JUDGMENT OF THE COURT (Second Chamber)
13 December 2007 *

Table of contents

Legal framework ..... I - 11004

Community legislation ..... I - 11004

The Birds Directive ..... I - 11004

The Habitats Directive ..... I - 11007

National legislation ..... I - 11009

The European Communities Act ..... I - 11009

The Wildlife Act ..... I - 11009

The Birds Regulations ..... I - 11010

The Habitats Regulations ..... I - 11010

Pre-litigation procedure and written procedure before the Court ..... I - 11020

The action ..... I - 11021

Preliminary observations ..... I - 11021

The first complaint: inadequate number and size of areas classified as SPAs, contrary to Article 4(1) and (2) of the Birds Directive ..... I - 11022

Preliminary observations ..... I - 11022

IBA 2000 ..... I - 11023

* Language of the case: English.

The first part of the first complaint ..... I - 11031

— Arguments of the parties ..... I - 11031

— Findings of the Court ..... I - 11032

A — The sites identified in IBA 2000 ..... I - 11032

1. The Cross Lough area ..... I - 11034

(a) Arguments of the parties ..... I - 11034

(b) Findings of the Court ..... I - 11035

2. The three suitable areas for conservation of the corncrake ..... I - 11037

(a) Arguments of the parties ..... I - 11037

(b) Findings of the Court ..... I - 11038

B — The birds to be protected in other sites ..... I - 11040

1. Suitable sites for conservation of the kingfisher ..... I - 11042

2. Suitable sites for conservation of the corncrake ..... I - 11043

The second part of the first complaint ..... I - 11046

— Arguments of the parties ..... I - 11046

— Findings of the Court ..... I - 11047

The second complaint: failure to establish the necessary legal protection regime in accordance with Article 4(1) and (2) of the Birds Directive ..... I - 11052

Arguments of the parties ..... I - 11052

Findings of the Court ..... I - 11053

The third complaint: failure to apply the first sentence of Article 4(4) of the Birds Directive to the areas which should have been classified as SPAs ..... I - 11057

Arguments of the parties ..... I - 11057

Findings of the Court ..... I - 11058

The fourth complaint: failure to transpose and apply the second sentence of Article 4(4) of the Birds Directive ..... I - 11059

Arguments of the parties ..... I - 11059

Findings of the Court ..... I - 11060

The fifth complaint: inadequate transposition and application of Article 6(2) to (4) of the Habitats Directive ..... I - 11063

Preliminary observations ..... I - 11064

Inadequate transposition and application of Article 6(2) of the Habitats Directive ..... I - 11064

— Arguments of the parties ..... I - 11064

— Findings of the Court ..... I - 11066

Inadequate transposition of Article 6(2) of the Habitats Directive in the field of recreational activities ..... I - 11069

— Arguments of the parties ..... I - 11069

— Findings of the Court ..... I - 11070

Inadequate transposition and application of Article 6(3) and (4) of the Habitats Directive ..... I - 11072

— Arguments of the parties ..... I - 11072

— Findings of the Court ..... I - 11073

The sixth complaint: failure to transpose Article 10 of the Birds Directive ..... I - 11083

Arguments of the parties ..... I - 11083

Findings of the Court ..... I - 11084

Costs ..... I - 11087

In Case C-418/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 September 2004,

Commission of the European Communities, represented by B. Doherty and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, assisted by E. Cogan, Barrister, and G. Hogan SC,

defendant,

supported by:

Hellenic Republic, represented by E. Skandalou, acting as Agent, with an address for service in Luxembourg,

and

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

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, R. Schintgen, R. Silva de Lapuerta and P. Kūris (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

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

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

Judgment

1 By its application the Commission of the European Communities is seeking a declaration from the Court that, by failing:

— to classify, since 1981, in accordance with Article 4(1) and (2) of 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'), all the most suitable territories in number and size for the species in Annex I to that directive ('Annex I'), as well as regularly occurring migratory species;

— to establish, since 1981, in accordance with Article 4(1) and (2) of the Birds Directive, the necessary legal protection regime for those territories;

— to ensure that, since 1981, the provisions of the first sentence of Article 4(4) of the Birds Directive are applied to areas requiring classification as special protection areas ('SPAs') under that directive;

— to transpose and apply the requirements of the second sentence of Article 4(4) of the Birds Directive fully and correctly;

— in respect of classified SPAs under the Birds Directive, to take all the measures necessary to comply with the provisions of 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'), and, in respect of recreational use of all sites intended to be subject to Article 6(2) of that directive, to take all the necessary measures to comply with the provisions of the said Article 6(2); and

— to take all the measures necessary to comply with Article 10 of the Birds Directive;

Ireland has failed to fulfil its obligations under those articles of the said directives.

2 By order of the President of the Court of 17 March 2005, the Hellenic Republic and the Kingdom of Spain were granted leave to intervene in support of the form of order sought by Ireland, which has asked the Court to dismiss the action or, in the alternative, to limit the scope of any order made to the specific issues upon which it finds that Ireland has failed to comply with its obligations under the relevant directives.

Legal framework

Community legislation

The Birds Directive

3 The ninth recital in the preamble to the Birds Directive states that 'the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds; ... certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution; ... such measures must also take account of migratory species and be coordinated with a view to setting up a coherent whole'.

4 According to Article 4 of the Birds Directive:

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

In this connection, account shall be taken of:

(a) species in danger of extinction;

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

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

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

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

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

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

...

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

5 Article 10 of the Birds Directive provides:

'1. Member States shall encourage research and any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1.

2. Particular attention shall be paid to research and work on the subjects listed in Annex V. Member States shall send the Commission any information required to enable it to take appropriate measures for the coordination of the research and work referred to in this Article.'

6 The topics of research and work listed in Annex V to the Birds Directive are as follows:

'(a) National lists of species in danger of extinction or particularly endangered species, taking into account their geographical distribution.

(b) Listing and ecological description of areas particularly important to migratory species on their migratory routes and as wintering and nesting grounds.

(c) Listing of data on the population levels of migratory species as shown by ringing.

(d) Assessing the influence of methods of taking wild birds on population levels.

(e) Developing or refining ecological methods for preventing the type of damage caused by birds.

(f) Determining the role of certain species as indicators of pollution.

(g) Studying the adverse effect of chemical pollution on population levels of bird species.'

The Habitats Directive

7 Article 6 of the Habitats Directive is worded 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.'

National legislation

The European Communities Act

8 The European Communities Act 1972 empowers ministers to legislate independently of the national Parliament where obligations under Community law so require.

The Wildlife Act

9 Section 11(1) and (3) of the Wildlife Act 1976, as amended by the Wildlife (Amendment) Act 2000 ('the Wildlife Act'), provides:

'1. It shall be a function of the Minister to secure the conservation of wildlife and to promote the conservation of biological diversity.

...

3. The Minister may, either directly or in association with or through the agency of another person:

(a) carry out or cause to be carried out research which he considers desirable for the performance of his functions under this Act;

...'

10 Sections 15 to 17 of the Wildlife Act give the competent minister the power to create nature reserves on State-owned land by means of establishment orders. It also gives the minister a power to recognise nature reserves on other land and to designate areas of land as refuges for fauna.

The Birds Regulations

11 The European Communities (Conservation of Wild Birds) Regulations 1985 ('the Birds Regulations') prohibit the deposit of food, waste and deleterious matter in the SPAs concerned.

The Habitats Regulations

12 The preamble to the European Communities (Natural Habitats) Regulations 1997, as amended by the Wildlife (Amendment) Act 2000 ('the Habitats Regulations'), states that the regulations were enacted with a view to giving effect to the Habitats Directive in domestic law.

13 Regulation 2 of the Habitats Regulations defines 'European site' as: (a) a site notified for the purposes of Regulation 4; (b) a site adopted by the Commission as a site of Community importance for the purposes of Article 4(2) of the Habitats Directive, in accordance with the procedure laid down in Article 21 of that directive; (c) a special area of conservation; (d) an area classified pursuant to Article 4(1) and (2) of the Birds Directive.

14 Regulation 4 of those regulations provides:

'1. The Minister shall cause a copy of the candidate list of European sites or a modified list under Regulation 3(3) to be sent to the Minister for the Environment, the Minister for Agriculture, Food and Forestry, the Minister for the Marine, the Minister for Transport, Energy and Communications, the Commissioners of Public Works in Ireland, the Environmental Protection Agency and to any planning authority within whose functional area the land to which the list relates, or any part of such land, is situated and the Minister shall, where appropriate, consult with all or any of them.

2. (a) The Minister by notice shall notify every owner and occupier of any land mentioned in the candidate list of European sites and any holder of a valid prospecting licence or exploration licence duly issued under any enactment which relates to such land of the proposal to include the land in such a list and to transmit the list to the Commission pursuant to the provisions of the Habitats Directive;

(b) Where the address of any person to whom subparagraph (a) of this paragraph relates cannot be found after reasonable inquiry, notices and maps showing the site concerned shall be displayed in a conspicuous place:

(i) in one or more Garda Síochána stations, local authority offices, local offices of the Department of Social Welfare, local offices of the Department of Agriculture, Food and Forestry and offices of Teagasc which are located within or contiguous to the site concerned, or

(ii) where in any case there is no such station or office so located, in one or more of each such station or office within the vicinity or closest to such site, and

advertisements shall be broadcast on at least one radio station duly broadcasting in the area of the site concerned and be placed in at least one newspaper circulating in that area and every such advertisement shall request any person affected by the candidate list of European sites to contact the Department of Arts, Culture and the Gaeltacht.

...

3. The candidate list of European sites sent by the Minister under paragraph (1) and the notification issued by the Minister under paragraph (2) shall, in respect of each site:

(a) be accompanied by an ordnance map of appropriate scale in the circumstances, upon which is marked the site, so as to identify the land comprising the site to which the notice relates and the boundaries thereof;

(b) indicate the operation or activity which the Minister considers would be likely to alter, damage, destroy or interfere with the integrity of the site;

(c) indicate the habitat type, or types, the site hosts or the species the site hosts and for which the site is proposed to be identified as a site of Community importance;

(d) indicate the procedures by which a person may object.

...'

15 Regulation 5 provides that any person to whom notice is given under Regulation 4(2) has the right to object to the inclusion of the site in the candidate list of European sites, and defines the procedure for deciding on objections.

16 Regulation 7 of the Habitats Regulations provides that the minister may appoint 'authorised officers' to enter onto land and inspect it.

17 Regulation 9 provides:

'1. Not later than six years from the date a site is adopted by the Commission in accordance with the procedure laid down in paragraph 2 of Article 4 of the Habitats Directive the Minister shall designate the site as a special area of conservation and the Minister shall publish, or cause to be published, in the *Iris Oifigiúil* a copy of every such designation.

...'

18 Regulation 13 is worded as follows:

'1. The Minister shall establish the conservation measures which the Minister considers appropriate in respect of special areas of conservation designated under Regulation 9 including, if necessary, management plans ... either specifically designated for the sites or integrated into appropriate plans.

2. The Minister shall establish the administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I to the Habitats Directive and the species in Annex II to that Directive present on the sites.

3. The Minister shall take the appropriate steps to avoid, in the special areas of conservation designated under Regulation 9, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive.'

19 According to Regulation 14 of the Habitats Regulations:

'1. A person shall not carry out, cause to be carried out or continue to carry out, on any land included in a special area of conservation or a site placed on a list in accordance with Chapter I of this Part an operation or activity mentioned in a notice issued under Regulation 4(2) unless the operation or activity is carried out, or caused

or permitted to be carried out or continued to be carried out, by the owner, occupier or user of the land and:

(a) one of them has given the Minister written notice of a proposal to carry out the operation, or activity, specifying its nature and the land on which it is proposed to carry it out, and

(b) one of the conditions specified in paragraph (2) is fulfilled.

2. The conditions referred to in paragraph (1) are as follows:

(a) that the operation or activity is carried out with the written consent of the Minister, or

(b) that the operation or activity is carried out in accordance with the terms of a management agreement provided for under Regulation 12.

