles 2, 3 and 5(1) and (3) of Directive 85/337 as amended in respect of the assessments of the environmental impacts of the 'Fonfría', 'Nueva Julia' and 'Ladrones' open-cast mining projects

Arguments of the parties

60 By its first complaint, the Commission maintains that the assessments of the environmental impacts of the 'Fonfría', 'Nueva Julia' and 'Ladrones' projects contained major omissions, rendering them inadequate assessments not complying with Directive 85/337 as amended.

61 In that regard, the Commission refers to point 4 of Annex IV to that directive, and in particular to a note concerning the term 'description' appearing in that point, which implies that projects falling within the scope of the directive must be accompanied by a description of their significant effects on the environment, setting out their 'direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary... effects'.

62 It infers that, in this case, the assessments of the environmental impacts of the mining projects concerned should have included an analysis of the significant cumulative impacts which the proximity of several open-cast coal mines simultaneously operated in

the Laciana valley were likely to have. The 2005 report confirms that no such analysis was carried out prior to the authorisation of the three projects in question.

63 In addition, the Commission cites the following specific deficiencies of the environmental impact assessments for the three mines forming the subject-matter of this complaint:

— concerning the 'Fonfría' project, there is nothing in the initial assessment to indicate that an assessment was made of the possible disturbances for the capercaillie, even though the authorities were aware of the presence of that species on a breeding ground situated close to the extraction area of the mine. Moreover, the 2005 report stated without further explanation that that project is situated inside the recovery plan of the brown bear;

— although the 'Ladrones' project is very close to the breeding grounds of the capercaillie, justifying the designation of a critical area in the recovery plan for that species, there is nothing to indicate that that presence was taken into account in the initial assessment of that project. With regard to the brown bear, that assessment merely stated that the project is located within the recovery plan for that species, but that there would be no significant disturbances for the latter since the mining extraction 'does not affect any critical area and does not involve any barrier effect between the various pockets';

— concerning the 'Nueva Julia' project, the assessment contains no information on the two most problematic species, namely the capercaillie and the brown bear.

The effects of that project situated outside the SCI are obviously likely to be felt at a distance of several kilometres and could therefore affect habitats and species within the SCI. That eventuality does not appear to have been taken into account.

64 The Kingdom of Spain argues, first, concerning the interpretation of the term 'description' in point 4 of Annex IV to Directive 85/337 as amended, that the use of the conditional in the note concerning that point to the effect that '[t]his description should cover', indicates that the required description does not necessarily have to mention the cumulative effects of the various projects on the environment, but that it is merely desirable that it should contain such a description. The formulation used in other language versions of the directive confirms that interpretation.

65 Moreover, that Member State argues, such a description of the cumulative effects was not necessary in this case, since the mines in question were authorised in very different periods and the areas of the SCI which they affect are also different.

66 In any event, the 2005 report contains a detailed assessment of the potential effects of each of the projects in question and the potential cumulative effects which they might produce in combination with other projects.

67 As regards the 'Fonfría' project, the 2005 report concluded, at the end of a description of the cumulative effects, that the protected species were not significantly disturbed in the SCI.

68 That is also the case with the 'Nueva Julia' project. Concerning the brown bear, it was concluded in the 2005 report, following an assessment of the cumulative environmental effects of the mines and projects concerned, that no critical area or transit route was disturbed, so that the effect of that project on that species was not significant.

69 With regard to the bird species protected under the SPA and thus the 'Alto Sil' SCI, the Kingdom of Spain argues that no species has been significantly disturbed. As regards the 'Ladrones' project, the 2005 report concluded that there was no significant impact on habitat 4020, identified as a priority habitat of the capercaillie in the recovery plan for that species.

Findings of the Court

70 Concerning, first, the Commission's first complaint regarding the 'Fonfria' open-cast coal mining project, it should be noted that, according to Article 3(2) of Directive 97/11, the provisions of Directive 85/337, in its version prior to the amendments introduced by Directive 97/11, continue to apply to applications for authorisation submitted before the time-limit laid down in Article 3(1), namely 14 March 1999.

71 In this case, it is apparent from the documents before the Court that the application for authorisation for the 'Fonfría' mine project was submitted on 11 March 1998.

72 The Court cannot therefore uphold the Commission's application for a declaration that the provisions of Directive 85/337 have been infringed in relation to this project.

73 Moreover, the Commission's complaint concerning this project cannot be understood as seeking a finding of an infringement of Directive 85/337 in its version prior to the amendments introduced by Directive 97/11.

74 That is all the more so as certain amendments introduced by Directive 97/11 are directly relevant for assessing whether this complaint is well founded. That applies in particular to the insertion, in point 19 of Annex I to Directive 85/337, of the reference to open-cast mining projects with a surface area larger than 25 hectares, which implies that the latter do not have to form the subject-matter of an assessment pursuant to Article 4(1) of Directive 85/337 as amended unless they concern applications for authorisation submitted after 14 March 1999.

75 Therefore, the first complaint must be dismissed in so far as it concerns the 'Fonfría' project.

76 It needs to be examined, secondly, whether, in this case the environmental impact assessments carried out in accordance with Directive 85/337 as amended of the 'Nueva Julia' and 'Ladrones' mining projects are inadequate, as the Commission argues, because they do not include an analysis of the cumulative environmental effects capable of being produced by those projects and other operations, such as open-cast coal mines in operation or the commencement in operation of which is authorised or in the course of authorisation.

77 In that regard, contrary to what the Kingdom of Spain argues, it cannot be inferred from the use of the conditional, in the note concerning point 4 of Annex IV to Directive 85/337 as amended, to the effect that '[t]his description should cover... any...

cumulative... effects of the project', that the assessment of the environmental impacts does not necessarily have to cover the cumulative effects of the various projects on the environment, but that such an analysis is merely desirable.

