OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 20 January 2011 [1]

I — Introduction

1. The provisions of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [2] ('the Habitats Directive') concerning the protection of certain species have been in force since 1994. Nevertheless, many of those species do not have a favourable conservation status. [3]

2. As regards the presence of the European (or common) hamster (*Cricetus cricetus*) in France, in the area around Strasbourg, there has even been a significant deterioration of its conservation status. [4] The secretariat of the Convention on the Conservation of European Wildlife and Natural Habitats [5] received a complaint in that connection from a non-governmental organisation, which is at present being investigated. [6]

3. The Commission has also been prompted by the decline in the European hamster population to raise a complaint concerning France's implementation of the Habitats Directive in relation to the European hamster. The Commission considers that the French measures are not sufficient to secure the continued existence of the European hamster population in the future. The difficulty in the present case arises from the fact that the relevant provision, Article 12 of the Habitats Directive, does not lay down a general obligation to ensure a favourable conservation status for the protected species, but only requires certain prohibitions to be introduced.

4. It is necessary to ascertain on the basis of the specific needs of the European hamster the requirements that must accordingly

1 — Original language: German.

2 — OJ 1992 L 206, p. 7; the relevant version of the Habitats Directive is that amended by Council Directive 2006/105/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 368).

3 — See the Commission's Composite Report pursuant to Article 17 of the Habitats Directive COM(2009) 358 final, and the related website http://biodiversity.eionet.europa.eu/article17.

4 — The conservation status of the species is unfavourable in Germany also; see *Drucksache 14/6976 des Landtages von Baden-Württemberg*, p. 3 et seq.

5 — Opened for signature in Bern on 19 September 1979, ETS No 104, OJ 1982 L 38, p. 3.

6 — See, most recently, the working documents for the 30th session of the Standing Committee on 6 to 9 December 2010, *Summary of case files and complaints*, T-PVS(2010)02RevE, 15 October 2010, p. 6.

be met in order to ensure that the European hamster is protected, but in principle similar questions arise in relation to many other species, such as certain species of bat, or the wild cat (*Felix silvestris*), for which the Habitats Directive lays down a system of strict protection.

II — Legal context

A — *The Bern Convention*

5. The European Union is a contracting party to the Convention on the Conservation of European Wildlife and Natural Habitats, which was opened for signature in Bern on 19 November 1979 ('the Bern Convention').[7]

6. Article 4(1) of the Convention lays down an obligation to protect habitats:

'1. Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in the Appendices I and II and the conservation of endangered natural habitats.

2. The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimise as far as possible any deterioration of such areas.

3. The Contracting Parties undertake to give special attention to the protection of areas that are of importance for the migratory species specified in Appendices II and III and which are appropriately situated in relation to migration routes, as wintering, staging, feeding, breeding or moulting areas.

4. The Contracting Parties undertake to coordinate as appropriate their efforts for the protection of the natural habitats referred to in this Article when these are situated in frontier areas.'

7 — Council Decision of 3 December 1981 concerning the conclusion of the Convention on the Conservation of European Wildlife and Natural Habitats (OJ 1982 L 38, p. 1). The Convention is reproduced in OJ 1982 L 38, p. 3.

7. In addition Article 6 of the Convention contains provisions concerning the protection of species:

'Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II. The following will in particular be prohibited for these species:

(a) all forms of deliberate capture and keeping and deliberate killing;

(b) the deliberate damage to or destruction of breeding or resting sites;

(c) the deliberate disturbance of wild fauna particularly during the period of breeding, rearing and hibernation, in so far as disturbance would be significant in relation to the objectives of this Convention;

(d) the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty;

(e) the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the provisions of this Article.'

8. Appendix II to the Convention specifies in particular the European hamster.

9. On 27 November 2008 the Convention's Standing Committee adopted Recommendation No 136, by virtue of which contracting parties with small or declining hamster populations were to draft and implement national action plans on the basis of a European action plan. [8]

B — *The Habitats Directive*

10. The Habitats Directive and the Wild Birds Directive [9] together serve to implement

8 — Draft European Action Plan for the conservation of the Common hamster (*Cricetus cricetus*, L. 1758), 15 September 2008, Document T-PVS/Inf (2008) 9.