3. A person who, without reasonable excuse, contravenes paragraph (1) shall be guilty of an offence.

4. The provisions of this Regulation shall not apply to an operation or activity to which Regulation 15(2) relates.'

20 Regulation 15(1) provides that, where an application to the Irish authorities for consent under Regulation 14 relates to a proposed activity which is likely to have a significant effect on the site, those authorities are to assess the implications for the site in view of that site's conservation objectives. Regulation 15(2) further provides that, where the proposed activity has already been authorised under other legislation, the competent minister under whose authority the authorisation was issued is to assess that activity and, where appropriate, modify or revoke the authorisation in question.

21 Regulation 16 states that if, in the light of the assessment under Regulation 15, the proposed activity would harm the site, the activity must not be allowed. There is, however, an exception for 'imperative reasons of overriding public interest'.

22 Regulation 17 provides:

'1. Where the Minister considers that an operation or activity is being carried out or may be carried out on:

(a) a site placed on a list in accordance with Chapter I of this Part, or

(b) a site where consultation has been initiated in accordance with Article 5 of the Habitats Directive, or

(c) a European site,

which is neither directly connected with nor necessary to the management of such sites but likely to have a significant effect thereon either individually or in combination with other operations or activities the Minister shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

2. An environmental impact assessment in respect of a proposed operation or activity shall be an appropriate assessment for the purposes of this Regulation.

3. If the Minister, having regard to the conclusions of the assessment undertaken under paragraph (1), is of the opinion that the operation or activity will adversely affect the integrity of the site concerned, the Minister shall make application to a court of competent jurisdiction to prohibit the continuance of the operation or activity.

4. An application to a court of competent jurisdiction for a prohibition under this Regulation shall be in a summary manner and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate having regard to paragraph 4 of Article 6 of the Habitats Directive and to the overall requirement of safeguarding the integrity of the site concerned and ensuring that the overall coherence of Natura 2000 is protected.

5. For the purposes of this section "a court of competent jurisdiction" means either a Judge of the Circuit Court within whose Circuit the lands or part of the lands concerned are situated or the High Court.'

23 Regulation 18 is worded as follows:

'1. Where an operation or activity is being carried out, or is proposed to be carried out, on any land that is not within:

(a) a site placed on a list in accordance with Chapter I of this Part, or

(b) a site where consultation has been initiated in accordance with Article 5 of the Habitats Directive, or

(c) a European site,

and is liable to have an adverse effect on the integrity of the site concerned either alone or in combination with other operations or activities the Minister shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

2. Having regard to the conclusions of the assessment undertaken under paragraph (1) the provisions of paragraphs (2) to (5) of Regulation 17 shall apply.'

24 Regulation 34 provides:

'The provisions of Regulations 4, 5, 7, 13, 14, 15 and 16 shall, where appropriate, apply with any necessary modifications to areas classified pursuant to paragraph 1 and 2 of Article 4 of the Birds Directive.'

25 Regulation 35 is worded as follows:

'The Minister shall:

(a) promote education and general information on the need to protect species of wild flora and fauna and to conserve their habitats and natural habitats;

(b) encourage the necessary research and scientific work for the purpose of meeting the requirements of Article 11 of the Habitats Directive with particular attention to scientific work necessary for the implementation of Articles 4 and 10 of that Directive;

(c) supply information, where appropriate, for the purpose of proper co-ordination of research carried out at Member State and Community level to other Member States and the Commission.'

Pre-litigation procedure and written procedure before the Court

26 After receiving complaints, the Commission initiated two sets of infringement proceedings against Ireland and sent it, between 11 November 1998 and 18 April 2002, four letters of formal notice relating, first, to a failure fully and correctly to transpose and apply the Birds and Habitats Directives and, secondly, to specific infringements concerning damage caused to habitats by recreational users.

27 As the explanations provided by the Irish authorities in their replies were not considered to be satisfactory, and following bilateral meetings between Ireland and the Commission, the latter sent Ireland, on 24 October 2001, a reasoned opinion and, on 11 July 2003, an additional reasoned opinion and a reasoned opinion concerning recreational activities.

28 As it took the view that the arguments put forward by Ireland in its replies to the reasoned opinions were not wholly satisfactory and, accordingly, that there was a continuing failure on Ireland's part to comply with a number of its obligations under the Birds and Habitats Directives, the Commission decided to bring the present action.

29 Given the close connection between the two cases, the Commission decided to join both infringements in a single set of proceedings before the Court.

The action

30 In support of its application, the Commission relies on six complaints concerning the failure of Ireland to comply with a number of obligations imposed on it by Articles 4(1), (2) and (4) and 10 of the Birds Directive and by Article 6(2) to (4) of the Habitats Directive.

Preliminary observations

31 Under Article 18(1) of the Birds Directive the Member States were required to comply with that directive within two years of its notification. Accordingly, the period within which Ireland was required to transpose the Birds Directive into national law expired on 6 April 1981.

32 Under Article 23(1) of the Habitats Directive the Member States were required to comply with that directive within two years of its notification. Accordingly, the period within which Ireland was required to transpose the Habitats Directive into national law expired on 10 June 1994.

33 It is not disputed that, in the present case, the date of expiry of the period laid down in the reasoned opinions must be set at 11 September 2003.

The first complaint: inadequate number and size of areas classified as SPAs, contrary to Article 4(1) and (2) of the Birds Directive

34 The Commission claims that Ireland has failed, since 1981, to classify, in accordance with Article 4(1) and (2) of the Birds Directive, all the most suitable areas in number and size for the conservation of the species referred to in Annex I as well as regularly occurring migratory species not listed in that annex. There are two aspects to the first complaint. The Commission states, firstly, that there has been a failure to make any classification in respect of certain sites and, secondly, that there has been a failure to make a complete classification of other sites.

35 Ireland denies the alleged failure to comply with its obligations. It states that when it informs the Commission of its intentions regarding SPA classification, it does so as part of the cooperation and consultation between the Member States, as provided for by the Birds and Habitats Directives. Moreover, when it informs the Commission that research is being carried out, it does not follow that the present SPA network is inadequate or that Ireland has failed to fulfil its obligations under the Birds Directive.

Preliminary observations

36 The Court notes, as a preliminary point, that, according to its settled case-law, Article 4(1) and (2) of the Birds Directive requires the Member States to classify as SPAs the territories meeting the ornithological criteria specified by those provisions (Case C-378/01 *Commission* v *Italy* [2003] ECR I-2857, paragraph 14 and case-law cited).

37 Secondly, Member States are obliged to classify as SPAs all the sites which, in accordance with the ornithological criteria, appear to be the most suitable for conservation of the species in question (Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraph 62).

38 Thirdly, the obligation imposed on Member States to classify sites as SPAs cannot be avoided by the adoption of other special conservation measures (see, to that effect, *Commission* v *Netherlands*, paragraph 55).

39 Fourthly and lastly, although Member States do have a certain margin of discretion with regard to the choice of SPAs, the classification of those areas is nevertheless subject exclusively to the ornithological criteria determined by the Birds Directive (see, to that effect, Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 26). The economic requirements mentioned in Article 2 of that directive may therefore not be taken into account when selecting an SPA and defining its boundaries (*Commission* v *Netherlands*, paragraph 59 and case-law cited).

IBA 2000

40 In support of its complaint the Commission refers, inter alia, to the judgment in *Commission* v *Netherlands*, in which the Court took account of the *Inventory of Important Bird Areas in the European Community*, published in 1989 ('IBA 89'), finding that, although it was not legally binding on the Member States concerned, it could, by reason of its scientific value in that case, be used by the Court as a basis of reference for assessing the extent to which a Member State had complied with its obligation to classify SPAs. According to the Commission, a similar inventory is under consideration in the present case.

41 Ireland disagrees with the Commission on certain aspects of the *Review of Ireland's Important Bird Areas*, drawn up in 1999 in the context of a European census and published in 2000 ('IBA 2000'). It argues that neither the existence of such a list alone nor the existence of such disagreement is evidence of a failure on Ireland's part to comply with its obligations under the Birds Directive.

42 The Hellenic Republic and the Kingdom of Spain take the view that IBA 2000 is deficient and therefore cannot be attributed the same value as IBA 1989.

43 The Greek and Spanish Governments contend that IBA 2000 differs from IBA 89 on a number of points. In their view, IBA 2000 contains scientific data which may well provide a reference attesting to the existence of species in each territory, but which are merely indicative and general in nature in terms of the size of the population of the various species and boundaries and, therefore, the size of the areas to be classified as SPAs. IBA 2000, by contrast, does not contain scientific information sufficient to enable a delimitation of areas important for bird conservation to be made with certainty, it includes areas which are too large and of limited ornithological interest and the list of areas should be updated in accordance with the most recent scientific analysis. Accordingly, the content of the list in question cannot be used in the present case to draw certain conclusions as to the populations and exact boundaries of the SPAs.

44 The Hellenic Republic and the Kingdom of Spain infer therefrom that IBA 2000 is not a sufficient or unique basis on which to establish that Ireland has failed to fulfil its obligations, as alleged by the Commission.

45 Since the merits of the first complaint depend in large measure on whether the discrepancy between IBA 2000 and the SPAs actually classified by Ireland establishes that that Member State has not fulfilled its obligation to classify sites as SPAs to a sufficient degree, it is appropriate to consider whether IBA 2000 carries scientific value comparable to that of IBA 89 and whether it may thus be used as a reference to appraise the alleged failure to fulfil obligations.

46 It must be borne in mind that Article 4 of the Birds Directive lays down a protection regime which is specifically targeted and reinforced both for the species listed in Annex I and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the Community (Case C-191/05 *Commission* v *Portugal* [2006] ECR I-6853, paragraph 9 and case-law cited). Furthermore, it is clear from the ninth recital in the preamble to that directive that the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. The Member States are therefore required to adopt the measures necessary for the conservation of those species (Case C-235/04 *Commission* v *Spain* [2007] ECR I-5415, paragraph 23).

47 For that purpose, the updating of scientific data is necessary to determine the situation of the most endangered species and the species constituting the common heritage of the Community in order to classify the most suitable areas as SPAs. It is therefore necessary to use the most up-to-date scientific data available at the end of the period laid down in the reasoned opinion (Case C-235/04 *Commission* v *Spain*, paragraph 24).

48 In that regard, it should be borne in mind that the national inventories, including IBA 2000 prepared by BirdLife International, revised the initial Europe-wide study carried out in IBA 89 by presenting more specific and up-to-date scientific data. IBA 2000 states that that inventory lists 48 new sites in Ireland in comparison with IBA 89.

49 As noted by the Advocate General in point 20 of her Opinion, the areas listed in both inventories result from the application of specific criteria to information on the presence of birds. The criteria of IBA 2000 are largely the same as those of IBA 89. It follows that the increase in the number and territory of the areas stems essentially from better knowledge of the presence of birds.

50 Ireland maintains that the Commission is wrong to argue that IBA 2000 is not exhaustive. It adds that IBA 2000 is merely a reference for establishing correctly a network of areas of importance for the conservation of birds and that other ornithological studies may serve as a basis for the classification of the most suitable areas for the conservation of certain bird species.

51 That lack of completeness, as pointed out by the Advocate General in point 25 of her Opinion, does not undermine the probative value of IBA 2000. The situation would be different if Ireland had adduced scientific evidence tending in particular to show that the obligations flowing from Article 4(1) and (2) of the Birds Directive could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area (see *Commission* v *Italy*, paragraph 18).

52 In view of the scientific nature of IBA 89 and of the absence of any scientific evidence adduced by a Member State tending in particular to show that the obligations flowing from Article 4(1) and (2) of the Birds Directive could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area, the Court has held that that inventory, although not legally binding, could be used by the Court as a basis of reference for assessing whether a Member State has classified a sufficient number and size of areas as SPAs for the purposes of the abovementioned provisions of that directive (Case C-235/04 *Commission* v *Spain*, paragraph 26 and case-law cited).

53 In the present case, it is common ground that Ireland has not put forward any other ornithological criteria which are objectively verifiable, as compared with those used in IBA 2000, to serve as a basis for a different classification; nor has it presented a complete national inventory contradicting IBA 2000, established according to scientific methods and designating all the most suitable areas with a view to classification as SPAs.