78 The scope of that obligation to assess impacts on the environment follows from the provision contained in Article 3 of Directive 85/337 as amended, according to which the environmental impact assessment is to identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11 of that directive, the direct and indirect effects of a project on human beings, fauna and flora, soil, water, air, climate and the landscape, material assets and the cultural heritage, and the interaction between those factors.

79 Given the extended scope and very broad objective of Directive 85/337 as amended, which are apparent from Articles 1(2), 2(1) and 3 of the latter (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraphs 30 and 31), the mere fact that there may have been uncertainty as to the exact meaning of the use of the conditional in the expression '[t]his description should cover' used in a note to point 4 of Annex IV to Directive 85/337 as amended, even if that also appears in other language versions of that directive, cannot prevent a broad interpretation from being given to Article 3 of the latter.

80 Therefore, that provision should be taken as meaning that, where the assessment of the environmental impacts must, in particular, identify, describe and assess in an appropriate manner the indirect effects of a project, that assessment must also include an analysis of the cumulative effects on the environment which that project

may produce if considered jointly with other projects, in so far as such an analysis is necessary in order to ensure that the assessment covers examination of all the notable impacts on the environment of the project in question.

81 The Kingdom of Spain argues that, in this case, such a cumulative assessment was not necessary, since the mines concerned are distant from each other and were authorised in very different periods.

82 However, the documents before the Court do not show that to be the case with, in particular, the 'Nueva Julia' and 'Ladrones' projects, since those southern mines are situated in proximity to each other and the procedures for authorising them were carried out in parallel.

83 Moreover, even if, as the Kingdom of Spain argues, the 2005 report contained such an analysis, that report cannot remedy the lack of that analysis in the context of the initial assessment, since Article 2(1) of Directive 85/337 as amended requires that the assessment be a preliminary to the authorisation of the project.

84 Thirdly, it needs to be examined whether, as the Commission maintains, the possible and specific impacts of the 'Nueva Julia' and 'Ladrones' open-cast coal mining projects on the capercaillie and the brown bear have not been adequately examined in the environmental impact assessments for those projects.

85 Concerning, first, the 'Nueva Julia' mining project, the environmental impact assessment of 25 August 2003 refers only to the impact of that project on certain amphibians. That assessment contains no indication that an assessment was actually carried out as to the impacts of that project on the brown bear and the capercaillie.

86 An analysis of the impacts of that project on those species was, however, necessary, first, because the Spanish authorities could not have been unaware of the presence of those species on the territory of the 'Alto Sil' site. Indeed, during 1998, the Kingdom of Spain had proposed the classification of the 'Alto Sil' site and an SCI by reason, in particular, of the presence on that site of those two species, and that same Member State had, with effect from the year 2000, classified that site as an SPA by reason of the presence of the capercaillie.

87 Moreover, even if that operation is situated outside the SCI, it is undisputed that it is immediately adjacent to that site, so that it is possible that it may have impacts on the latter.

88 Such an analysis was all the more needed since, in the standard data formula for the 'Alto Sil' site, sent by the Kingdom of Spain to the Commission when it was proposed to classify that site as an SCI, that Member State had stated that the vulnerability of that site was fundamentally due to the open-cast coal mining operations.

89 Concerning, next, the 'Ladrones' open-cast coal mining project, it should be noted that the environmental impact statement of 9 October 2003 refers to the presence of the brown bear on the 'Alto Sil' site proposed as an SCI, but concludes that, as follows from a report of 5 June 2001, the operation causes only a small loss of habitat favourable to that species, does not affect any area critical for the species and does not create any barrier effect between the various pockets.

90 In that respect, it must be held that, as regards the brown bear, the Commission has not produced any document capable of throwing doubt on the adequacy of that assessment of the project's environmental impact.

91 Concerning the capercaillie, it is mentioned in that environmental impact statement that a representative of an environmental organisation had referred in particular to the possible impact of the project on that species, that that claim was challenged by the promoter, and that the latter was examined and assessed in a satisfactory manner. However, it is not apparent from that statement or from other documents produced by the Kingdom of Spain that the assessment of the impacts of the project on the capercaillie was actually made. For the reasons already set out in paragraphs 86 and 88 of this judgment, an analysis of the impacts of that project on that species was clearly necessary.

92 Consequently, that assessment must be held to be inadequate as regards the capercaillie.

93 Finally, the defects thus identified in the environmental impact assessments for the 'Nueva Julia' and 'Ladrones' mining projects cannot be regarded as being compensated for by the 2005 report since, as has already been pointed out in paragraph 83 of this judgment, Article 2(1) of Directive 85/337 as amended requires the assessment to be a preliminary to the authorisation of the project.

94 Accordingly, the first complaint, in so far as it seeks a declaration of failure to fulfil obligations under Articles 2, 3 and 5(1) and (3) of Directive 85/337 as amended, as regards the environmental impact assessments for the 'Nueva Julia' and 'Ladrones' open-cast mining projects, must, save for the latter project in respect of the brown bear, be upheld.

The second complaint, alleging non-compliance with Article 6(2) to (4) of the Habitats Directive as regards the capercaillie as protected since the classification of the 'Alto Sil' site as an SPA from the year 2000 onwards

The first part of the second complaint

— Arguments of the parties

95 The Commission argues that, by authorising the 'Nueva Julia' and 'Ladrones' operations, the Kingdom of Spain infringed Article 6(3) and (4) of the Habitats Directive, having regard to the protection which the capercaillie has enjoyed since the classification of the 'Alto Sil' site as an SPA since 2000.

96 The Kingdom of Spain argues that the assessments of the projected operations contain a sufficient assessment of the possible impacts of those projects on that species.