9 — Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). Consolidated by Directive 2009/147/EC of 30 November 2009 (OJ 2010 L 20, p. 7).

the Bern Convention.[10] Of the definitions contained in Article 1 of the Habitats Directive, the definition of the 'conservation status of a species' is of particular interest:

'For the purpose of this Directive:

…

(i) conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The conservation status will be taken as "favourable" when:

— population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

— the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

— there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

…'

11. Article 2 of the Habitats Directive sets out the fundamental aims of the Directive:

'(1) The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

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

10 — Report on the Convention on the Conservation of European Wildlife and Natural Habitats (1997-1998) (Article 9(2)) (presented by the European Commission), SEC(2001) 515 final. See also the Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992), OJ 1987 C 328, [p. 1], paragraph 5.1.6. The judgment in Case C-75/01 *Commission* v *Luxembourg* [2003] ECR I-1585, paragraph 57, does not preclude the Convention from being taken into account because the Court found only that implementation of the Convention is not sufficient for implementation of the Habitats Directive in so far as the Convention falls short of the Directive.

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

12. The relevant provision of the Habitats Directive for the protection of the European hamster is Article 12(1), which is worded as follows:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

13. Annex IV(a) to the Habitats Directive includes in particular the European hamster.

C — *French law*

14. France implemented Article 12 of the Habitats Directive by means of the Regulation of 23 April 2007 laying down the list of land mammals protected throughout France and detailed rules for their protection [11] ('Regulation of 23 April 2007'). Article 2-(2) regulates the protection of breeding sites and resting places:

'The destruction, deterioration of or damage to areas serving as breeding sites or resting places for fauna shall be prohibited in those parts of France in which the species occurs and which are to be regarded as a natural habitat for the main stock of existing populations. These prohibitions apply to the physical and biological elements which are deemed necessary for the breeding or recovery of the species affected, provided that they are actually used or can be used for the breeding or recovery of that species in the course of successive cycles and provided that destruction, deterioration of or damage to those ar-

11 — Arrêté du 23 avril 2007 fixant la liste des mammifères terrestres protégés sur l'ensemble du territoire et les modalités de leur protection, JORF No 108, 10 May 2007, p. 8367, Text No 152.

eas constitutes a threat to the successful completion of those biological cycles.'

III — Facts, pre-litigation procedure and forms of order sought

15. In 2007 the Commission contacted the French Government in connection with a complaint concerning the conservation status of the European hamster populations in Alsace. It was established that the number of documented European hamster burrows in the main areas had fallen from 1 167 in 2001 to between 161 and 174 in 2007. The Commission therefore feared that those populations would soon disappear and requested France to submit its observations pursuant to Article 258 TFEU.

16. France subsequently informed the Commission of the measures which had been taken to protect the European hamster.

17. On 6 June 2008 the Commission nevertheless delivered a reasoned opinion pursuant to Article 258 TFEU on account of infringement of Article 12(1)(d) of the Habitats Directive, setting a final time-limit of two months within which to put an end to the alleged infringement.

18. The French Government replied on 7 August 2008 and subsequently provided the Commission with additional information. As the Commission was not satisfied with the information, it brought the present action on 25 September 2009.

19. The Commission claims that the Court should:

— declare that, by failing to establish a programme of measures to ensure strict protection of the species *Cricetus cricetus* (European hamster), the French Republic has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive;

— order the French Republic to pay the costs.

20. The French Republic contends that the Court should:

— dismiss the action;

— order the Commission to pay the costs.

21. The parties submitted written pleadings and presented oral argument at the hearing on 21 October 2010.

IV — Legal assessment

22. The parties agree that the conservation status of the European hamster in Alsace is not favourable. The number of documented hamster burrows has fallen considerably since at least 2000, and the territory in which hamsters are present has decreased significantly. The parties attribute the decline of the European hamster essentially to two factors: agricultural practices and urbanisation. The French measures address both factors, but the Commission takes the view that they do not satisfy Article 12(1)(d) of the Habitats Directive.

23. Under Article 12(1) of the Habitats Directive, the Member States are to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, that is to say, in particular for the European hamster. Under Article 12(1)(d), the protection system must, inter alia, prohibit deterioration or destruction of breeding sites or resting places.

24. The view might be taken that the imposition of a ban is sufficient for the purposes of implementing Article 12(1)(d). However, that is not what is at issue here. Rather, the Commission requires France to establish a programme of measures in favour of the European hamster. The Commission can find support for its approach in the case-law.

25. The Court has found that the transposition of Article 12-(1) of the Habitats Directive requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures. Consequently the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature. [12]

26. What the specific requirements in respect of urbanisation or agriculture are to be has not yet been made clear. However, they must be in line with Article 12(1)(d) of the Habitats Directive. Consequently the measures must be such as are necessary in order to

12 — Case C-183/05 *Commission* v *Ireland* [2007] ECR I-137, paragraph 29 et seq. See also judgment of 16 March 2006 in Case C-518/04 *Commission v Greece* (Milos viper), paragraph 16.

implement the prohibition of deterioration or destruction of breeding sites or resting places. There is particular uncertainty with regard to agricultural measures because it is not a question of typical bans on certain practices, but of encouraging certain forms of management of agricultural land.