54 The Court accordingly finds that IBA 2000 provides an up-to-date inventory of the areas of importance for the conservation of birds in Ireland which, in the absence of scientific evidence to the contrary, provides a point of reference which makes it possible to assess whether that Member State has classified as SPAs sufficient areas of territory in terms of number and size to provide protection to all the species of birds listed in Annex I and also to migratory species not listed in that annex.

55 This finding cannot be affected by the Spanish Government's argument that the various non-governmental organisations involved in bird conservation chose to modify unilaterally the previous inventory concerning the various Member States, without any competent State environmental body having supervised that process or having guaranteed the accuracy and correctness of the data contained therein.

56 The Court finds in that regard, firstly, that IBA 2000 was published by BirdLife International, an association of national organisations for the protection of birds which had already been involved in drawing up IBA 89 under the designation of the International Council for Bird Preservation. The Eurogroup for the Conservation of Birds, which was also involved at that time, was an ad hoc group of experts of that council. Consequently, BirdLife International provides continuity in respect of the work on the area inventories, as noted by the Advocate General in point 22 of her Opinion.

57 Secondly, it is common ground that the IBA 2000 chapter on Ireland was drawn up in collaboration with Dúchas, the heritage service of the Department of Arts, Heritage, Gaeltacht and the Islands (now National Parks and Wildlife Service of the Department of the Environment, Heritage and Local Government) ('National Parks and Wildlife'). That part of the inventory was drawn up with the help of high-level Irish ornithological experts and is based mostly on available data on numbers and distribution of birds and on studies carried out with the financial support of the competent authorities. The list of scientific references shows, moreover, that the experts relied largely on studies published and carried out with the participation of scientists from the competent conservation authorities.

58 At the hearing, Ireland maintained its position that the nature of a Member State's obligation in the light of Article 4(1) of the Birds Directive and the recitals in the preamble thereto must be assessed at European level and not in the light of the territory of the Member State concerned alone. It is thus possible that a specific area may be eligible but may not be the most suitable area for classification as an SPA.

59 Yet even if, as Ireland correctly points out, the Member States' obligation under Article 4(1) of that directive concerns only the classification of the most suitable areas for the conservation of birds and it is possible that areas which, in the light of species protection requirements, would in fact be suitable for such conservation never become classified as SPAs, it nevertheless follows from Article 4(1) of the Birds Directive, as interpreted by the Court, that, if species mentioned in Annex I occur on the territory of a Member State, it is obliged inter alia to define SPAs for them (see *Commission* v *Netherlands*, paragraph 56 and case-law cited).

60 As noted by the Advocate General in point 32 of her Opinion, in the Member States in which these species occur relatively frequently, the SPAs ensure above all that large sections of the overall population are conserved. However, SPAs are also necessary where these species are rather rare. In that case the SPAs help the geographical distribution of the species.

61 Indeed, if each Member State could escape the obligation to classify SPAs to ensure protection of the species listed in Annex I and present on its territory on the sole ground that there were numerous other sites in other Member States which were much more appropriate for the conservation of those same species, the objective of creating a coherent network of SPAs, as referred to in Article 4(3) of the Birds Directive, might not be achieved (see, by analogy, *Commission* v *Netherlands*, paragraph 58).

62 The Greek Government submits that the obligation on Ireland, within the framework of cooperation with the competent Commission departments, and the timetable which Ireland set for delimiting new SPAs and extending existing SPAs must be taken into account, as that Member State must verify the content of IBA 2000 for the suppose of being able to determine areas of importance for the conservation of birds and classification as SPAs.

63 The Court finds on this point that, although any classification presupposes that the competent authorities are convinced, based on the best scientific knowledge available, that the site in question is among the most suitable areas for the protection of birds (see, to that effect, Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 27), that does not however mean that the obligation to classify does not, as a rule, arise so long as those authorities have not completed their evaluation and check of the new scientific knowledge.

64 On the contrary, as the Court has held previously, faithful transposition becomes particularly important in the case of the Birds Directive, where management of the common heritage is entrusted to the Member States in their respective territories (see Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 9, and Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53).

65 In view of the fact that the obligation to classify the most suitable areas for species conservation as SPAs has been in place for Ireland since 6 April 1981, Ireland's request for an additional period in which to assess the best scientific source available cannot succeed, as that request is not compatible with the objectives pursued by the Birds Directive or with the responsibility which that directive imposes on the Member States to manage the common heritage on their territory.

66 Moreover, as has just been held in paragraph 47 of this judgment, it is necessary to use the most up-to-date scientific data available at the end of the period laid down in the reasoned opinion.

67 It follows from all the foregoing that, in the absence of scientific studies capable of rebutting the results of IBA 2000, that inventory is the most up-to-date and accurate reference for identifying the most suitable sites in number and in size for the conservation of the species listed in Annex I and for the regularly occurring migratory species not listed in that annex.

The first part of the first complaint

— Arguments of the parties

68 The Commission acknowledged, during the pre-litigation procedure, that Ireland had classified a relatively high number of sites as SPAs. It takes the view, however, that other areas also should have been thus classified. After noting that IBA 2000 listed a total of 140 areas of importance for the conservation of birds covering an area of 4 309 km^2, or approximately 6% of Ireland's total land area (approximately 60% of those areas are coastal areas, in line with the fact that Ireland has 7 100 km of coast; internal waters account for another 20%), the Commission maintains that 42 of those areas had not been classified as SPAs. It its view, even if all of those areas were to be classified as SPAs, Ireland's SPA network would still suffer from shortcomings with regard to a number of bird species referred to in Annex I and regularly occurring migratory species because they are not entirely covered by the classification made in IBA 2000.

69 It further observes that, in terms of territorial coverage, Ireland's SPA network is the second smallest of the group of 15 Member States prior to enlargement in 2004. The level of territorial coverage of Ireland's SPA network has in fact already been surpassed by several of the 10 new Member States.

70 Lastly, the Commission notes that, during the pre-litigation procedure, the Irish authorities proposed a timetable for the classification, re-classification and extension of a certain number of sites. In reality that timetable has not been adhered to and Ireland has not made or notified any classification.

71 After stating that it is well aware that its obligation to classify appropriate areas for species conservation follows from the Birds Directive and not from IBA 2000, Ireland replies that the overall research work for extending, if necessary, Ireland's SPA network is currently being carried out and should be completed soon.

72 Ireland adds, however, that the kingfisher (*Alcedo athis*) is the least appropriate species for an attempt at conservation using SPA classification and that there is good reason for not classifying other SPAs for the corncrake (*Crex crex*). Ireland adds that it may lawfully deem the Cross Lough area not to be one of the most suitable territories for classification on the basis of information available to it.

— Findings of the Court

A —
The sites identified in IBA 2000

73 The Court finds, as a preliminary point, that the Commission acknowledged, in its additional reasoned opinion, that there was en error in Table 1 in its reasoned opinion notified on 24 October 2001 concerning the Bull and Cow Rocks site, already classified as an SPA, and that, consequently, that site no longer forms part of the subject-matter of the present action.

74 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, inter alia, Case C-282/02 *Commission* v *Ireland* [2005] ECR I-4653, paragraph 40).

75 In the present case, it is clear from the indications given as to the abovementioned grounds for failure to fulfil obligations that Ireland does not dispute the allegation that it had not classified 42 of the 140 sites identified in IBA 2000 as SPAs within the period laid down in the additional reasoned opinion notified on 11 July 2003.

76 In the light of what has been stated in paragraph 67 of this judgment, the mere fact that Ireland has embarked upon an extensive SPA classification and re-classification programme cannot justify the failure to classify the sites identified in IBA 2000 as SPAs.

77 By contrast, the interest in classifying the Cross Lough area, as well as the three sites suitable for conservation of the corncrake, namely Falcarragh to Min an Chladaigh, Malin Head and the Fanad Head Peninsula, is the subject of a detailed challenge by Ireland.

78 Accordingly, the Commission's action must be upheld in respect of 38 of the 42 sites identified in IBA 2000 and it is appropriate to examine the merits of the action in respect of the four sites the ornithological interest of which is specifically challenged by Ireland.

1. The Cross Lough area

(a) Arguments of the parties

79 The Commission has referred to the Cross Lough area for two reasons. Firstly, Ireland has specifically challenged the need to classify that area as an SPA, even though it was, up to quite recently, an important breeding ground for the sandwich tern (*Sterna sandvicensis*). Secondly, the failure to classify the area in a timely manner was likely to have a negative impact on the protection of the species.

80 The Commission states that, according to the information available to it, the disappearance of the sandwich tern colony, which, according to IBA 89, had been present in the area since 1937, can be traced to predatory activity on the part of the American mink (*Mustela vison*) and that no measures were ever put in place to protect the colony. According to the Commission, with appropriate restoration measures, the sandwich tern might resettle this important long-standing breeding ground. Ireland should not be allowed to benefit from the fact that it failed to ensure classification and protection of the Cross Lough area in a timely manner.

81 Ireland states that the Commission has failed to provide scientific substantiation for its assertion that Ireland is required to classify as an SPA an area which is no longer of interest to the species in question and is no longer an important area for bird conservation but to which birds, after having bred and even though they have moved, might return. Although the Commission might be right in believing that, according to its information, the Cross Lough (or any other) area might be recolonised by the sandwich tern and enjoy the protection of classification as an SPA, it has not succeeded in establishing hat that area would be one of the most

suitable for the conservation of the species in question. Ireland adds that the Commission has not proven that the disappearance of the sandwich tern colony was caused by the predatory activity of the American mink in that area.

(b) Findings of the Court

82 It is common ground that the Cross Lough area was identified in both IBA 89 and IBA 2000 as being one of the most suitable areas for conservation of the sandwich tern, a species referred to in Annex I, according to the ornithological criteria drawn up in 1984 and 1995 respectively. It must accordingly be held that the area has featured among the most suitable areas for conservation of that species since 6 April 1981. Consequently, pursuant to the case-law resulting from the judgment in *Commission* v *Netherlands*, paragraph 62, Ireland should have classified that area as an SPA.

83 As noted by the Advocate General in point 58 of her Opinion, that classification obligation does not necessarily cease to apply if the area is no longer most suitable.

84 According to settled case-law, areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive, since otherwise the protection objectives of that directive, as expressed in the ninth recital in the preamble thereto, could not be achieved (see Case C-355/90 *Commission* v *Spain*, paragraph 22, and Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraphs 47 and 57).

85 It follows that Ireland ought, at the very least, to have adopted appropriate measures pursuant to the first sentence of Article 4(4) of the Birds Directive in order to avoid pollution or deterioration of the habitats in the Cross Lough area or any disturbances affecting the sandwich tern, in so far as those disturbances may have been significant with regard to the objectives of that article.

86 In the present case, having failed to take such measures for that area, Ireland has not provided proof that the area would no longer be suitable even if protection measures had been taken (see, to that effect, Case C-191/05 *Commission* v *Portugal*, paragraphs 13 and 14).

87 Moreover, according to the results of scientific studies and observations submitted by the Commission during the proceedings, which have not been disputed by Ireland, protection measures were possible. Relying on two articles written by an Irish naturalist, the Commission explained the predatory effect of the American mink on the nests of ground-breeding sandwich terns and, referring to recent observations carried out in an area of County Donegal, showed that management (trapping of minks) reduced the problems of predators and that most of the local population of sandwich terns always nest in the same area.

88 Relying on the aforementioned observations, not disputed by Ireland, which confirm the potential for recolonisation of areas by the sandwich tern, the Commission adds that there is a genuine chance that the sandwich tern may resettle in the area. It adds that the species must have a number of nesting sites within one area, not all of which are necessarily used in a given breeding season.

89 In those circumstances, the Court finds that the action is well-founded in respect of the Cross Lough area.

2. The three suitable areas for conservation of the corncrake

(a) Arguments of the parties

90 The Commission states that the corncrake is the only bird species endangered at world level which is present in Ireland. Its population has declined sharply in recent years and it is now to be found only in limited pockets. Only a much reduced population now survives in Ireland, a fact which justifies a high level of site protection.

91 In its view, a Member State may not validly rely on the low number and vulnerability of a corncrake population to justify a failure to classify the most suitable areas for the conservation of that species. In its reply, the Commission adds that the successful conservation and management of core areas are essential for the corncrake to recover and expand from its current, precarious population.