— Findings of the Court

97 It follows from Article 7 of the Habitats Directive that Article 6(2) to (4) of that directive replaces the first sentence of Article 4(4) of the Birds Directive as from the date of implementation of the Habitats Directive or the date of classification by a

Member State under the Birds Directive, where the latter date is later (see, in particular, Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 173).

98 In this case, the complaint concerning the assessment of the impacts on the 'Nueva Julia' and 'Ladrones' projects on the species protected by virtue of the 'Alto Sil' SPA, particularly on the capercaillie, must therefore be examined having regard to the provisions of Article 6(3) and (4) of the Habitats Directive as regards these projects, in relation to which it is undisputed that the applications for authorisation relating thereto were brought after the 'Alto Sil' site was classified as an SPA.

99 Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, in particular, *Commission* v *Ireland*, at paragraph 243).

100 An assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned (see, to that effect, Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, paragraph 69).

101 In this case, protection of the capercaillie clearly constitutes a conservation objective which led the Kingdom of Spain to classify the 'Alto Sil' site as an SPA in 2000.

102 Moreover, it should be remembered that the national authorities had indicated, at the time of the proposal, formulated in 1998, to classify that site as an SCI, that the capercaillie population present on that site was of regional and even national importance and that the vulnerability of that same site was fundamentally due to the open-cast mining operations.

103 As has already been held in the consideration of the first complaint concerning Directive 85/337 as amended, particularly in paragraphs 76 to 93 of this judgment, the environmental impact assessments carried out before the approval of the 'Nueva Julia' and 'Ladrones' projects do not contain any analysis of the possible cumulative effects of the various operations on the capercaillie, whereas, in this case, such an analysis was necessary. Similarly, nor do those assessments contain sufficient indications to allow verification that the impacts of those operations on the capercaillie population present in the 'Alto Sil' SPA have actually been assessed.

104 Moreover, the 2005 report cannot make up for those deficiencies, since it was drawn up after the authorisation of those projects and cannot therefore be regarded as relevant in the context of Article 6(3) of the Habitats Directive (see, to that effect, *Commission* v *Italy*, paragraph 72).

105 It follows that the assessments concerning the 'Nueva Julia' and 'Ladrones' open-cast mining projects cannot be regarded as appropriate since they are characterised by gaps and by the lack of complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of those projects on

the 'Alto Sil' SPA, and in particular on the capercaillie population, the protection of which constitutes one of the objectives of that area.

106 It cannot therefore be maintained that, before the authorisation of those operations, all the aspects of the plan or project capable, by themselves or in combination with other plans or projects, of affecting the conservation objectives of the 'Alto Sil' site were identified, taking into account the best scientific knowledge on the matter.

107 In those circumstances, the said assessments do not demonstrate that the competent national authorities could have acquired the certainty that those operations would be free of damaging effects for the integrity of the said site.

108 It follows that the authorisations for the said projects did not comply with Article 6(3) of the Habitats Directive.

109 The Kingdom of Spain, which has invoked the importance of mining activities for the local economy, needs to be reminded that, whilst that consideration is capable of constituting an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive, that provision can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (*Commission* v *Italy*, paragraph 83).

110 It is clear from the considerations above that the national authorities did not have those data at the time the decisions to grant the authorisations in question were taken. It follows that those authorisations cannot be based on Article 6(4) of the Habitats Directive.

111 Consequently, those authorisations did not comply with Article 6(4) of the Habitats Directive.

112 In those circumstances, the first part of the second complaint must be regarded as well founded.

The second part of the second complaint

— Arguments of the parties

113 The Commission accuses the Kingdom of Spain of infringing Article 6(2) of the Habitats Directive by failing to take the necessary measures to prevent the operation of the 'Feixolín', 'Fonfría', 'Salguero-Prégame-Valdesesgadas', 'Ampliación de Feixolín' and 'Nueva Julia' open-cast mines after January 2000, the date from which classification of the 'Alto Sil' site as an SPA became effective, from affecting that site and in particular the capercaillie species protected by virtue of that SPA.

114 It refers to the recovery plan for the Cantabrian capercaillie, approved by Decree 4/2009, of 15 January 2009, of the Junta de Castilla y León (B.O.C. y L. nº 13, p. 1540). The latter states that, in 1982, the population of the Cantabrian capercaillie still amounted to about 1 000 specimens and that the occupation rate of the breeding grounds amounted to 85 %. In 2002, however, that population did not exceed 500 to 600 specimens, spread between two sides of a mountain range, and the occupation rate of the breeding grounds was 45 %. During that 20-year period, half of that population was located in the autonomous community of Castile-León. According to the said recovery plan, in 2005, the population present in that autonomous community amounted to about 164 adult specimens and risked becoming extinct in about 20 years.

115 The Commission argues, in particular, that certain breeding grounds of the capercaillie are close to the mining operations in question. That applies to the 'Robledo El Chano' breeding ground, situated close to the 'Fonfría' mine and still occupied in 1999.

116 As for the 2005 report, the Commission argues, inter alia, that the conclusion that the impact of open-cast mining operations on the capercaillie must be regarded as insignificant is incoherent. That report confirmed the risk of 'supra-local' effects being engendered by mining operations and the exclusion of the possibility, important for the conservation of the species, that an abandoned habitat might once again be used if its quality permitted.

117 The Commission also argues that scientific studies show that the fragmentation of forest enclaves available for the capercaillie in the 'Alto Sil' area has been made manifestly worse by the possibility of a barrier effect caused by the simultaneous and uninterrupted entry into operation of several mines.

118 The Kingdom of Spain acknowledges that the Cantabrian capercaillie has undergone a major decline, but argues that the populations suffering the greatest decline in the Castile- León region are those located in the areas with the highest levels of protection, such as national parks, whereas the capercaillie population present on the 'Alto Sil' site is the largest of the region and has undergone only a modest decline. It is moreover significant that the decline of the species on that site has been much greater in areas distant from the mining basin.