27. I shall begin therefore by considering what measures for the protection of the European hamster are required by Article 12(1)(d) of the Habitats Directive (see A below); I shall then consider whether the French measures meet the requirements of that provision (see B below).

28. In doing so, I shall take into account the Guidance document on the protection of species under the Habitats Directive, which was drawn up by the Commission's Directorate-General for the Environment in consultation with the Member States. [13] Although that document – to which France refers on one point –is not binding, it contains useful guidance on the interpretation of the relevant provisions. [14]

A — *Interpretation of Article 12(1)(d) of the Habitats Directive*

29. The measures required by Article 12(1)(d) of the Habitats Directive must be inferred from the various elements of that provision, namely the object of protection: the breeding sites and resting places (see (1) below); the fact that the strict protection system necessitates certain prohibitions (see (2) below); and the prevention of deterioration or destruction of protected sites (see (3) below).

1. Breeding sites and resting places

30. The scope – particularly the territorial scope – of the protection conferred depends on the meaning of the two terms 'breeding sites and resting places'.

13 — *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC,* February 2007, available in English, French and German at http://circa.europa.eu/Public/irc/env/species_protection/home.

14 — Referred to in Case C-342/05 *Commission* v *Finland* [2007] ECR I-4713, paragraph 30 (Wolf hunting).

31. In relation to the hamster, breeding covers mating and giving birth to young, [15] but the rearing of young must also be included, [16] because the young contribute to the continued existence of the species only if they survive long enough to be able themselves to breed. Resting places are defined as the areas essential to sustain an animal or group of animals when they are not active. Resting places include structures created by animals to function as resting places. [17]

32. If the intention were to protect only the specific place where European hamsters breed or rest, such protection could be confined to their burrows. However, the protection of breeding sites and resting places cannot be construed so narrowly if the aims of the Habitats Directive are taken into account in the interpretation of those terms. [18]

33. In accordance with Article 2(1) and (2) of the Habitats Directive, the purpose of measures intended to transpose that directive is to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest. Under Article 1(i) of the Habitats Directive, the conservation status of a species is favourable when population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future.

34. The protection of breeding sites and resting places must ensure that they can contribute to the maintenance or restoration of a favourable conservation status for the species in question. The Commission describes this as aiming to safeguard their continuing ecological functionality. [19] Such sites and places should provide all that is required for a specific animal to rest or to breed successfully. [20] The French measure implementing Article 12(1)(d) of the Habitats Directive – that is Article 2(2) of the Regulation of 23 April 2007 – delimited the scope of protection in a very similar way.

15 — *Guidance document*, cited in footnote 13, p. 42, paragraph 57.

16 — Ibid., p. 42, paragraph 58.

17 — Ibid., p. 42, paragraph 59.

18 — Opinion of Advocate General Léger in Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, point 43 (*Caretta caretta*), and in Case C-183/05 *Commission* v *Ireland* [2007] ECR I-137, point 25.

19 — *Guidance document*, cited in footnote 13, p. 41, paragraph 53.

20 — Ibid., p. 41, paragraph 53.

35. That approach means that the variety of different ecological needs and strategies of protected species must be taken into account and that protection measures must reflect different prevailing conditions. [21]

36. The Commission's Guidance document thus correctly proposes a more comprehensive (wider) interpretation of breeding sites and resting places for species with small home ranges. Such species, which include the European hamster, can – unlike wide-ranging species – use isolated breeding sites and resting places lacking the necessary food sources in the immediate vicinity for temporary rest at most. If they were to stay there for longer, they would starve. Consequently the habitats in the immediate vicinity of the European hamster's burrow that are needed in order for the European hamster to survive and breed must also be included in the protection of breeding sites and resting places.

37. The requisite substance of protection measures also depends considerably on the conservation status of the species to be protected. If its conservation status is good, it may be sufficient to make general provision for the prohibitions laid down in Article 12(1) of the Habitats Directive and to monitor the species. An unfavourable conservation status gives rise to more far-reaching obligations for the Member States, however, because the system of protection is intended to help to restore a favourable conservation status. The protection of breeding sites and resting places of a species with a very unfavourable conservation status, as in the case of the European hamster in Alsace, therefore requires a generous delimitation of territory in order to prevent the species from disappearing, and thus the functionality of the sites from being lost. The protection measures must, so far as possible, be adjusted specifically to the circumstances giving rise to the unfavourable conservation status.