92 Ireland, for its part, contends that any further designation of SPAs must be considered in the context of available species information (which is extensive) and the positive species conservation steps taken by the National Parks and Wildlife Service. The application of the term 'globally endangered' to the corncrake is no longer valid in the light of available species information and it is therefore misleading to describe it as such. The use of the relevant land is changing substantially. The insistence by the Commission that other areas suitable for

conversation of the corncrake must be classified as SPAs is misguided and is in any event not supported by adequate evidence.

93 After observing that there is indeed a small and unpredictable distribution of corncrakes outside current SPAs, Ireland goes on to state that it is the unpredictability, not the precariousness, of a site's occupation by corncrakes which presents the difficulty. In other words, sound ornithological criteria, and not speculation, should form the basis for classification.

(b) Findings of the Court

94 Although new studies on the presence of the corncrake in Europe have changed its classification category, the fact remains that the 'near threatened' category in which it is currently classified, as much as the 'vulnerable' category in which it was classified previously, meets the conditions for identification of areas of importance for the conservation of birds according to the C.1 criterion used in IBA 2000. This also does not affect the application of the C.6 criterion used in that same inventory. The sites identified in IBA 2000 accordingly cannot be called into question.

95 This finding cannot be rebutted by Ireland's argument that the requirements of the Birds Directive are met with regard to the needs of the corncrake by designating as SPAs the lands used by a significant proportion of the corncrake population through the State funding of the Corncrake Grant Scheme, which involves funding for three fieldworkers, administration costs and payments to farmers, funding and facilitating research and the inclusion of a corncrake tier in the latest Rural Environment Protection Scheme.

96 As evidenced by the case-law referred to in paragraphs 37 to 39 of this judgment, such conservation measures cannot be considered to be sufficient.

97 Ireland's argument that the distribution of corncrakes outside current SPAs is small and unpredictable must also be rejected.

98 The Commission submitted, without being contradicted by Ireland on the point, ornithological publications indicating that, between 1999 and 2001, an average of 39% of the corncrake population present on Irish territory was outside SPAs and that, between 2002 and 2004, that figure was closer to 50%.

99 Ireland's argument that major changes have affected the distribution of the species over short periods (less than 10 years), and that it would be premature to recommend classification of other areas as SPAs as long as the situation has not stabilised, must also be rejected.

100 It is clear in this regard that there has been a sufficiently stable presence of the corncrake in the sites in question over brief periods. Ireland has not disputed that, according to the results of a study carried out by BirdWatch Ireland and submitted

by the Commission, in the period from 1993 to 2001, the reduced presence of the corncrake in the area of Falcarragh to Min an Chladaigh accounted for 8% of its population in Ireland, in Malin Head 4% of the population in Ireland, and on the Fanad Head Peninsula 3% of the population in Ireland. According to the same source, the figures are similar for the period 2002 to 2004.

101 As to Ireland's argument that the goodwill and cooperation of landowners is conducive to the success of future conservation schemes and the application of protective instruments, the Court observes that, even if that were the case, that fact does not release a Member State from its obligations under Article 4 of the Birds Directive.

102 In those circumstances, the Court finds that the action is also well-founded in respect of the sites of Falcarragh to Min an Chladaigh, Malin Head and the Fanad Head Peninsula.

B — *The birds to be protected in other sites*

103 The Commission submits that for the red-throated diver (*Gavia stellata*), the hen harrier (*Circus cyaneus*), the merlin (*Falco columbarius*), the peregrine falcon (*Falco peregrinus*), the golden plover (*Pluvialis apricaria*), the corncrake, the kingfisher, the white-fronted goose (Greenland race) (*Anser albifrons flavirostris*) and the short-eared owl (*Asio flammeus*), protected species referred to in Annex I, and also for the lapwing (*Vanellus vanellus*), the redshank (*Tringa totanus*), the snipe (*Gallinago gallinago*), the curlew (*Numenius arquata*) and the dunlin (*Calidris alpina*), regularly occurring migratory species, the areas of importance for the conservation

of birds identified in IBA 2000 clearly do not offer a sufficient set of sites in number and in size to satisfy the conservation needs of those species.

104 Ireland states that studies have been carried out on six of the nine abovementioned species included in Annex I as well as on the dunlin, a regularly occurring migratory species. The completion of that work henceforth allows for the identification of sites which may be classified as SPAs for the conservation of the red-throated diver, the hen harrier, the merlin, the golden plover and the dunlin. During the pre-litigation procedure, Ireland stated that the SPAs which will be proposed for the conservation of the hen harrier would also allow for conservation of the short-eared owl. Moreover, at the current time, the golden plover is already a 'qualifying interest' in three classified SPAs and the merlin is a 'qualifying interest' at four sites with a multi-species interest. The peregrine falcon is likely to be a qualifying species in most of the SPAs concerning the red-billed chough (*Pyrrhocorax pyrrhocorax*).

105 Although Ireland provides evidence of a number of partial initiatives, these had not been completed at the end of the period laid down in the additional reasoned opinion notified on 11 July 2003. Since the question whether there has been a failure to fulfil obligations must be examined solely on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion, the Court finds that, in the light of the information referred to in the preceding paragraph of this judgment, Ireland has failed to fulfil its obligations in respect of the designation of SPAs to ensure the conservation of the red-throated diver, the hen harrier, the merlin, the peregrine falcon, the golden plover and the short-eared owl, species referred to in Annex I, and the protection of the dunlin, a regularly occurring migratory species not listed in Annex I. The complaint is also well-founded on this point.

106 Furthermore, it does not appear that the Commission, which has the burden of proof in proceedings for failure to fulfil obligations (Case C-288/02 *Commission* v *Greece* [2004] ECR I-10071, paragraph 35 and case-law cited), has succeeded in

demonstrating to the requisite legal standard that Ireland has failed to fulfil its obligations in respect of the designation of SPAs to ensure the conservation of the white-fronted goose (Greenland race), a species referred to in Annex I, and the protection of the lapwing, the redshank, the snipe and the curlew, regularly occurring migratory species not listed in Annex I. Consequently, the complaint is not well-founded on this point.

107 As regards the kingfisher and the corncrake, Ireland disputes the need to classify other sites as SPAs for their conservation.

1. Suitable sites for conservation of the kingfisher

108 The Commission takes the view that the Irish SPA network should include a representative set of river corridors that could be used by the kingfisher. Ireland, however, has taken no steps towards classifying the most suitable territories for the conservation of the kingfisher and does not even know the current population of the species.

109 Ireland considers that a species as widely dispersed as the kingfisher is the least appropriate of the dispersed species to attempt to conserve through SPA classification. This conclusion is based on available information including two 'breeding atlases' compiled between 1988 and 1991. Although the current population of the kingfisher is not known, it is understood that BirdWatch Ireland intends to carry out a survey. In the event that the survey shows a more significant kingfisher population, the Irish authorities would reconsider the matter of the creation of SPAs for the purpose of kingfisher conservation in the future.

110 As has just been pointed out in paragraph 59 of this judgment, it is clear from Article 4(1) of the Birds Directive, as interpreted by the Court, that if species listed in Annex I occur on the territory of a Member State, it is obliged to define SPAs for them. It follows that Ireland ought to have identified the most suitable territories for conservation of the kingfisher and classified them as SPAs.

111 It follows that Ireland, which acknowledges that the kingfisher is present in its territory, had failed to comply with that obligation at the end of the period laid down in the additional reasoned opinion notified on 11 July 2003. The action is therefore also well-founded as regards the suitable sites for conservation of the kingfisher.

2. Suitable sites for conservation of the corncrake

112 The Commission observes that the current SPA network for protection of the corncrake is weak. It states that IBA 2000 identifies five additional areas: Falcarragh to Min an Chladaigh, Malin Head, the Fanad Head Peninsula, the Mullet Peninsula and the Moy Valley.

113 As regards the five additional areas referred to in the preceding paragraph, the Court finds, first, that they are areas of importance for the conservation of birds and, second, that for three of them — Falcarragh to Min an Chladaigh, Malin Head and the Fanad Head Peninsula — the failure to fulfil obligations has already been declared in paragraph 102 of this judgment.

114 With regard to the Mullet Peninsula, the Commission states, in its reply, that part of this area is subject to SPA classification for other purposes. It is clear, therefore, that the Mullet Peninsula is an example of part classification.

115 Next, the C.6 criterion is applicable to the Mullet Peninsula. That criterion designates an area which is one of the five most important areas in each European region for a species or subspecies listed in Annex I. Therefore, under the criteria used in IBA 2000, it is sufficient that the area in question hosts a significant number of individuals of such a species or subspecies (at least 1% of the national breeding population of a species referred to in Annex I or 0.1% of the biogeographical population) in order for it to have to be classified as an SPA.

116 Thus, in the present case, in its reply, the Commission submitted results — which were not challenged by Ireland — of a study by BirdWatch Ireland, according to which, in the period from 1993 to 2001, the reduced presence of the corncrake on the Mullet Peninsula accounted for 4% of the national population. According to the same source, similar figures can be shown for the years 2002 to 2004.

117 Accordingly, the Commission's action must be upheld in respect of the Mullet Peninsula.

118 With regard to the Moy Valley, the Commission acknowledges that the census data show an absence of corncrakes for several years. However, the BirdWatch figures indicate that the Moy Valley had important numbers of corncrakes in the 1980s and up to the mid-1990s. In particular, up to 1993, the area held the second largest concentration of corncrakes in the country after the Shannon Callows and therefore would have unreservedly qualified for classification on any reasonable application of ornithological criteria. Thus there was evidence to justify classification of the Moy Valley as an SPA for a long period after the Birds Directive came into force. The loss of corncrakes in the Moy Valley was the result of changes in agricultural practices

which Ireland took no steps to remedy. The Commission submits that Ireland ought not to derive any advantage from its failure to classify and protect this site. Ireland has not demonstrated the infeasibility of re-establishing a corncrake presence in that area.

119 It is clear that the figures from BirdWatch Ireland, submitted by the Commission in its reply and showing that the Moy Valley area had numerous corncrakes in the 1980s until the mid-1990s, are not disputed by Ireland. It follows that that site was one of the most suitable areas for conservation of the corncrake and that, in line with the case-law cited in paragraph 37 of this judgment, Ireland ought to have classified it as an SPA.

120 According to the settled case-law referred to in paragraph 84 of this judgment, areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive, since otherwise the protection objectives of that directive, as expressed in the ninth recital in the preamble thereto, could not be achieved. It follows that Ireland ought at the very least to have adopted appropriate measures under the first sentence of Article 4(4) of the Birds Directive in order to prevent the deterioration of habitats in the Moy Valley and disturbances affecting the corncrake, in so far as they have significant effects in the light of the objectives of that article.

121 The case-file shows that in the Moy Valley, which should have been classified as an SPA, the loss of corncrake was the result of changes in agricultural practices which Ireland took no steps to remedy.

122 Nor has Ireland demonstrated that it would be impossible to re-establish the presence of the corncrake in that area. Accordingly, the Commission's action must be upheld on this point.

123 It follows that the action is also well-founded in respect of the Mullet Peninsula and the Moy Valley.

The second part of the first complaint

— Arguments of the parties

124 The Commission argues that Ireland has failed to fulfil its obligation under Article 4(1) and (2) of the Birds Directive because it classified certain sites as SPAs only partially. In its view, the SPA boundaries were in many cases drawn so as to exclude equivalent adjacent areas of ornithological interest as identified in IBA 2000. These criticisms cover a total of 37 sites.

125 After pointing out that SPA boundaries should be defined by ornithological considerations and not economic ones, the Commission notes that the Irish authorities, by contrast, have in many cases limited SPAs to sites in public ownership and have not classified sites seriously contested by economic interests.

126 The Commission adds that, during the proceedings, the Irish authorities stated that they intended to extend and re-designate a large number of sites by the end of June 2004, but do not appear to have followed up on that intention in practice.

127 Ireland states that the relevant survey work is in progress and that it is intended that fresh SPAs will be classified for the purpose of conservation of the species concerned. All reclassifications and new classifications will be carried out in accordance with the requirements of the Habitats Regulations. Nevertheless, it disputes the alleged failure to classify a sufficiently large area for the Sandymount Strand and Tolka Estuary SPA.