119 The Kingdom of Spain also maintains that, in the areas affected by the open-cast mining operations concerned by this complaint, the presence of the capercaillie is ancient and marginal. In those areas, there is only one known breeding ground, namely 'Robledo El Chano' which, in accordance with the national strategy for conservation of the species, forms part of a critical area for the safeguarding of the Cantabrian capercaillie. However, that breeding ground has been abandoned since the end of the 1980's and cannot, therefore, have been affected by the operation of 'Fonfría'.

— Findings of the Court

120 It needs first to be examined whether Article 6(2) of the Habitats Directive is applicable to the operations of the 'Feixolín', 'Fonfría', 'Salguero-Prégame-Valdesesgadas', 'Ampliación de Feixolín' and 'Nueva Julia' open-cast mines which took place subsequently to the classification of the 'Alto Sil' site as an SPA, effective from the year 2000.

121 In that regard, concerning first the 'Nueva Julia' operation, since it has been held in the context of the first part of the second complaint that authorisation for that project

was granted without complying with Article 6(3) of the Habitats Directive, the case-law shows that a breach of Article 6(2) may be found where deterioration of a habitat or disturbance of the species for which the area in question was designated has been established (*Commission* v *Italy*, paragraph 94).

122 Next, as regards the 'Ampliación de Feixolín' operation, it should be recalled that the fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2) (*Commission* v *Ireland*, paragraph 250).

123 It follows that, in so far as the operation of the 'Ampliación de Feixolín' mine which the Commission criticises took place at a time when the latter had not yet been authorised, as has been pointed out in paragraph 35 of this judgment, the latter may constitute an infringement of Article 6(2) of the Habitats Directive.

124 Finally, it should be noted that Article 6(2) of the Habitats Directive applies to the 'Feixolín', 'Fonfría' and 'Salguero-Prégame-Valdesesgadas' open-cast mines, notwithstanding the fact that operation of the latter was authorised before the system of protection laid down by the Habitats Directive became applicable to the 'Alto Sil' site by reason of its classification as an SPA.

125 The Court has already held that, although such projects are not subject to the requirements relating to the procedure for prior assessment of the implications of the project for the site concerned, laid down by the Habitats Directive, their implementation nevertheless falls within the scope of Article 6(2) of that directive (see, to that effect, Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraphs 48 and 49).

126 Concerning, secondly, the complaint that, in relation to the operational activities of the open-cast mines in question, the Kingdom of Spain did not comply with Article 6(2) of the Habitats Directive, it should be recalled that an activity complies with that provision only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives (see, to that effect, Case C-241/08 *Commission* v *France* [2010] ECR I-1697, paragraph 32).

127 Moreover, by virtue of Article 6(2) of the Habitats Directive, the protective legal status of SPAs must guarantee the avoidance therein of the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been classified (see, in particular, Case C-535/07 *Commission* v *Austria* [2010] ECR I-9483, paragraph 58 and case-law cited).

128 It follows that this complaint is well founded only if the Commission demonstrates to a sufficient legal standard that the Kingdom of Spain has not taken the appropriate protective measures, consisting in preventing the operational activities of the 'Feixolín', 'Fonfría', 'Salguero-Prégame-Valdesegadas', 'Ampliación de Feixolín' and 'Nueva Julia' mines, in so far as they took place after the classification of the 'Alto Sil' site as an SPA from the year 2000 onwards, from producing deteriorations of the habitats of the capercaillie and disturbances of that species likely to have significant effects having regard to the objective of that directive consisting in ensuring the conservation of that species.

129 In that respect, is needs to be examined, first, whether the mines in question occupy surfaces which constitute appropriate habitats for the capercaillie but cannot be used by that species during the operation of those mines, or during their subsequent 'renaturation'.

130 The Commission maintains that that is the case in particular with habitat 9230, constituted by Galicia-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*.

131 In that respect, as the Advocate General states in points 81 and 82 of her Opinion, the Commission provides evidence of the destruction of that habitat after the classification of the 'Alto Sil' site as an SPA only as regards the 'Fonfría' mine. The 2005 report shows that, in the context of that operation, which took place from 2001 onwards, an area of 17.92 hectares of habitat type 9230 has in fact been destroyed.

132 The Kingdom of Spain argues that that loss of habitat is unimportant for the conservation of the capercaillie species, since the area concerned did not contain any breeding ground.

133 That argument cannot be accepted, because, even if that area were not usable as a breeding ground, it could conceivably be used by that species as a habitat for other purposes, such as a living or hibernating area.

134 Moreover, if that operation had not taken place in that area, the possibility cannot be excluded that, following measures taken by the authorities for that purpose, that area could have become usable as a breeding ground.

135 In that respect, it should be recalled that the protection of SPAs is not to be limited to measures intended to avoid external anthropogenic impairment and disturbance but must also, according to the situation that presents itself, include positive measures to preserve or improve the state of the site (*Commission* v *Austria*, paragraph 59 and case-law cited).

136 The Commission argues, secondly, that the mining operations concerned are, by reason of the noise and vibrations which they produce and which are felt within the 'Alto Sil' SPA, likely significantly to disturb the capercaillie population protected by virtue of that SPA.

137 In that regard, it is apparent from the documents before the Court that, as the Advocate General has stated in point 88 of her Opinion, bearing in mind the relatively short distances between various areas critical for the capercaillie and the open-cast mines in question, noise and vibrations caused by those operations are likely to be felt in those areas.

138 It follows that those nuisances are capable of causing disturbances likely significantly to affect the objectives of the said directive, particularly the objectives of conserving the capercaillie.