38. Such protection of the breeding sites and resting places of the European hamster, covering also its habitats surrounding the sites, conforms with the European Union's obligations under international law, to which the Habitats Directive is designed to give effect. Under Article 4 of and Appendix II to the Bern Convention, the appropriate and necessary legislative and administrative measures must be taken to ensure the conservation of the habitats of wild flora and fauna species, in particular those of the European hamster specified in Appendix II.

21 — Ibid., p. 41, paragraph 55.

39. Provisions of secondary European Union law must, so far as possible, be interpreted in a manner that is consistent with the obligations of the European Union under international law. [22] This applies in particular to the provisions of the Habitats Directive relating to the European hamster. These are intended to give effect so far as possible to the obligation to protect its habitats in accordance with Article 4 of the Bern Convention, although the European Union has expressly implemented that aspect of the Bern Convention only in relation to breeding sites and resting places, so far as the European hamster is concerned. [23]

40. Consequently the protection conferred by Article 12(1)(d) of the Habitats Directive on the European hamster's breeding sites and resting places in Alsace by means of coherent and coordinated preventive measures extends to its burrows and the surrounding habitats.

22 — Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52; Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20; Case C-286/02 *Bellio F. lli* [2004] ECR I-3465, paragraph 33; Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 35; and Case C-161/08 *International Verhuis- en Transportbedrijf Jan de Lely* [2009] ECR I-4075, paragraph 38.

23 — In the case of other species, the territorial protection under Articles 4 to 6 of the Habitats Directive is applicable, which expressly covers their other habitats.

2. The concept of prohibition

41. The necessary protective measures are limited by the fact that the strict protection system under Article 12(1) of the Habitats Directive must include certain prohibitions. Therefore the necessary measures need not relate to natural developments.

42. On the other hand, human behaviour is a suitable object of prohibition. The Court of Justice has already made it clear that measures under Article 12(1)(d) of the Habitats Directive are not confined to prohibitions in the true sense, but include measures for enforcing them [24] and the monitoring of the species. [25]

43. In the French Government's opinion, however, the Commission requires measures which go further than the prohibitions necessary under Article 12(1)(d) and their enforcement and monitoring. The French Government relies in that respect on the Guidance document referred to above, according to which that provision does not prescribe

24 — Case C-103/00 *Commission* v *Greece* [2002] I-1147, paragraph 32 et seq. (*Caretta caretta*).

25 — *Commission* v *Ireland*, cited in footnote 12, paragraph 32.

proactive habitat management measures such as the restoration or improvement of the habitats of certain species. [26]

44. That position is based essentially on the fact that such measures are associated mainly with territorial protection under Articles 4 to 6 of the Habitats Directive. [27] However, that does not altogether preclude proactive measures from also being included in the protection of species under Article 12(1). This applies particularly to species such as the European hamster for which no such protected areas are provided.

45. What is more important is the idea that prohibitions are of a defensive nature and therefore aim primarily to prevent the deterioration of an existing condition. However, prohibitions can also help to restore or improve habitats in so far as they enable positive natural developments to take place.

46. Furthermore, prohibitions for the protection of species can of course also influence habitat management. With regard to the protection of the European hamster, one could imagine, for example, a ban on deep ploughing in agriculture because that is likely to destroy its burrows. [28]

47. Finally, prohibitions can be formulated in such comprehensive terms that they practically amount to obligations if they permit only the behaviour that is specifically required. It would be inconsistent with the object of maintaining or restoring a favourable conservation status to exclude that method of controlling behaviour from the concept of a prohibition – and thereby from the system of strict protection – where the actual living conditions of the species in question necessitate corresponding measures.

3. The requisite measures against deterioration and destruction

48. The crucial question, therefore, is what forms of human behaviour must be prevented by means of the prohibition of deterioration or destruction of the breeding sites or resting places of the European hamster.

49. The criterion for that must likewise be the continuing ecological functionality of

26 — *Guidance document*, cited in footnote 13, p. 20, paragraph 61, p. 26, paragraph 10, p. 28, paragraph 19, and p. 40, paragraph 49.

27 — Ibid., p. 20.

28 — Kupfernagel, *Populationsdynamik und Habitatnutzung des Feldhamsters (Cricetus cricetus) in Südost-Niedersachsen*, Dissertation 2007, p. 82.

breeding sites and resting places. [29] Therefore, behaviour which impairs or eliminates that functionality must be regarded as deterioration or destruction.