— Findings of the Court

128 In acknowledging that certain SPAs must be extended, Ireland admits that it has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive. Accordingly, the Commission's action must be upheld in respect of 36 of the 37 sites.

129 Next, the situation of the Sandymount Strand and Tolka Estuary SPA must be examined.

130 The Commission claims that the boundaries of the Sandymount Strand and Tolka Estuary SPA have not taken proper account of ornithological interests, contrary to Article 4(1) and (2) of the Birds Directive.

131 In its view, evidence indicates that the approach taken by the Irish authorities for the demarcation of the boundaries of the Sandymount Strand and Tolka Estuary SPA, an internationally important wetland for waterfowl, situated in Dublin Bay and regularly supporting over 20 000 wintering birds, leads to the exclusion of two areas earmarked for development in connection with major public works; that exclusion was decided upon on the basis of an isolated consideration of the ornithological value of those areas, whereas the boundaries of the SPAs should have been drawn up in the light of the natural boundaries of the wetland ecosystem.

132 According to the Commission, the first area of 4.5 hectares, the inclusion of which in the SPA had been proposed previously, was excluded from the initial extension project for the Sandymount Strand and Tolka Estuary SPA following representations by the Dublin Port Company, which wished to infill the area for a port extension.

133 Ireland, for its part, contends that that area should not have been included in the proposed extended area in the first instance and that its inclusion has no scientific basis. The adjustment of the proposed extended SPA was subjected to close examination and it was concluded that the inclusion of the area was not scientifically justified on the ground that only a small part is exposed briefly at low spring tides.

134 Ireland observes in particular that common adaptable wader species can use the area only when it is exposed at low tide. Those species find the bulk of their food elsewhere. Further, the area may not relate to significant habitats located nearby which provide better conditions for the species concerned. In Ireland's view, no real attempt has been made by the Commission to dispute the underlying scientific basis for this view.

135 As regards the first area, the Court finds, as a preliminary point, that the complaints expressed by the Commission in its reply regarding other sites in that area are inadmissible at the stage of proceedings before the Court on the ground that they were not the subject-matter of the action.

136 In accordance with the Court's settled case-law, the subject-matter of an action under Article 226 EC for failure to fulfil obligations is delimited by the pre-litigation procedure provided for by that provision, so that the application must be based on the same grounds and pleas as the reasoned opinion (see Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 35 and case-law cited).

137 Next, as evidenced by the case-file, the Commission produced an ornithological study carried out in November 2002 by Dublin Bay Watch, which, on the basis of an examination of the ornithological implications of the infilling project, called for the inclusion of those areas in the Sandymount Strand and Tolka Estuary SPA. That study, which has not been disputed by the Irish authorities, shows, as noted by the Advocate General in point 72 of her Opinion, that various species make above-average use of the land, which is exposed infrequently. Furthermore, at least parts of this land are exposed also on less extreme tides and can be used by birds. Lastly, the areas in question are used not only by wading birds but also by sandwich terns, for example, which do not rely on the land being exposed.

138 Accordingly, the first area in question is an integral part of the wetland ecosystem and should have been classified as an SPA. It follows that the action is well-founded in respect of the first area excluded from the initial proposal to extend the Sandymount Strand and Tolka Estuary SPA.

139 The second area comprised 2.2 hectares of inter-tidal mudflat at the entry to the estuary of the Tolka, destroyed, according to the Commission, in the construction of the Dublin Port Tunnel, the promoter of which is Dublin Corporation (now the Dublin City Council). The Commission argues that, although small, the excluded area had features similar to those of a complete ecosystem, namely mudflats, and had confirmed usage by birds that depend on the overall ecosystem, that is to say, the oystercatcher (*Haematopus ostralegus*) and the redshank. Such piecemeal exclusions of portions of an integrated wetland system undermine the objectives of the Birds Directive.

140 Ireland contends that only very small numbers of oystercatcher and redshank occur in the 2.2 hectare inter-tidal mudflat area, which is exposed as a feeding area only for very short periods of time at low tide. The area is therefore not regarded as significant for the purposes of inclusion in the relevant SPA. The criteria applied in reaching that decision were scientifically sound ornithological criteria. Ireland submits that the Commission's view that the loss of the 2.2 hectare area constitutes a significant deterioration of bird habitats and source of disturbance is not accepted and that the Commission has not identified any scientific or objectively verifiable evidence for its view.

141 In respect of the second area, it should be borne in mind that, according to the case-law referred to in paragraph 39 of this judgment, the classification of areas as SPAs is subject solely to the ornithological criteria determined by the Birds Directive.

142 The Commission is therefore correct in claiming, first, that SPA classification cannot be the result of an isolated study of the ornithological value of each of the areas in question but must be carried out in the light of the natural boundaries of the wetland ecosystem and, second, that the ornithological criteria which form the

foundation of the classification must have a scientific basis. The use of flawed, allegedly ornithological criteria might lead to an incorrect demarcation of the boundaries of SPAs.

143 In the present case, it is common ground that the area in question is separated from the rest of the classified estuary by a road which crosses the river and, being a mudflat, has the same characteristics as the Dublin Bay site as a whole.

144 It is furthermore clear from the environmental impact assessment published in July 1998, on which both parties relied during the proceedings, that that area is used as a feeding ground by some of the wild birds present in the Sandymount Strand and Tolka Estuary SPA.

145 The Court accordingly finds that the second area is used as a feeding ground by three of the nine bird species which are decisive for the classification of Dublin Bay as an area of ornithological importance. That area is used by those species within the average limits which could be expected, if not more. Consequently, it is an integral part of the entire wetland ecosystem and for that reason ought also to have been classified as an SPA.

146 It follows that the action is also well-founded in respect of the second area not included in the Sandymount Strand and Tolka Estuary SPA.

147 Consequently, the Court finds that the second part of the first complaint is well-founded.

148 In the light of all the foregoing considerations, the Court finds that the first complaint is well-founded, except for the point relating to the classification of SPAs to ensure conservation of the Greenland white-fronted goose, a species referred to in Annex I, and protection of the lapwing, the redshank, the snipe and the curlew, regularly occurring migratory species not listed in Annex I.

The second complaint: failure to establish the necessary legal protection regime in accordance with Article 4(1) and (2) of the Birds Directive

Arguments of the parties

149 The Commission argues that, since 1981, Irish legislation has failed adequately to give effect to Article 4(1) and (2) of the Birds Directive and that, moreover, Ireland has not applied those provisions in practice by establishing a specific legal protection regime for SPAs such as to ensure survival and reproduction of the bird species concerned.

150 In the Commission's view, ensuring the survival and reproduction of bird species within SPAs may require not only preventive measures, but also active or positive measures, which, with one exception, have not been taken in Ireland. Secondly, there is a doubt as to whether the relevant Irish legislation actually provides a legal basis for taking such measures.

151 Ireland disputes the alleged failure to fulfil obligations. Regarding the obligation to establish an effective legal protection regime for SPAs, whilst accepting that the preventive approach is not sufficient to protect birds in all situations, it contends

that that view informed the creation of the voluntary Corncrake Grant Scheme. To that may be added a number of plans, at the draft stage, for bird management and conservation in a number of SPAs.

152 As regards the scope of the Irish legislation transposing Article 4(1) and (2) of the Birds Directive, Ireland denies that the sole purpose of the Habitats Regulations is to implement the Habitats Directive and contends that those regulations provide an adequate legal basis in national law for the creation and implementation of SPA management plans. Ireland states that the Habitats Regulations clearly apply a number of key protective and enforcement measures to SPAs, including Regulation 13, which is expressly listed in Regulation 34 as a provision applying to areas classified pursuant to the Birds Directive.

Findings of the Court

153 According to the case-law of the Court, Article 4(1) and (2) of the Birds Directive requires the Member States to provide SPAs with a legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the directive and the breeding, moulting and wintering of migratory species not listed in Annex I which are, nevertheless, regular visitors (Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 21 and case-law cited).

154 As observed by the Advocate General in point 77 of her Opinion, the protection of SPAs may not be limited to avoiding harmful human effects but must also include positive measures to preserve or improve the state of the area, as the case may be.

155 It is common ground that Regulation 13 of the Habitats Regulations would have adequately transposed Article 4(1) and (2) of the Birds Directive if that provision had been applicable to SPAs. However, contrary to Ireland's position that Regulation 13 applies also to SPAs essentially by virtue of Regulation 34, the Commission takes the view that the Habitats Regulations are intended to implement only the Habitats Directive.

156 Regulation 34 of the Habitats Regulations provides that '[t]he provisions of Regulations 4, 5, 7, 13, 14, 15 and 16 shall, where appropriate, apply with any necessary modifications to areas classified pursuant to paragraph 1 and 2 of Article 4 of the Birds Directive'.

157 According to the wording of the third paragraph of Article 249 EC, a directive, in binding all addressee Member States as to the result to be achieved, leaves it to the national authorities to decide the form and methods. It follows that Ireland, just like any other Member State, may choose the form and methods for implementing the Birds Directive (see, to that effect, Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 55).

158 However, according to the case-law of the Court, the transposition of a directive into domestic law must guarantee the full application of the directive in a sufficiently clear and precise manner (see, to that effect, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 15).

159 The Court has also held, as mentioned in paragraph 64 of this judgment, that faithful transposition becomes particularly important in the case of the Birds Directive, where management of the common heritage is entrusted to the Member States in their respective territories.

160 It is therefore appropriate to examine whether Regulation 34 of the Habitats Regulations does not guarantee the application of Regulation 13 of those regulations to the areas classified as SPAs under Article 4(1) and (2) of the Birds Directive, as claimed by the Commission.

161 A literal reading of Regulation 34 shows that it does not, on the face of it, exclude from the scope of application of the Habitats Regulations the application of Regulation 13 to areas classified under Article 4(1) and (2) of the Birds Directive.

162 Consequently, it is not possible to accept the Commission's argument that, due to the lack of reference in the Habitats Regulations to a distinct objective of giving effect also to the Birds Directive and in the light of the limitations imposed by the European Communities Act, those regulations cannot provide a legal basis allowing the adoption of management plans for bird conservation in the SPAs.

163 For the same reason, it is also not possible to accept the Commission's argument that the Habitats Regulations do not allow for application to SPAs of the management measures provided for in Article 6(1) of the Habitats Directive, as the sole declared purpose of those regulations is to implement that directive. As observed by the Advocate General in point 82 of her Opinion, if measures similar to those provided for in Article 6(1) are to be applied to SPAs pursuant to Article 4(1) and (2) of the Birds Directive, the national legislature is not prevented from creating a single provision to transpose the rules of both directives.

164 The Court also cannot accept the Commission's argument relating to the limitations imposed by the European Communities Act. Ireland contends in its statement in

defence, without being contradicted on the point by the Commission, that the Habitats Regulations are not a statute but are, in their entirety and undoubtedly, of full force and effect unless and until they are successfully challenged before a court of competent jurisdiction.

165 Lastly, on the same ground as that referred to in paragraph 161 of this judgment, the Court cannot accept the Commission's argument that the application to SPAs of Regulation 13 of the Habitats Regulations, which relates to conservation measures to be taken by the Minister in relation to Special Areas of Conservation, is not automatic since, according to the wording of Regulation 34 of those regulations, some provisions of those regulations apply 'where appropriate' and 'with any necessary modifications' to areas classified under Article 4(1) and (2) of the Birds Directive.

166 Moreover, the Court has consistently held that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 37 and case-law cited). In the present case, the Commission has not put forward in support of its action any decisions of national courts which interpreted the disputed national provision in a manner contrary to the Birds Directive.

167 In those circumstances, it does not appear that the Commission, which has the burden of proof in proceedings for failure to fulfil obligations (*Commission* v *Greece*, paragraph 35 and case-law cited), has demonstrated to the requisite legal standard that, at the date of expiry of the period laid down in the additional reasoned opinion notified on 11 July 2003, the Habitats Regulations had the scope attributed to them by the Commission.