139 That is all the more so as it is undisputed that the capercaillie is a sensitive species and particularly demanding as to the tranquillity and quality of its habitats. It is further apparent from the documents before the Court that the degree of isolation and tranquillity required by that species constitutes a factor of the very first order as it has a considerable impact on the ability of that species to reproduce.

140 The Kingdom of Spain expresses doubts in that regard by objecting that the decline in the populations of that species, including on the 'Alto Sil' site, has also been observed outside the mining basin and is even more marked there. That was confirmed by the 2005 report, which indicates that there is no relation of cause and effect between the existence of mining operations and the abandonment of breeding grounds by the Cantabrian capercaillie, that latter phenomenon being more significant in areas beyond those neighbouring the operations.

141 However, that circumstance in itself does not prevent the said nuisances produced inside the SPA by the mining operations in question from being capable of having had significant impacts on that species, even if the decline of that species may have been greater yet for populations relatively distant from those operations.

142 Moreover, in order to establish a failure to fulfil obligations within the meaning of Article 6(2) of the Habitats Directive, the Commission does not have to prove a cause and effect relationship between a mining operation and significant disturbance to the capercaillie. Since Article 6(2) and (3) of the Habitats Directive are designed to ensure the same level of protection, it is sufficient for the Commission to establish the existence of a probability or risk that that operation might cause significant disturbances for that species (see, to that effect, *Commission* v *France*, paragraph 32, and Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* [2011] ECR I-6561, paragraph 41).

143 In any event, as the Advocate General has pointed out in points 90 to 92 of her Opinion, the documents before the Court show that the abandonment of the 'Robledo El Chano' breeding ground, still occupied by the capercaillie in 1999, results from the operation of the 'Fonfría' open-cast mine as from 2001.

144 That finding confirms that the operation of the mines in question, particularly the noises and vibrations produced, is capable of causing significant disturbances for that species.

145 Therefore, it must be held that the open-cast operations of the 'Feixolín', 'Fonfría', 'Salguero-Prégame-Valdesesgadas', 'Ampliación de Feixolín' and 'Nueva Julia' mines are contrary to Article 6(2) of the Habitats Directive by reason of the noises and vibrations which they produce and which are capable of significantly affecting the conservation of the capercaillie.

146 The Commission maintains, thirdly, that the open-cast mining operations contribute to isolating sub-populations of capercaillie by blocking communication corridors linking those sub-populations with other populations. It refers to the report of December 2004 on the impact of mining operations on the Cantabrian capercaillie, drawn up by the Ministry of the Environment and by the coordinators of the strategy for conserving the Cantabrian capercaillie in Spain.

147 In that respect, it must be held that that expert report, drawn up by recognised experts on the Cantabrian capercaillie of the national Ministry of the Environment and the Ministry of the Environment of the autonomous community of Castile- León, concludes that there is a risk that operations currently being carried out, including the 'Feixolín' and 'Fonfría' mines, in conjunction with projects the implementation of which is imminent, such as the 'Ampliación de Feixolín' mine, form a continuous east-west barrier for the capercaillie, capable of leading to the isolation of population pockets of that species, and, over time, to the disappearance of pockets located to the south of that barrier.

148 Since the Kingdom of Spain does not produce evidence refuting the conclusions of that report, the scientific value of which is undisputed, it must be held that the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín' operations are capable of producing a barrier effect likely to contribute to the fragmentation of the habitat of the capercaillie and the isolation of certain sub-populations of that species.

149 The question arises, however, whether the Kingdom of Spain can be accused of the failures to fulfil obligations under Article 6(2) of the Habitats Directive thus determined in so far as they concern the 'Ampliación de Feixolín' open-cast mine.

150 Unlike the other mines concerned by this complaint, the 'Ampliación de Feixolín' open-cast mine was not authorised at the time when the operations criticised by the Commission took place. Moreover, the authorities penalised the operator of that mine for operating it without prior authorisation and ordered him to cease that operation.

151 However, as the Advocate General points out in point 105 of her Opinion, whereas the authorities were informed of the actual operation of that mine at least since 2005, the documents before the Court show that they did not prohibit it until November 2009, following an inspection carried out during September the same year.

152 Thus, by allowing a situation which caused significant disturbances in the 'Alto Sil' SPA to continue for at least four years, the Kingdom of Spain omitted to take, in good time, the measures necessary to bring those disturbances to an end. Thus, the Kingdom of Spain can be accused of the failures to fulfil obligations under Article 6(2) of the Habitats Directive in so far as they concern the 'Ampliación de Feixolín' mine.

153 Finally, the further question arises whether the failures to fulfil obligations under Article 6(2) of the Habitats Directive thus established can be justified by reason of the importance of mining activities for the local economy, as the Kingdom of Spain has pleaded.

154 Such a ground can in fact be relied upon by a Member State under the procedure laid down by Article 6(4) of the Habitats Directive. If the conditions laid down by that provision are met, its application may lead to the authorisation of activities which, as has already been held in paragraph 122 of this judgment, can no longer be halted having regard to Article 6(2).

155 However, as is apparent from the case-law referred to in paragraph 125 of this judgment, the procedures for prior assessment laid down by the Habitats Directive do not apply to projects such as 'Feixolín' and 'Fonfría', since they were authorised before the system of protection provided for by the Habitats Directive became applicable to the 'Alto Sil' site by reason of its classification as an SPA.

156 Concerning those projects, the possibility cannot be excluded that a Member State, by analogy with the procedure in derogation provided for in Article 6(4) of the Habitats Directive, may, in a procedure under domestic law for assessing the environmental impacts of a plan or project capable of significantly affecting the interests of conserving a site, invoke a reason of public interest and, if the conditions laid down by that provision are essentially satisfied, authorise an activity which, subsequently, is no longer prohibited by Article 6(2).