50. On the other hand, measures in areas where there are no hamster burrows are not necessary. Measures of that kind are certainly sensible for the future repopulation of those habitats by the European hamster and, therefore, presumably also necessary for the restoration of a favourable conservation status for the species in Alsace generally. However, the measures required by Article 12(1)(d) of the Habitats Directive relate only to the breeding sites and resting places of existing populations. The Commission has not asserted, and it appears unlikely, that a favourable conservation status for those specific populations would require a particular form of management of land outside the vicinity of their burrows.

51. Contrary to its submissions in the reply, the Commission cannot claim, at least in the present proceedings, that there is an obligation to restore hamster populations that previously existed, on the ground that France may not have given sufficient protection to the European hamster in the past. It is true that, as early as 1994, a system of strict protection had to be introduced for the European hamster, and it is possible that past omissions may give rise to an obligation on the part of Member States to provide for restoration. [30] However, the Commission did not make a claim in respect of restoration in the prelitigation procedure or in the application, but only indirectly in the reply. That is an impermissible extension of the subject-matter of the proceedings. [31]

52. Finally, it must be observed that France correctly submits that Article 12(1)(d) of the Habitats Directive contains no obligation to achieve a particular result. The conservation status of different species depends on too many natural factors for a Member State to be able to guarantee particular population figures.

53. However, it is not sufficient for the competent authorities to 'make a serious attempt at' preventing deterioration or destruction of breeding sites and resting places, as France proposes with reference to a judgment concerning the second sentence of Article 4(4) of

29 — See point 33 et seq. above.

30 — See Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 82 et seq. regarding omissions in relation to a potential bird protection area. The case-law on the transfer of a Member State's own resources to the European Union points in the same direction: see Case C-239/06 *Commission* v *Italy* [2009] ECR I-11913, paragraph 56 et seq., and Case C-284/05 *Commission* v *Finland* [2009] ECR I-11705, paragraph 55 et seq.

31 — Case C-186/06 *Commission* v *Spain* [2007] ECR I-12093, paragraph 15 et seq. and the case-law cited.

the Wild Birds Directive,[32] which allows the Member States merely to 'strive' to take steps outside bird protection areas, whereas Article 12(1) of the Habitats Directive requires a system of strict protection. Such a system must in principle be capable of effectively preventing any deterioration or destruction of breeding sites and resting places which could be detrimental to the maintenance or restoration of a favourable conservation status.

54. Consequently, although changes in population figures cannot provide direct proof of an infringement of Article 12(1)(d) of the Habitats Directive, they may be relied upon as evidence of the effectiveness of the measures taken.

55. To sum up, therefore, Article 12(1)(d) of the Habitats Directive requires coherent and coordinated preventive measures which effectively prohibit human behaviour that would impair or eliminate altogether the ecological functionality of hamster burrows and the surrounding habitats as the European hamster's breeding sites and resting places.

B — *The French measures*

56. The French measures must be examined by reference to that principle. I shall consider agriculture first, and then urbanisation.

1. Agriculture

57. France has adopted measures in the 'priority action areas' (zones d'action prioritaire, 'PAAs') and in a larger area, the 'repopulation area'.

58. Within the PAAs the aim is to ensure, by means of contractual arrangements, the cultivation of 20 % standing cereals and 2 % lucerne. The PAAs are three areas of at least 600 hectares each (3 285 hectares in total), in

32 — Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 179.

each of which the aim is to achieve a population of 1 500 individuals.

59. In addition, the cultivation of lucerne and winter cereals is being encouraged in a larger area of 77 000 hectares, the repopulation area, which covers 49 % of the land historically used by the European hamster and which is suitable for future stocks. Here again, the aim is to grow 20 % cereals and 2 % lucerne in the areas where hamsters occur.

60. The Commission objects to the scope and quality of those measures.

61. However, they are to be assessed by reference to the yardstick of Article 12(1)(d) of the Habitats Directive only if they are necessary in order effectively to prohibit human behaviour that would impair or eliminate altogether the ecological functionality of hamster burrows and the surrounding habitats as the European hamster's breeding sites and resting places.

62. The serious decline in the hamster population in Alsace in the past shows that the species cannot survive without additional protection measures. The parties agree that agricultural practices, in particular the cultivation of maize, are significant factors. It is also common ground that the European hamster cannot survive unless the agricultural use of its habitats is favourable.

63. Consequently, it must be assumed that the continuing ecological functionality of European hamster burrows can be ensured only if the surrounding agricultural land is used in a way that is favourable to the European hamster. It follows that statutory measures must be formulated so as to prohibit, in respect of that land, all uses detrimental to the European hamster.

64. It is true that France has not enacted such prohibitions, but has tried to bring about the appropriate land use by means of measures to promote it. However, that is just another way of controlling human behaviour as required by Article 12(1)(d) of the Habitats Directive. France has infringed that provision only if that other way is not sufficiently effective.