168 The second complaint must accordingly be rejected.

The third complaint: failure to apply the first sentence of Article 4(4) of the Birds Directive to the areas which should have been classified as SPAs

Arguments of the parties

169 The Commission argues that, since 1981, Ireland has failed to ensure the application of the first sentence of Article 4(4) of the Birds Directive as regards sites which should have been classified as SPAs under that directive, but have not been. It considers that, given the extent of the inadequacy of the classification of SPAs by the Irish authorities, that omission has potentially important implications for the conservation of the bird species concerned.

170 In its view, although there is Irish legislation of relevance to the protection of habitats other than classified SPAs, that legislation lacks the ornithological specificity required by the first sentence of Article 4(4) of the Birds Directive. In particular, the Irish legislation fails to impose any specific duties in respect of the habitats of the wild bird species which should benefit from the protection conferred on SPAs in areas not covered by Ireland's existing SPA network. The Commission cites the specific example of the difficulties faced by the hen harrier and adds that unclassified areas requiring classification do not enjoy in Ireland the protection required by the first sentence of Article 4(4) of the Birds Directive, even in respect of the actions of public authorities.

171 Ireland replies, essentially, that important hen harrier survey work is nearing completion and that draft guidelines in relation to the development of wind energy are soon to be concluded.

Findings of the Court

172 As already noted in paragraph 84 of this judgment, the protection objectives of the Birds Directive, as expressed in the ninth recital in the preamble thereto, cannot be achieved if Member States are required to comply with their obligations under Article 4(4) thereof only where an area has been previously classified as an SPA.

173 As is also clear from the Court's case-law, the text of Article 7 of the Habitats Directive states 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. It is clear, therefore, that areas which have not been classified as SPAs but which should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive (Case C-374/98 *Commission* v *France*, paragraphs 46 and 47).

174 In the present case, however, Ireland has not even asserted that it ensured the application of the first sentence of Article 4(4) of the Birds Directive to areas requiring classification as SPAs under that directive.

175 Consequently, and without its being necessary to consider the specific examples provided by the Commission, the Court finds that the third complaint is well-founded.

The fourth complaint: failure to transpose and apply the second sentence of Article 4(4) of the Birds Directive

Arguments of the parties

176 The Commission complains that Ireland has failed to transpose and apply fully and correctly the second sentence of Article 4(4) of the Birds Directive relating to appropriate steps to be taken by the Member States to avoid pollution or deterioration of habitats outside SPAs.

177 In support of its complaint, the Commission states that the various domestic legal measures, in particular integrated pollution control licences, the Control of Farmyard Manure scheme, and provisions of planning legislation including environmental impact assessment requirements, which are deemed to transpose the second sentence of Article 4(4) of the Birds Directive, do not have any specifically ornithological content from that article. In the absence of any specific ornithological considerations, entities playing a role in the context of environmental measures cannot be expected to take account of ornithological interests. In the Commission's view, several of the domestic measures transposing the second sentence of Article 4(4) are partial and numerous lacunae remain. The shortcomings of those measures are borne out by the deterioration of habitats and, despite denials by Ireland, it cannot validly be disputed in the present case that human intervention has led to a deterioration of the habitats.

178 Ireland replies by stating that Article 4(4) of the Birds Directive is in practice transposed by a number of statutory schemes and measures. It adds that the second sentence of Article 4(4) of the Birds Directive is implemented by the Wildlife Act, which provides a sound legal basis for the protection of bird species in the wider countryside.

Findings of the Court

179 Although the second sentence of Article 4(4) of the Birds Directive does not require that certain results be achieved, the Member States must nevertheless make a serious attempt at protecting those habitats which lie outside the SPAs. It is thus clear, in the present case, that Ireland must endeavour to take suitable steps to avoid pollution or disturbances of the habitats (see, to that effect, Case C-166/97 *Commission* v *France*, paragraph 48).

180 First of all, it is appropriate to consider whether Ireland has transposed that provision fully and correctly by taking suitable steps to avoid pollution or deterioration of the habitats lying outside the SPAs.

181 It is clear, in the light of all the evidence submitted, assessed as a whole, that that is not so in the present case.

182 As regards the licences issued by the Environmental Protection Agency under the integrated pollution control scheme, it is not disputed, as pointed out by the Commission, that that scheme covers only a limited range of polluting activities and does not contain any specific reference to the ornithological considerations referred to in Article 4 of the Birds Directive. It would appear, moreover, that Ireland refers to the transposition of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), the objectives of which are different. Accordingly, the national rules relating to those licences cannot be regarded as being an adequate transposition of the second sentence of Article 4(4) of the Birds Directive.

183 With regard to the cross-compliance aspect of the single payment under the common agricultural policy, Ireland states that the various statutory management requirements (SMRs), the first key element of cross-compliance, referred to in Article 4 of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1), the list of which is contained in Annex III to that regulation, are to be introduced progressively over three years, starting on 1 January 2005. Ireland adds that the list of those regulatory requirements includes a reference to the Birds Directive. However, for the same reasons as those referred to in paragraph 74 of this judgment, the progressive introduction in national law of those requirements may not be taken into account.

184 The same holds true for the second key element of cross-compliance of the single payment, relating to good agricultural and environmental condition referred to in Article 5 of Regulation No 1782/2003, the minimum requirements of which must be defined on the basis of the framework laid down in Annex IV to that regulation, with transposition measures for that article entering into force only as of 1 January 2005.

185 Regarding the steps taken under the Rural Environment Protection Scheme, designed to reward farmers for carrying out their farming activities in an environmentally friendly manner and to bring about environmental improvements on existing farms, the Commission acknowledges that they have advantages for wild birds in that they make it possible to avoid pollution and deterioration of habitats. It is common ground, however, that that scheme does not apply generally to all farmlands or to territories not classified as SPAs. Accordingly, those steps also cannot be regarded as transposing the second sentence of Article 4(4) of the Birds Directive.

186 The arguments concerning the Farm Waste Management Scheme and the planning legislation, including the provisions on environmental impact assessment, must also be rejected. In those texts, Ireland has not introduced any ornithological considerations in respect of the second sentence of Article 4(4) of the Birds Directive.

187 Lastly, with regard to the Wildlife Act, it is clear that the only provision of that act relevant in this context and referred to by Ireland during the proceedings is section 11(1). However, that provision is not sufficiently specific to be regarded as guaranteeing the transposition of the second sentence of Article 4(4) of the Birds Directive.

188 Secondly, it is appropriate to consider whether the Commission has established that Ireland has not made sufficient efforts in practice to avoid pollution or deterioration of habitats lying outside SPAs.

189 The Commission puts forward in this regard, by way of example, the habitats of the cuckoo (*Cuculus canorus*), skylark (*Alauda arvensis*), swallow (*Hirundo rustica*) and sand martin (*Riparia riparia*), widespread bird species contained in the 'orange list' of the *Birds of Conservation Concern in Ireland* inventory published in 1999 by BirdWatch Ireland and the Royal Society for the Protection of Birds. That inventory states that those species suffer greatly from the changes in agricultural practices. In addition, the Commission refers to the report *Ireland's Environment 2004*, drawn up by the Environmental Protection Agency, which attributes the general deterioration of habitats in Ireland to a number of developments.

190 It is also clear that the mere fact that a number of programmes and regulatory measures may have been implemented and taken, as contended by Ireland, does not

establish that Ireland has made sufficient efforts to avoid pollution or deterioration of habitats. As noted by the Advocate General in point 111 of her Opinion, serious endeavours, namely the taking of all reasonable measures to achieve the success being sought, require targeted action.

191 The Court finds in the present case that the measures taken by Ireland are partial, isolated measures, only some of which promote conservation of the bird populations concerned, but which do not constitute a coherent whole.

192 That finding is supported by the fact that Ireland has not contradicted the content of the inventory *Birds of Conservation Concern in Ireland*, published in 1999, or the report *Ireland's Environment 2004*, two ornithological studies referred to above and submitted by the Commission.

193 Accordingly, in the light of all the evidence adduced by the Commission, the Court finds that Ireland has not transposed or applied fully and correctly the second sentence of Article 4(4) of the Birds Directive. Consequently, the failure to fulfil obligations in regard to this complaint is well-founded.

The fifth complaint: inadequate transposition and application of Article 6(2) to (4) of the Habitats Directive

194 The fifth complaint concerns, in respect of the SPAs classified under the Birds Directive, the fact that Ireland has not adopted all the measures required to comply with Article 6(2) to (4) of the Habitats Directive. This complaint also concerns the inadequate transposition of Article 6(2) of that directive as regards the use of all the sites covered by that provision for recreational purposes.

Preliminary observations

195 Article 7 of the Habitats Directive provides that obligations arising under Article 6(2) to (4) of that directive are to 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) of that directive or similarly recognised under Article 4(2) thereof, as from the date of implementation of the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive, where the latter date is later.

196 It follows that Article 6(2) to (4) of the Habitats Directive has applied to SPAs in Ireland since 10 June 1994, the date on which the period for transposition of that directive in Ireland expired, or since the date of their classification or recognition under the Birds Directive, where the latter date is later.

Inadequate transposition and application of Article 6(2) of the Habitats Directive

— Arguments of the parties

197 The Commission submits that Ireland has not transposed or applied correctly, as at 10 June 1994 or after that date, Article 6(2) of the Habitats Directive to all the areas classified under Article 4(1) of the Birds Directive or recognised under Article 4(2) thereof.

198 It submits that, according to the wording of the Habitats Regulations, which, Ireland asserts, implement Article 6(2) of the Habitats Directive, the ability to control potentially damaging activities on the part of landowners is to a significant extent dependent on notices being served on landowners at the time an area is proposed to become a site subject to Article 6(2) of the Habitats Directive. Regulation 14 of those regulations provides for ministerial power to issue notices and impose conditions concerning the use of land. That power is subject to two limitations, however.

199 The first of those limitations is a limitation de jure in that Regulation 14 of the Habitats Regulations is worded in such a manner as to apply only to SPAs so classified after the entry into force of those regulations, so that it does not cover SPAs classified before that date. In the case of existing SPAs, there is no provision for issuing notices to landowners expressly informing them of the activities which require authorisation under the transposing legislation, so as to make the system of controls on damaging activities operational for these.

200 The second is a limitation de facto in that that regulation has not been applied to all SPAs.

201 According to the Commission, in the absence of any use of restrictive notices, Irish legislation does not contain any provision giving full effect to Article 6(2) of the Habitats Directive for State-owned land situated inside SPAs. It also takes the view that, in so far as those activities take place on State-owned land or State-controlled land, the national legislation does not provide for any explicit statutory obligation requiring the authorities responsible for regulating those activities to take enforcement action to ensure compliance with Article 6(2) of that directive.

202 The Commission refers, by way of example of an activity which infringes Article 6(2) of the Habitats Directive, to unauthorised mechanical cockle harvesting in the Bannow Bay SPA and also refers to the damaging development of the Glen Lough SPA.

203 Ireland rejects all of the Commission's allegations. It contends that, in addition to Regulation 14 of the Habitats Regulations, Regulation 13(3) of those regulations, which applies to both Special Areas of Conservation and SPAs, transposes Article 6(2) of the Habitats Directive. Ireland also refers, for the same purposes, to Regulations 17 and 18 of the Habitats Regulations and maintains its position that the Foreshore Acts ensure protection of SPAs.

— Findings of the Court

204 Article 6(2) of the Habitats Directive, like the first sentence of Article 4(4) of the Birds Directive, requires Member States to take appropriate steps to avoid, in the areas classified pursuant to Article 4(1) or recognised pursuant to Article 4(2), the deterioration of habitats and disturbances having a significant effect on the species for which the SPAs were classified or recognised (see, to that effect, Case C-117/00 *Commission* v *Ireland* [2002] ECR I-5335, paragraph 26).

205 As regards Ireland's argument that Regulation 13(3) of the Habitats Regulations transposes Article 6(2) of the Habitats Directive, it is clear that the sole purpose of Regulation 13(3) of those regulations is to require the competent minister to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been

designated, with the result that that provision has effect only when that minister has direct responsibility over the SPAs concerned. Moreover, under the Habitats Regulations scheme, Regulation 13(3) thereof complements the provisions of Regulations 4 and 14, which provide for a notice-based scheme of landowner liability. In the present case, since it is common ground that notices were not issued for all the SPAs, Regulation 13(3) of the Habitats Regulations cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive.