157 However, as already stated in paragraph 109 of this judgment, in order to be able to verify whether the conditions laid down by Article 6(4) of the Habitats Directive have been met, the impacts of the plan or project must first have been analysed in accordance with Article 6(3) of that directive.

158 In this case, the documents before the Court show that, at the time of the assessment of the environmental impacts of the 'Feixolín' and 'Fonfría' projects carried out under the authorisation procedure of national law, the significant disturbances which those projects are capable of causing for the capercaillie, and which have been established in paragraphs 131, 145 and 148 of this judgment, could not be analysed because the Kingdom of Spain had not identified them and even denied their existence, including in the procedure before the Court.

159 In those circumstances, it appears that, in the context of the authorisation procedure under national law, the conditions laid down by Article 6(4) of the Habitats Directive have not been capable of verification.

160 Therefore, the failures to fulfil obligations under Article 6(2) of the Habitats Directive which have been established cannot be justified by reference to the importance of mining activities for the local economy.

The third complaint, alleging infringement of the obligations arising under the Habitats Directive from the proposal of the 'Alto Sil' site as an SCI in relation to the operation of the 'Fonfría', 'Feixolín', 'Salguero-Prégame-Valdesegadas' and 'Nueva Julia' open-cast mines

— Arguments of the parties

161 By its third complaint, the Commission accuses the Kingdom of Spain of failing, from January 1998 onwards, to take the necessary measures in relation to the extraction of coal from the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines, to preserve the national ecological interest represented by the proposed 'Alto Sil' site, particularly in relation to the brown bear, and did not therefore comply with its obligations under the Habitats Directive as described in the abovementioned judgments in *Dragaggi and Others* and *Bund Naturschutz in Bayern and Others*.

162 The Kingdom of Spain replies that it complied with the said obligations and observes in that respect that, according to official census data, the brown bear population, particularly in the western pocket of which the 'Alto Sil' site forms part, has experienced remarkable growth during the past 10 years.

— Findings of the Court

163 Under the Habitats Directive, Member States must take appropriate protective measures to preserve the characteristics of sites which host priority natural habitat types and/or priority species and which have been identified by Member States with a view to their inclusion on the Community list. Member States cannot therefore authorise intervention where there is a risk that the ecological characteristics of those sites will be seriously compromised as a result. That is particularly so where there is a risk that intervention of a particular kind will bring about the extinction of priority species present on the sites concerned (Case C-308/08 *Commission* v *Spain* [2010] ECR I-4281, paragraph 21 and case-law cited).

164 In this case, it is undisputed that the brown bear is a priority species which is present on the 'Alto Sil' site and that its conservation was an objective envisaged by the Kingdom of Spain at the time of the proposal of that site as an SCI.

165 The question therefore arises whether, as the Commission argues, the operations of the 'Fonfría', 'Feixolín', 'Salguero-Prégame-Valdesegadas' and 'Nueva Julia' open-cast mines, in so far as they took place during the provisional period of protection between January 1998, when it was proposed to classify that site as an SCI, and December 2004, when the said site was in fact classified as an SCI, may be regarded as being interventions which risked seriously compromising the ecological characteristics of that site and, with regard in particular to the brown bear priority species, risked resulting in the disappearance of that species on that site.

166 In that respect, it is apparent from the documents before the Court, and in particular from the documents to which the Advocate General refers in point 130 of her Opinion, that the mining operations north of the River Sil, particularly 'Fonfría' and

'Feixolín', caused disturbances for the brown bear, especially by creating or aggravating a 'barrier effect' which risked preventing or severely impeding access to the Leitariegos corridor, whereas the latter is a north-south transit route of great importance for the western population of Cantabrian brown bears, of which the pocket of brown bears present on the 'Alto Sil' forms part.

167 However, having regard to the evidence produced by the Commission, it cannot be held that that 'barrier effect' seriously compromised the ecological characteristics of the said site as regards in particular the state of conservation of the brown bear.

168 As the Kingdom of Spain has argued without being contradicted by the Commission, between 1998 and 2004, the demographic evolution of the western population of Cantabrian brown bears, of which the pocket of bears present on the 'Alto Sil' site forms part, reveals a clearly positive trend.

169 As the file confirms, even if, between 1982 and 1995 that population regressed in the order of 4 to 5 % per year, it has since experienced an annual and uninterrupted growth of 7.5 %, causing it to rise from an estimated total of 50 to 65 specimens at the beginning of the 1990s to a total of about 100 to 130 specimens in 2008. It is currently regarded as a threatened, but viable, population. By contrast, according to the studies, the eastern population of Cantabrian brown bears remains precarious by reason primarily of its isolation in relation to the western population. It has not yet been able to re-establish itself at a level considered viable, the number of individuals belonging to that population having increased only from an estimated total of 20 to 25 specimens to a total of 30 during the said period.

170 It follows from these considerations that, bearing in mind the scientific studies submitted to the Court in the context of the present procedure concerning the western population of Cantabrian brown bears of which the population of brown bears present on the 'Alto Sil' site forms part, there is insufficient evidence that the operations of the 'Fonfría', 'Feixolín', 'Salguero-Prégame-Valdesegadas' and 'Nueva Julia' open-cast mines, in so far as they took place between January 1998, when it was proposed to classify that site as an SCI, and December 2004, when the said site was in fact classified as an SCI, risked seriously compromising the ecological characteristics of that site and, with regard in particular to the brown bear priority species, risked resulting in the disappearance of that species on that site.