65. The Commission's complaint mainly concerns the extent of appropriately cultivated land as compared with the European hamster's range in the past. That complaint is, at least in part, well founded.

66. At the relevant time (2008) only 60 % of the areas populated by European hamsters were subject to agro-environmental measures in the PAAs and the repopulation area. [33] The remaining 40 % were therefore not subject to the measures which, in the opinion of the French Government, are necessary in order to ensure the continued use of breeding sites and resting places.

67. It is true that the missing land was included in subsequent years up to 2011, but that is not relevant for the purposes of the present action. The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion. [34]

68. The Commission also rightly criticises the fact that the agricultural measures are confined to the PAAs and the repopulation area. Although the latter corresponds to the area in which the European hamster occurred in 2000, this does not preclude the possibility that the European hamster may dig burrows in other areas which need protection against interference from agriculture. Those places may also lie in the remainder of the hamster's historical range where, according to the French Government, one burrow was found in 2008 at least. [35]

69. Contrary to the Commission's view, that does not mean that France has to implement the agricultural measures throughout the European hamster's entire historical range. On the assumption that there is proper monitoring of changes in stocks, it would be sufficient if those measures were implemented at the sites of known hamster burrows. Where there are no burrows, no measures are required by Article 12(1)(d) of the Habitats Directive.

70. Consequently France has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive inasmuch as the agro-environmental measures taken in favour of the European hamster cover only 60 % of the land populated by that species and are not applied to populations outside the PAAs and the repopulation area.

33 — See the French Government's statement of 7 April 2009, Annex 7 to the application, p. 98.

34 — Judgment of 25 July 2008 in Case C-504/06 *Commission* v *Italy*, paragraph 24; Case C-241/08 *Commission* v *France* [2010] ECR I-1697, paragraph 59; and Case C-458/08 *Commission* v *Portugal* [2010] ECR I-11599, paragraph 81.

35 — According to the statement of 7 August 2008, in that year 643 European hamster burrows were found in the whole of its historical range, of which only 642 were in the repopulation area; see Annex 6 to the application, p. 91 et seq.

71. It is also doubtful whether the French measures as such are sufficiently effective.

72. Because of the European hamster's poor conservation status, the French authorities assume that existing stocks are too small to continue to exist in the long term. They state that only populations of at least 1 500 individuals are viable in the long term in a single settled area. The three PAAs are to be managed in such a way that each of them can support a population of that size in the future.

73. However, between 2007 and 2010 the French measures did not achieve their target in the PAAs.

74. In the first two years there were, in total, 230 and 231 burrows in the PAAs, and in 2009 only 161, while in 2010 the figure rose to 298. Each burrow corresponds to one animal. If this trend continues, it may be hoped that the hamster stock will once again reach a viable size in the long term. In that case the French measures would possibly be sufficient.

75. However, closer examination of the figures shows that the positive trend is concentrated in only a few areas where it appears that particularly favourable conditions for the European hamster predominate. Those are the municipality of Geispolsheim, in particular the water protection area, [36] and the Agricultural College of Obernai. [37] At those two locations there were 267 burrows in total at the last count, some of which were evidently outside the PAAs. On the other hand, populations in other areas are unchanged or continue to decline.

76. In addition to the PAAs, changes in stocks are being recorded in the 'main areas'. In these there were 1 167 burrows in 2001, a figure which had fallen to 174 by 2007. In the subsequent years the numbers recovered slightly to 209, then 244 and most recently 261 burrows. However, this trend is also significantly influenced by the exceptional areas in Geispolsheim and Obernai.

36 — In the *Plan de conservation 2007 – 2011 pour le Hamster commun (Cricetus cricetus) en Alsace, Bilan de comptages 2009*, p. 121 et seq., this area is named as an example of a positive development in the suitable cultivation of land in the longer term.

37 — *Plan de conservation 2007 – 2011 pour le Hamster commun (Cricetus cricetus) en Alsace, Bilan de comptages 2009*, p. 117 of the application, and the French Government notice in respect of the 2010 figures. That institution evidently plays an important part in various elements of the action programme in favour of the European hamster: see the *Plan d'action pour le Hamster commun (Cricetus cricetus) en Alsace*, Vol. 1, 2007 – 2011, pp. 8, 21, 47 and 53 (measures A2-5 and A2-8).

77. It must be concluded from this that the French cultivation strategy of 20% standing cereals and 2% lucerne is not sufficient to achieve a favourable conservation status for the European hamster in Alsace. Additional elements are necessary, such as those which it appears are to be found in Geispolsheim and Obernai.