206 With regard to the argument that Regulation 14 of the Habitats Regulations provides for the control of operations and activities listed in a notice issued by the competent minister pursuant to Regulation 4 and that listed activities may only be carried out with ministerial consent or pursuant to a management agreement provided for in Regulation 12 of those regulations, suffice it to hold that Regulation 14 is also dependent on the existence of a notice. Accordingly, and for the same reason as stated in the preceding paragraph of this judgment, the latter provision cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive.

207 As to the argument that Regulation 17 of the Habitat Regulations empowers the competent minister to seek injunctive relief to stop operations or activities that appear on assessment to be damaging to a European site, including an SPA, and that Regulation 18 of those regulations provides for similar ministerial powers in the event that an operation or activity damaging to an SPA is being carried out in an area outside the SPA, the Court finds that, as rightly pointed out by the Commission and the Advocate General in point 127 of her Opinion, those provisions do not make it possible to avoid the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which the areas concerned have been designated.

208 Although Ireland states, in its rejoinder, that the powers of the competent minister, as described in the preceding paragraph of this judgment, can be used to apply immediately for injunctive relief on an interim basis, it is clear that those provisions necessarily can come into play only after the activities in question have already commenced and thus only after any deterioration has already occurred. Moreover, the competent minister is not entitled to prohibit a harmful activity unilaterally and the abovementioned powers presuppose that an appropriate assessment of the environmental impact of that activity has been carried out before any judicial relief is sought. The reactive protection of SPAs may be delayed considerably by those procedural steps. Moreover, those provisions do not ensure protection of SPAs against the activities of individuals, as such protection requires that individuals be prevented in advance from engaging in potentially harmful activities.

209 Accordingly, Regulations 17 and 18 of those regulations also cannot be regarded as constituting an adequate transposition of Article 6(2) of the Habitats Directive.

210 Moreover, Ireland's argument that the Foreshores Acts ensure protection of SPAs cannot be accepted either. Those statutes ensure protection of coastal areas only and therefore do not apply to SPAs situated outside such areas.

211 Lastly, as regards the unauthorised mechanical harvesting of cockles in the Bannow Bay SPA, referred to by the Commission as an activity which infringes Article 6(2) of the Habitats Directive, the Court finds, as noted by the Advocate General in point 140 of her Opinion, that this is mere illustrative use which is not the subject-matter of the application. In any event, the Commission has not adduced any evidence such as to establish the failure to fulfil obligations on this point.

212 It follows that, as at 10 June 1994 or after that date, Ireland had not correctly transposed Article 6(2) of the Habitats Directive in respect of all the areas classified under Article 4(1) of the Birds Directive or recognised under Article 4(2) of that directive.

213 Consequently, the Court finds that the complaint is well-founded on this point.

Inadequate transposition of Article 6(2) of the Habitats Directive in the field of recreational activities

— Arguments of the parties

214 The Commission takes the view that Ireland has not adequately transposed Article 6(2) of the Habitats Directive in respect of the use for recreational purposes of all the sites covered by that provision. It considers that the Irish legislation covers only the activities of landowners and that the legislation suffers from a number of shortcomings in terms of prevention of damage to habitats caused by users of the land for recreational purposes. The application of Regulations 14 and 17 of the Habitats Regulations has not resulted in the compilation of exhaustive lists of prohibited activities. Moreover, the mechanisms provided for in Regulation 17 of those regulations are reactive in nature and no other legislative provision referred to by Ireland appears to protect the SPAs against recreational activities engaged in by users.

215 Notwithstanding indications regarding proposals for appropriate legislative amendments, including the 2004 draft Maritime Safety Bill, Ireland denies that the current legislation is inadequate for implementing Article 6(2) of the Habitats Directive in the context of recreational use of land situated in the SPAs. Ireland explains that the

national authorities have powers to control recreational and other activities in European sites by persons other than the landowner and to impose penalties. In that context, Ireland refers to Regulation 4(3)(b) of the Habitats Regulations and to Regulations 14, 17 and 18 of those regulations, to the Wildlife Act and to the Criminal Justice (Public Order) Act 1994.

— Findings of the Court

216 With regard to Ireland's argument that Regulation 14 of the Habitats Regulations, which places restrictions on operations and activities, does not cover only landowners, occupiers or licence-holders, but also applies to all persons provided that the operation or activity is referred to in a notice issued pursuant to Regulation 4(2) of those regulations, suffice it to hold that Regulation 14(3) of those regulations does not allow for proceedings to be brought against third parties who were not aware of that notice. The latter may, in fact, rely on the defence of 'reasonable excuse' contained in Regulation 14(3). Accordingly, the transposition of Article 6(2) of the Habitats Directive is, at the very least, not sufficiently precise.

217 As to Ireland's argument that the procedure provided for in Regulations 17 and 18 of the Habitats Regulations is a separate and distinct procedure which may be implemented in respect of anyone and does not depend on the content of any particular 'notice', it is clear that there is no guarantee that it may be applied to persons who have not received the notice provided for in Regulation 4 of those regulations. Moreover, as has just been found in paragraphs 208 and 209 of this judgment, that procedure is a merely reactive measure; consequently, Regulations 17 and 18 of the Habitats Regulations cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive.

218 With respect to the argument that the Wildlife Act provides, in sections 22, 23 and 76, for a power to act where there is evident and wilful interference with the breeding place or the resting place of a protected wild animal, or where there is disturbance of protected birds as they nest, and under which the powers conferred by that statute include the power to seize equipment and vehicles used by the perpetrators, suffice it to hold that it is common ground that that statute does not cover all types of damage likely to be caused by recreational use.

219 Lastly, regarding the argument that trespass on private property was reclassified as a crime under Irish law by section 19A of the Criminal Justice (Public Order) Act, 1994, and that penalties on conviction include fines and the seizure of vehicles and equipment, the Court notes that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise (see Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 26).

220 An examination of the criminal-law provisions on trespass on private property relied on by Ireland shows that those provisions are not specifically linked to the protection of natural habitats and of habitats of species against deterioration or against disturbances affecting species and that they are therefore not designed to avoid damage caused to habitats by the use of SPAs for recreational purposes. Consequently, they do not constitute a clear and precise implementation of the provisions of the Habitats Directive such as to satisfy in full the requirements of legal certainty.

221 The complaint is, accordingly, also well-founded on this point.

Inadequate transposition and application of Article 6(3) and (4) of the Habitats Directive

— Arguments of the parties

222 The Commission states that Ireland has not correctly transposed or applied Article 6(3) and (4) of the Habitats Directive.

223 In terms of transposition, the Commission argues that the national legislation does not contain any provisions designed to ensure that plans, as distinct from projects, are assessed in accordance with Article 6(3) and (4) of the Habitats Directive. The national legislation also fails to make proper provision for the application of those Community provisions to projects situated outside SPAs but having significant effects inside them.

224 As regards application, the Commission takes the view that Ireland fails to ensure systematically that plans and projects likely to have significant effects on SPAs, either by themselves or in combination with other plans and projects, undergo appropriate prior assessment.

225 Ireland maintains that no action or project under any plan can have any effect in law or substance without having been subjected to assessment. Although plans can stimulate certain activities, they do not override or obviate controls applying to sites under relevant regulatory regimes. They have no bearing on whether a project which can have an effect on a site is agreed or not. Before any plan or project can affect a site, it will have gone through a full assessment procedure either under the regulatory system provided by the Habitats Regulations, the planning system or under another regulatory system, in compliance with the provisions of the Habitats

Directive. Therefore, no plan or project can affect a site without having been subject to assessment.

— Findings of the Court

226 As regards the transposition of Article 6(3) and (4) of the Habitats Directive, it should be noted at the outset that the Court has already held that Article 6(3) of that directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that that plan or project will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (Case C-6/04 *Commission* v *United Kingdom*, paragraph 54 and case-law cited).

227 It follows that the Habitats Directive requires that any plan or project undergo an appropriate assessment of its implications if it cannot be excluded on the basis of objective information that that plan or project will have a significant effect on the site concerned.

228 On this point, Ireland maintains that the plans are made subject to an appropriate assessment of their implications on a site under Regulations 27 to 33 of the Habitats Regulations, which provide for various development proposals. However, Ireland has not demonstrated that such projects are plans within the meaning of Article 6(3) of the Habitats Directive.

229 Next, Ireland contends that the Planning and Development Act 2000 introduced requirements in relation to the consideration of the likely significant effects on the environment of certain plans including regional planning guidelines, development plans and local area plans. Since 1 January 2001, each of those plans is required to include information on the likely significant effects on the environment of its implementation. Those requirements were included in anticipation of the terms of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30). Despite the existence of such legislation, however, it cannot be said that Ireland has satisfied its obligations under Article 6(3) of the Habitats Directive. The obligation provided for in the Planning and Development Act concerns only information relating to likely significant effects on the environment, whereas Article 6(3) of the Habitats Directive requires a prior assessment of the implications of development plans.

230 Ireland adds that it implements the assessments pursuant to 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) and to Directive 2001/42, also transposed by the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 and by the Planning and Development Strategic Environmental Assessment Regulations 2004.

231 Those two directives contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only certain projects and plans. By contrast, under the second sentence of Article 6(3) of the Habitats Directive, a plan or project can be authorised only after the national authorities have ascertained that it will not adversely affect the integrity of the site.

Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.

232 Lastly, regarding the Commission's assertion that the Irish legislation does not make adequate provision for the application of Article 6(3) and (4) of the Habitats Directive to projects situated outside SPAs but having significant effects inside them, the Court finds that it is common ground that the environmental impact assessment report, which must be commissioned by the private persons concerned, who must bear the costs thereof, amounting to a minimum of EUR 15 000, is required only for plantations of over 50 hectares, whereas the average surface area of a plantation in Ireland is approximately 8 hectares.

233 It therefore follows that, since the Irish legislation does not make plans subject to an appropriate assessment of their effects on SPAs, Article 6(3) and (4) of the Habitats Directive has not been adequately transposed in the Irish domestic legal order.

234 Accordingly, the action is well-founded on this point.

235 As to the application of Article 6(3) and (4) of the Habitats Directive, the Commission relies on examples of aquaculture programmes and drainage work inside the Glen Lough SPA. It is, accordingly, appropriate to consider them in turn.

236 Firstly, regarding the aquaculture programmes, the Commission relies, essentially, on the *Review of the Aquaculture Licensing System in Ireland* carried out in 2000 by BirdWatch Ireland as the basis for its view that Ireland has systematically failed to

carry out a proper assessment of those projects situated in SPAs or likely to have effects on SPAs, contrary to Article 6(3) and (4) of the Habitats Directive. In that context, it emphasises the importance of a prior assessment for the purpose of weighing the implications of a project with the conservation objectives fixed for the SPA concerned.

237 The Court notes that that study covered 271 authorisations for aquaculture programmes issued by the Department of Communications, Marine and Natural Resources during the period from June 1998 to December 1999 and 46 applications yet to be decided on. Moreover, 72 licences and nine pending applications concerned aquaculture programmes situated inside or near an SPA. The authorisations issued concern, in 84% of the activities authorised in SPAs, oyster and clam farms.

238 It should also be borne in mind that, under the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site is to be made subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 45).

239 The study carried out by BirdWatch Ireland refers to a number of potential negative effects of shellfish farming, including the loss of feeding areas and disturbances caused by increased human activity and states that, even when an aquaculture programme is inside an SPA, very little protection is provided for bird habitats. Ireland, for its part, does not allege that no aquaculture programmes have any effects on SPAs.

240 It follows that the authorisation procedure ought to have included an appropriate assessment of the implications of each specific project. It is clear that Ireland merely stated, without offering further explanation, that the Irish scheme for authorising mollusc farms, including the provisions on consultation, does in fact provide for detailed consideration of all aspects of an aquaculture development project before a decision is taken on authorisation.

241 Accordingly, the Court finds that Ireland fails to ensure systematically that aquaculture programmes likely to have a significant effect on SPAs, either individually or in combination with other projects, are made subject to an appropriate prior assessment.