171 The third complaint must therefore be dismissed.

The fourth complaint, alleging non-compliance, as from the registration of the 'Alto Sil' site as an SCI in December 2004, with Article 6(2) to (4) of the Habitats Directive

The first part of the fourth complaint

172 The Commission argues that the Kingdom of Spain has failed to fulfil its obligations under Article 6(3) and (4) of the Habitats Directive in that it authorised the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' open-cast mining projects without first assessing the impacts which those projects were capable of having, and, in any event, without complying with the conditions in accordance with which those projects might be realised despite their negative impacts.

173 In that regard, it should be held that the mining operations concerned by this complaint were all authorised before December 2004, and thus before the 'Alto Sil' site was classified as an SCI.

174 As is apparent from the case-law referred to in paragraph 125 of this judgment, projects which were authorised before the system of protection provided for by the Habitats Directive become applicable to a site are not subject to the requirements concerning the procedure for prior assessment of the impacts of the project on the site concerned, laid down by the Habitats Directive.

175 Therefore, Article 6(3) and (4) of the Habitats Directive was not applicable to the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' open-cast mining projects, so that the Commission cannot accuse the Kingdom of Spain of failing to fulfil its obligations under those provisions.

176 Therefore, the first part of the fourth complaint must be dismissed.

The second part of the fourth complaint

— Arguments of the parties

177 The Commission also accuses the Kingdom of Spain of not taking, in regard to the operation of the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Nueva Julia' and 'Ampliación de Feixolín' open-cast mines after the classification of he 'Alto Sil' site as

an SCI in December 2004, the measures which were necessary in application of Article 6(2) of the Habitats Directive.

178 It argues that those operations destroyed habitats protected by virtue of that SCI, including that of type 9230 – Galicia-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica* which is of particular importance for the brown bear as it is frequently used by that species as a transit route.

179 It also argues that the operations in question produced a 'barrier effect' which has contributed to the closing of the Leitariegos corridor which is a very important transit route for the western population of Cantabrian brown bears of which the pocket of brown bears present on the 'Alto Sil' site forms part, resulting in the fragmentation of the habitat of that population and the isolation of some of its pockets.

180 It argues that the barrier effect created by those operations makes exchanges between the western and eastern populations of Cantabrian brown bears even more difficult, causing the fragmentation of the species to continue and not allowing the eastern population of the species to re-establish itself in sufficient numbers to ensure its viability.

181 The Kingdom of Spain replies that the mining operations are situated in non-wooded areas, composed mainly of heathland, where females have never come to rear their young, not because of the operations but rather because of the lack of a habitat favourable to rearing, that having no connection to the potential disturbances which the operations might cause to the rearing of young.

182 The autonomous community of Castile- León has, moreover, adopted numerous measures for improving the habitat of the brown bear, including the re-establishment of the habitat of the latter in the Leitariegos corridor area.

183 The Kingdom of Spain considers that, whilst the northern part of the 'Alto Sil' site is important for the brown bear, it is however an area situated well to the north of the mining operations, at altitudes of over 1 800 metres, which is enclaved between the provinces of Asturias and Léon, and where bears feed in spring and autumn. The latter do not go to the southern part where the mines are situated, because the habitat there is completely different.

184 Finally, concerning the Commission's allegations concerning losses of habitat type 9230 – Galicia-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*, those losses represent an area of 17.92 hectares for the 'Fonfría' operation and 19.90 hectares for the 'Ampliación de Feixolín' operation. Since the total area of that habitat on the 'Alto Sil' site amounts, according to the latest studies, to 4 000 hectares, or even 8 000 hectares, and not to 2 600 hectares as initially indicated when classification of the site as an SCI was proposed, those losses are, the Kingdom of Spain submits, negligible in relative terms.

— Findings of the Court

185 It is necessary first to examine the Commission's claim that, in breach of Article 6(2) of the Habitats Directive, habitats protected by virtue of the 'Alto Sil' SCI have been destroyed since the 'Alto Sil' site was classified as an SCI in December 2004.

186 In that respect, as the Advocate General has pointed out in points 144 and 145 of her Opinion, it is apparent from the documents before the Court, particularly from the table of current operations in the 2005 study, that, while operation of the 'Fonfría' and 'Ampliación de Feixolín' mines has affected that site in such a way, the effects, as regards the latter mine, arose after December 2004 and affected an area of at least 19 hectares.

187 The Commission argues, secondly, that, in areas adjacent to the mines concerned, noise and vibrations produced by mining activities have caused significant disturbances to the brown bear, a priority species protected by virtue of the classification as an SCI.

188 In that respect, it is apparent from the environmental report of 7 November 2008 on the 'Feixolín' open-cast coal-mining project in the Orallo mountains (Villablino, Léon), promoted by Minero Siderúrgica de Ponferrada, produced as an annex to the Commission's application, that the loss of habitats for the Cantabrian brown bear caused by the 'Feixolín' operation has been significant within what is called the 'Leitariegos corridor', that the bears move 3.5 to 5 kilometres from the areas of impact of the noise and vibrations caused by mining operations, and that that operation will prevent access for the brown bear to that corridor, or make it much more difficult, whereas that corridor is a north-south transit route of critical importance for the western population of that species.

189 That is confirmed by the 2005 study, in which it is indicated, in the context of an analysis of the impacts of the northern mines including 'Feixolín' and 'Fonfría', that the Leitariegos corridor, with a width of 10 kilometres, is a transit route of great importance for the western population of the said species, allowing in particular communication between two very important pockets of reproduction.

190 That report states that the risk of deterioration and closure of that corridor constitutes one of the main threats hanging over the re-establishment of the Cantabrian brown bear, in that it might result in the western population being fragmented into two sub-populations and even in the species finally being divided into three populations.

191 Consequently, the noise and vibrations caused by the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín' open-cast mines, and the closure of the Leitariegos corridor by reason of those mines, constitute disturbances of the 'Alto Sil' SCI, which are significant having regard to the conservation of the brown bear.