78. That conclusion is supported by the document in which the French Government sets out the basis of its strategy. It is based on trials which showed that where 20% to 30% standing cereals and 2% to 4% lucerne were grown on arable land, the number of European hamster burrows had increased. [38] However, the target of 20% standing cereals and 2% lucerne remains at the lower end of that range. Furthermore, in those trials only three areas with those crop ratios were compared with nine other areas in which hardly any lucerne at all and considerably fewer standing cereals were grown.

79. Other measures, such as herbal field boundaries or leaving cereal strips unharvested, [39] were apparently not considered.

80. Admittedly the French Government correctly pointed out at the hearing that hamsters should not be maintained in small, artificial protected areas, but in agricultural areas that are actually used. Nevertheless, the poor conservation status of the hamster may – temporarily – require particularly strong protection for the species, until sufficiently large populations exist once again.

81. France takes the view that the aim of creating viable populations in the long term does not follow from Article 12(1)(d) of the Habitats Directive, but goes further than that provision.

82. However, the continuing ecological functionality of the European hamster's breeding sites and resting places sought by the Habitats Directive [40] presupposes that hamster populations are viable in the long term. Consequently the protection of those sites must be designed to maintain or restore viable populations.

83. If the conservation status of a species is unfavourable only because it is exposed to certain threats, it may be sufficient to protect its stocks against those factors. However, if, as in the present case, the populations of the species are so small that they may die out

38 — Annex 4 to the defence.

39 — See the list of possible measures in the Draft European Action Plan for the conservation of the Common hamster, cited in footnote 8, p. 24.

40 — See point 33 et seq. above.

because of natural fluctuations in numbers, an effective system of protection must aim to achieve a sufficient increase in stocks.

84. Therefore the protection of breeding sites and resting places must be such as to ensure the long-term survival of the species in the territory in question. That means in particular that where hamster populations are too small, habitats in the vicinity of their burrows must be managed in such a way that hamster stocks recover sufficiently.

85. Contrary to the opinion of the French Republic, that is not called into question by Article 2(3) of the Habitats Directive either, which states that measures taken pursuant to that directive are to take account of economic, social and cultural requirements and regional and local characteristics. Consequently those requirements must be taken into consideration in the development of protective measures. However, the aim of a favourable conservation status is not called into question by Article 2(3). Therefore measures for the protection of strictly protected species must, notwithstanding that consideration, be sufficient to maintain or restore a favourable conservation status. That is not the case here.

86. Finally, the Commission complains that the European hamster is also affected by the failure to comply with the requirements of the Nitrates Directive. [41] The Commission's complaint is based on an official French document concerning the protection of the European hamster, [42] which promotes good agricultural practices and, in particular, compliance with the Nitrates Directive. Most importantly, winter greening should be provided for in sensitive areas.

87. However, it is clear that the present proceedings do not relate to an infringement of the Nitrates Directive. Furthermore, neither the Commission's submissions nor the document which it has produced show why compliance with that directive or winter greening are necessary for the protection of the European hamster's breeding sites and resting places. Therefore, the Commission cannot succeed on that point.

88. However, it must be found that France has also failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive inasmuch as the agro-environmental measures taken in favour of the European hamster are

41 — Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1).

42 — Balland, *Définition et gestion du milieu particulier du grand hamster d'Alsace*, 14 February 2008, IGE/08/001, p. 5 et seq.

not sufficient to enable viable populations to develop in the long term.

C — *Measures relating to urbanisation*

89. European hamster burrows and the surrounding habitats must also be protected by measures relating to urbanisation. The assessment of urbanisation factors is less complex than that of agricultural measures because the European hamster is not dependent on particular measures relating to urbanisation in order to survive. Therefore it is sufficient to ensure that the land in question is not affected by urbanisation. [43] The French Government refers to various measures in that connection:

— the general statutory provisions for the protection of the European hamster,

— in the PAAs, totalling 3 285 hectares, land use may not be changed, except in relation to agriculture, [44]

— in the repopulation area of 77 000 hectares, that is 49 % of the land used by the European hamster in the past, it must be proved that projects involving more than one hectare do not affect the European hamster, [45]

— in the European hamster's historical range of 139 000 hectares, that is 89 % of the land used by the European hamster in the past, new planning measures in 301 municipalities must take account of the European hamster, [46]

— monitoring changes in European hamster stocks, and

— public information.