242 This finding is supported by the fact that Ireland has not put forward any specific scientific studies showing that a prior, detailed ornithological study was carried out, in order to challenge the failure to fulfil obligations alleged by the Commission.

243 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 *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 61).

244 As to Ireland's argument that no environmental impact assessment had been required for shellfish farms because they are small in size and are of only limited impact on the environment, the Commission is correct in arguing that that is not an adequate reason not to assess the effects of such a plan or project. As just pointed out in paragraph 238 of this judgment, the first sentence of Article 6(3) of the Habitats Directive requires an appropriate assessment of any plan or project in combination with other plans and projects.

245 It is also clear from the Court's case-law that the failure to take account of the cumulative effect of projects in practice leads to a situation where all projects of a certain type may escape the obligation to carry out an assessment, whereas, taken together, they are likely to have significant effects on the environment (see, by analogy, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 76).

246 Lastly, regarding Ireland's argument that maintenance authorisation for development projects carried out without prior authorisation is compatible with the Habitats Directive, the Court finds that the assessment of an already-completed development project cannot be regarded as being equivalent to the assessment of a plan or project within the meaning of the first sentence of Article 6(3) of the Habitats Directive.

247 Accordingly, the complaint must be regarded as being well-founded on this point.

248 Secondly, regarding the drainage work in the Glen Lough SPA, the Commission argues that in 1992 and 1997 Ireland carried out, contrary to Article 6(3) and (4) of the Habitats Directive, drainage work likely to have a significant effect on the Glen Lough SPA without having previously carried out an appropriate assessment of that

project or employed an adequate decision-making procedure, which led to habitat deterioration, contrary to Article 6(2) of that directive. Moreover, Ireland has failed to demonstrate that this deterioration has been remedied.

249 The Court notes, as a preliminary point, that at the time of the drainage works undertaken by the Office of Public Works in 1992, the Habitats Directive was not yet applicable. Consequently, those works do not form part of the subject-matter of the present proceedings.

250 It is, moreover, clear from the Court's case-law 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) (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 35).

251 Accordingly, in so far as the complaint relating to the drainage works carried out in 1997 are concerned, it is appropriate to ascertain whether such activities may be contrary to Article 6(3) and (4) of the Habitats Directive.

252 Infringement of Article 6(3) and (4) of that directive presupposes that the drainage works in question are a 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.

253 In this regard, it is common ground that those works are a project and that they are not directly connected with or necessary to the management of the site. It follows that, in accordance with the case-law referred to in paragraph 226 of this judgment, they had to be made subject to an assessment of their effects on the conservation objectives fixed for the Glen Lough SPA if it could not be ruled out, on the basis of objective information, that they would have a significant effect thereon, either individually or in combination with other plans or projects.

254 In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such an assessment must be carried out if there is doubt as to the absence of significant effects (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 44).

255 The case-file shows that the Glen Lough SPA, which comprises approximately 80 hectares and was classified in 1995, is an important over-wintering site for migratory species of wild birds in the Irish midlands. In particular, it held internationally important numbers of whooper swan (*Cygnus cygnus*) and is especially valuable to birds because of its water.

256 In the present case, however, Ireland, after stating that the works in question were merely maintenance work on existing drains, as part of a system of earlier drainage which preceded the classification of Glen Lough as an SPA, and did not have a significant impact on the wild bird habitats in that SPA, recognises, in its statement in defence, that the drain maintenance of the Silver River carried out by the Office of Public Works in 1997 seems to have reduced the hydrological response times and hence the usage of the site by whooper swans.

257 Accordingly, the Court finds that Ireland, in failing to assess the impact of the drains maintenance works on the conservation objectives of the Glen Lough SPA before those works were carried out, infringed the first sentence of Article 6(3) of the Habitats Directive.

258 Next, it follows from the second sentence of Article 6(3) of the Habitats Directive that, in a situation such as that in the present case, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of those works for the site concerned in the light of the site's conservation objectives, could have authorised such an activity only if they had made certain that it would not adversely affect the integrity of that site, which would have been the case if there had remained no reasonable scientific doubt as to the absence of such effects (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 67).

259 As noted by the Advocate General in point 182 of her Opinion, in the absence solely of an assessment of the impact on the site of the drain maintenance works carried out in 1997, authorisation would have been unlawful under the second sentence of Article 6(3) of the Habitats Directive. Ireland's submission shows, as just noted in paragraph 256 of this judgment, that authorisation was not possible also on account of the adverse effects that the works in question were likely to have on the Glen Lough SPA. Since conservation of the whooper swans' wintering area is the principal conservation objective of the SPA, its integrity was adversely affected within the meaning of the second sentence of Article 6(3) of the Habitats Directive.

260 It also follows that, in spite of a negative assessment of the implications for the site, an authorisation under Article 6(4) of the Habitats Directive would have been possible only if there had been no alternative solutions and if the project had had to be carried out for imperative reasons of overriding public interest, and on the

condition that the Member State took all necessary compensatory measures to ensure that the overall coherence of Natura 2000 was protected.

261 In that regard, and even if there was a public interest in the drainage, as noted by the Advocate General in point 183 of her Opinion, such an interest can justify a deterioration of the SPA within the meaning of Article 6(4) of the Habitats Directive only if there are no alternative solutions.

262 However, Ireland itself states that the National Parks and Wildlife Service, after having installed a dyke in 1998 along the Silver River where it runs through the SPA and holds back the lake water while allowing that river to fulfil its arterial drainage role for the lands upstream, in early 2005 entered into a contract to have the dyke repaired and a sluice and weir installed as well as the overflow pipe. According to Ireland, this will enable the close regulation of the lake level and the hydrological regime will be designed to optimise the usage of the lake by whooper swans. Ireland has not, however, put forward any arguments showing that such alternatives could not have been implemented before the drain maintenance works were carried out in 1997.

263 It follows that, contrary to Article 6(3) and (4) of the Habitats Directive, Ireland carried out a drain maintenance project in 1997 which was likely to have a significant effect on the Glen Lough SPA without having carried out beforehand an appropriate assessment of its implications on the site or employed an adequate decision-making procedure, which resulted in habitat deterioration, contrary to Article 6(2) of that directive.

264 Accordingly, the complaint is also well-founded on this point.

265 In those circumstances, the fifth complaint is well-founded.

The sixth complaint: failure to transpose Article 10 of the Birds Directive

Arguments of the parties

266 The Commission submits that the use of the verb 'shall' in Article 10 of the Birds Directive imposes an obligation on Member States to encourage research and any work required as a basis for the protection, management and use of the population of all species of bird as referred to in Article 1 of that directive. The national regulatory provisions, however, do not reflect that obligation. In its view, the position under Irish law is ambiguous, to say the least.

267 The Commission submits that the wording of the Wildlife Act makes the promotion of research an optional activity for the competent minister.

268 Conversely, Ireland denies that it has failed to comply with its obligation to encourage research. It contends that its legislation is not flawed, and that section 11(3) of the Wildlife Act constitutes a satisfactory transposition into national law of Article 10 of the Birds Directive and fully reflects, and arguably exceeds, the degree of obligation imposed by that Community provision.

Findings of the Court

269 As a preliminary point, section 11(3) of the Wildlife Act, read literally, clearly provides for the possibility for the competent minister to carry out or cause to be carried out research which he considers desirable for the performance of his functions under that statute. It does not, however, lay down any obligation for the competent minister to encourage such activities.

270 As correctly pointed out by the Commission, however, Article 10 of the Birds Directive creates an obligation for Member States to encourage research and any work required as a basis for the protection, management and use of the population of all species of bird as referred to in Article 1 of that directive.

271 It follows that Ireland cannot be deemed to have transposed Article 10 of the Birds Directive into its domestic legal order.

272 This finding cannot be affected by Ireland's argument that the competent minister's role is further extended by section 11(1) of the Wildlife Act. That provision merely states that it is his function to secure the conservation of wildlife and to promote the conservation of biological diversity.

273 Furthermore, the Court cannot accept Ireland's argument that the use of the word 'may', for the purpose of interpreting the national legislation, does not necessarily mean that the competent minister may, at his discretion, decide to carry out, or not to carry out, research.

274 The national case-law referred to by Ireland does not show that such an interpretation of Irish law is systematic, or refer specifically to the national provision in question.

275 Consequently, the sixth complaint is well-founded.

276 In the light of all the foregoing considerations, the Court finds that, by failing:

— to classify, since 6 April 1981, in accordance with Article 4(1) and (2) of the Birds Directive, all the most suitable territories in number and size for the species mentioned in Annex I, with the exception of those intended to ensure conservation of the Greenland white-fronted goose, as well as for regularly occurring migratory species not mentioned in Annex I, with the exception of those intended to ensure protection of the lapwing, the redshank, the snipe and the curlew;

— to ensure that, since 6 April 1981, the provisions of the first sentence of Article 4(4) of the Birds Directive are applied to areas requiring classification as SPAs under that directive;

— to transpose and apply the provisions of the second sentence of Article 4(4) of the Birds Directive fully and correctly;

— to take all the measures necessary to comply with Article 6(2) of the Habitats Directive in respect of all SPAs classified under Article 4(1) of the Birds Directive or recognised under Article 4(2) of that directive;

— to take all the measures necessary to comply with Article 6(2) of the Habitats Directive in respect of recreational use of all sites intended to be subject to that article;

— to take all the measures necessary to comply with Article 6(3) and (4) of the Habitats Directive in respect of plans;

— to take all the measures necessary to comply with Article 6(3) of the Habitats Directive in respect of authorisation of aquaculture projects;

— to take all the measures necessary to comply with Article 6(2) to (4) of the Habitats Directive in respect of the drain maintenance works in the Glen Lough SPA; and

— to take all the measures necessary to comply with Article 10 of the Birds Directive,

Ireland has failed to fulfil its obligations under Articles 4(1), (2) and (4), and 10 of the Birds Directive and Article 6(2) to (4) of the Habitats Directive.

Costs

277 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. Since the Commission has applied for costs to be awarded against Ireland and the latter has, in essence, been unsuccessful, Ireland must be ordered to pay the costs.

278 Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. The Hellenic Republic and the Kingdom of Spain must accordingly bear their own costs.

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

1. Declares that, by failing:

— **to classify, since 6 April 1981, in accordance with Article 4(1) and (2) of 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, all the most suitable territories in number and size for the species mentioned in Annex I to that directive, with the exception of those intended to ensure conservation of the Greenland white-fronted goose (*Anser albifrons flavirostris*), as well as for regularly occurring migratory species not mentioned in Annex I, with the exception of those intended to ensure protection of the lapwing (*Vanellus vanellus*), the redshank (*Tringa totanus*), the snipe (*Gallinago gallinago*) and the curlew (*Numenius arquata*);

— **to ensure that, since 6 April 1981, the provisions of the first sentence of Article 4(4) of Directive 79/409, as amended by Directive 97/49, are applied to areas requiring classification as special protection areas under that directive;**

— **to transpose and apply the provisions of the second sentence of Article 4(4) of Directive 79/409, as amended by Directive 97/49, fully and correctly;**

— **to take all the measures necessary to comply with Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora in respect of all special protection areas classified under Article 4(1) of Directive 79/409, as amended by Directive 97/49, or recognised under Article 4(2) of that directive;**

— **to take all the measures necessary to comply with Article 6(2) of Directive 92/43 in respect of recreational use of all sites intended to be subject to that article;**

— **to take all the measures necessary to comply with Article 6(3) and (4) of Directive 92/43 in respect of plans;**

— **to take all the measures necessary to comply with Article 6(3) of Directive 92/43 in respect of authorisation of aquaculture programmes;**

— **to take all the measures necessary to comply with of Article 6(2) to (4) of Directive 92/43 in respect of the drain maintenance works in the Glen Lough special protection area; and**

— **to take all the measures necessary to comply with Article 10 of Directive 79/409, as amended by Directive 97/49,**

Ireland has failed to fulfil its obligations under Articles 4(1), (2) and (4), and 10 of Directive 79/409, as amended by Directive 97/49, and Article 6(2) to (4) of Directive 92/43.

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

3. **Orders Ireland to pay the costs.**

4. **Orders the Hellenic Republic and the Kingdom of Spain to bear their own costs.**

[Signatures]