192 Since the 'Feixolín' and 'Fonfría' open-cast mines were authorised before the system of protection under the Habitats Directive became applicable to the 'Alto Sil' site by reason of its classification as an SCI in December 2004, the question arises whether, analogously with what has been stated in paragraph 156 of this judgment as regards the adverse effects suffered by the capercaillie by reason of the operations authorised before the site was classified as an SPA in the year 2000, it is possible to justify those disturbances by an application by analogy of Article 6(4) of the Habitats Directive in the context of the national procedure, from which it would follow that the Member State cannot be accused of an infringement of Article 6(2).

193 The Kingdom of Spain, basing its argument on the analysis contained in the 2005 report, invokes in that respect imperative reasons of major public interest in maintaining the mining operations, namely security of supply, the maintenance of employment and the definitive character of the authorisations, and proposals for measures to improve the habitat of the brown bear, in particular vegetation measures in the Leitariegos corridor.

194 However, it is apparent from the second subparagraph of Article 6(4) of the Habitats Directive that, 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.

195 It follows that, since this complaint concerns the brown bear as a priority species protected by virtue of the 'Alto Sil' SCI since 2004, and since the Kingdom of Spain has not invoked considerations of the same nature as those referred to in the second subparagraph of Article 6(4) of the Habitats Directive, the disturbances noted in paragraph 191 of this judgment cannot be justified by virtue of a national procedure in derogation analogous to that provided for in that provision.

196 Consequently, the second part of the fourth complaint must be upheld as regards the northern mines concerned by that part of the complaint, namely 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín'.

197 Having regard to the whole of the above considerations, it must be held that:

— by authorising the 'Nueva Julia' and 'Ladrones' open-cast mines but failing to subject that authorisation to an assessment in order to identify, describe and assess in an appropriate manner the direct, indirect and cumulative effects of the existing open-cast mining projects, save, in relation to the 'Ladrones' mine, as regards the brown bear,

the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3 and 5(1) and (3) of Directive 85/337 as amended,

— from 2000, the date of designation of the 'Alto Sil' area as an SPA under the Birds Directive,

  — by authorising the 'Nueva Julia' and 'Ladrones' open-cast mining operations, without making the grant of the authorisations relating thereto subject to the carrying out of an appropriate assessment of the possible impacts of those projects, and, in any event, without complying with the conditions in which a project might be realised despite the risk posed by that project for the capercaillie, which constitutes one of the natural assets which motivated the classification of the 'Alto Sil' site as an SPA, namely the absence of alternative solutions, the existence of imperative reasons of major public interest and communication to the Commission of the necessary compensatory measures to ensure the overall coherence of the Natura 2000 network, and

  — by failing to adopt the necessary measures to prevent the deterioration of habitats including the habitats of species, and to prevent significant disturbance of the capercaillie, the presence of which on the 'Alto Sil' site was the reason for the designation of that area as an SPA, caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Ampliación de Feixolín' and 'Nueva Julia' mines,

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' SPA under Article 6(2) to (4) of the Habitats Directive in conjunction with Article 7 thereof, and

— from December 2004, by failing to adopt the necessary measures to prevent the deterioration of habitats, including the habitats of species, and the disturbances caused to species by the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín'

operations, the Kingdom of Spain has failed, in relation to the 'Alto Sil' SCI to fulfil its obligations under Article 6(2) of the Habitats Directive.

Costs

198 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs, inter alia, where each party succeeds on some and fails on other heads.

199 In this case, account must be taken of the fact that some of the Commission's complaints have not been upheld.

200 Therefore, the Kingdom of Spain must be ordered to pay, in addition to its own costs, two thirds of the Commission's costs. The Commission must pay one third of its own costs.

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

1. Declares that, by authorising the 'Nueva Julia' and 'Ladrones' open-cast mines but failing to subject that authorisation to an assessment in order to

identify, describe and assess in an appropriate manner the direct, indirect and cumulative effects of the existing open-cast mining projects, save, in relation to the 'Ladrones' mine, as regards the brown bear (Ursus arctos), the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3 and 5(1) and (3) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997;

2. Declares that, from 2000, the date of designation of the 'Alto Sil' area as a special protection area under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as amended by Commission Directive 97/49/EC of 29 July 1997,

— by authorising the 'Nueva Julia' and 'Ladrones' open-cast mining operations, without making the grant of the authorisations relating thereto subject to the carrying out of an appropriate assessment of the possible impacts of those projects, and, in any event, without complying with the conditions in which a project might be realised despite the risk posed by that project for the capercaillie, (Tetrao urogallus), which constitutes one of the natural assets which motivated the classification of the 'Alto Sil' site as a special protection area, namely the absence of alternative solutions, the existence of imperative reasons of major public interest and communication to the European Commission of the necessary compensatory measures to ensure the overall coherence of the Natura 2000 network, and

— by failing to adopt the necessary measures to prevent the deterioration of habitats including the habitats of species, and to prevent significant disturbance of the capercaillie, the presence of which on the 'Alto Sil' site

was the reason for the designation of that area as a special protection area, caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Ampliación de Feixolín' and 'Nueva Julia' mines,

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' special protection area under Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in conjunction with Article 7 thereof;

3. **Declares that, from December 2004, by failing to adopt the necessary measures to prevent the deterioration of habitats, including the habitats of species, and the disturbances caused to species by the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín' operations, the Kingdom of Spain has failed, in relation to the 'Alto Sil' site of Community importance, to fulfil its obligations under Article 6(2) of Directive 92/43;**

4. **Dismisses the action as to the remainder;**

5. **Orders the Kingdom of Spain to pay, in addition to its own costs, two thirds of the Commission's costs. The Commission is ordered to pay one third of its own costs.**

[Signatures]