90. The Commission does not object to the general statutory provisions for the protection of the European hamster. Although the Commission fears that exceptions are allowed without adequate offsetting measures, it does not object to the relevant provision, Article L.411-2 of the French Code de l'environnement (Environment Code). It must therefore be presumed that those provisions lay down the prohibitions necessary to forbid deterioration or destruction of breeding sites

43 — The Commission does not object to the mere isolation of habitats and populations as a result of measures relating to urbanisation, particularly infrastructure projects. Consequently it is unnecessary to decide here whether that form of interference would conflict with the protection of breeding sites and resting places.

44 — Defence, paragraph 62.

45 — Defence, paragraphs 63 and 152.

46 — Defence, paragraph 68

and resting places of the European hamster by measures relating to urbanisation.

91. However, these prohibitions can be effective only if, when decisions on measures relating to urbanisation are taken, it is known whether breeding sites or resting places of the European hamster are affected. This is ensured in particular by means of specific requirements relating to planning by municipalities and to the approval of certain projects.

92. According to French figures, which are not disputed, 301 municipalities, covering 89% of the historical range of the European hamster, must provide for a study on the European hamster when renewing their town planning documentation ('*document de planification de l'urbanisme*'). In those planning documents municipalities must encourage the economical use of land and conserve land which is favourable for the species.

93. That procedure may in particular lead to development being prohibited altogether on certain sites, for the protection of the European hamster. That has apparently happened above all in the very limited PAAs, but also in other areas.

94. In the repopulation area, which covers a large part of the hamster's historical range, there are in addition obligations to carry out a special study in the case of projects involving an area of more than one hectare. This means that in the case of such projects, no reliance can be placed on the fact that a planning measure contains no reference to the presence of hamsters; before permission is granted, it is necessary to establish whether European hamster burrows would be affected.

95. In the Commission's opinion, that does not amount to a system of strict protection, particularly because the areas where no development is allowed and the PAAs, taken together, are too small. However, the Commission overlooks the fact that the aforementioned obligations regarding a study in conjunction with the statutory provisions may, in principle, prevent deterioration and destruction of hamster burrows in the areas covered. If such studies are carried out carefully and objectively, it should be known where burrows occur or might exist and therefore where special caution is needed.

96. Areas which are only potentially usable by the European hamster do not need special protection under Article 12(1)(d) of the Habitats Directive, as has already been stated above. [47] Consequently, it is not necessary for

47 — See point 50 above.

development to be prohibited in respect of such areas.

97. The Commission also complains that no enquiries have to be made in relation to smaller projects.

98. That objection is particularly important with regard to land which was developed in the past without an investigation of the effect on European hamsters, if any. It is possible, moreover, for a site to be populated by European hamsters between the planning and construction stages, and consequently for burrows to be found there. However, outside the repopulation area even the larger projects do not require any special investigation.

99. Nevertheless, public information provided by the competent authorities and the monitoring of changes in the hamster population can help to lead to the discovery of burrows on such sites in sufficient time to prevent their deterioration or destruction. Public information draws attention to the risks to hamsters, and the monitoring of their numbers can lead to the early discovery of their presence. However, as soon as their presence is established, the statutory protective measures to which the Commission has not objected should prevent the deterioration of their burrows and the surrounding habitats as a result of building work.

100. In principle, that system of protection against deterioration in connection with urbanisation appears to be adequate. However, it was still incomplete when the deadline of 6 August 2008 specified in the reasoned opinion expired. On 7 August 2008 the French Government gave notice that one PAA had still not been recognised and no decision had been reached regarding the requirements for projects in the repopulation area and planning by municipalities in the hamster's historical range. [48]

101. Without those measures there was no guarantee that the statutory provisions for the protection of the European hamster would be systematically implemented. However, systematic implementation is necessary in view of the European hamster's poor conservation status.

102. Therefore France has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive inasmuch as the coherent and coordinated measures of a preventive nature for the protection of the European hamster against the adverse effects of urbanisation projects were still incomplete at the material time.

48 — Annex 6 to the application, page 91.

V — Costs

103. 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 essentially been successful, France must be ordered to pay the costs.

VI — Conclusion

104. I therefore propose that the Court should:

'1. Declare that the French Republic has failed to fulfil its obligations under Article 12(1)(d) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora inasmuch as:

— the agro-environmental measures taken in favour of the European hamster (*Cricetus cricetus*) cover only 60 % of the land populated by that species and are not applied to populations outside the priority action areas or the repopulation area;

— the agro-environmental measures taken in favour of the European hamster are not sufficient to enable viable populations to develop in the long term; and

— the coherent and coordinated measures of a preventive nature for the protection of the European hamster against the adverse effects of urbanisation projects were still incomplete at the material time;

2. Order the French Republic to pay the costs.'