# OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 14 September 2006 [1]

## I — Introduction

1. By these proceedings the Commission is bringing an action against another Member State on account of the inadequacy of areas classified as special protection areas for birds ('SPAs') in accordance with Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [2] ('the Birds Directive'). The Court has already delivered judgment against the Netherlands, [3] France, [4] Finland [5] and Italy [6] for similar infringements. Proceedings are also pending against Greece [7] and Spain. [8] The Commission is preparing another case against Portugal. [9]

2. The central issue in each of these cases is the evidence that the relevant Member State has not yet classified as special protection areas all areas requiring classification as such. In the present case the Commission bases its claim on the data on Ireland contained in a list of important bird areas in Europe which was published in the year 2000 by the non-governmental organisation BirdLife International, an international umbrella organisation for national organisations for the protection of birds ('IBA 2000'; IBA stands for Important Bird Area or Important Bird Areas). [10]

1 — Original language: German.

2 — OJ 1979 L 103, p. 1.

3 — Case C-3/96 [1998] ECR I-3031.

4 — Case C-202/01 [2002] ECR I-11019.

5 — Case C-240/00 [2003] ECR I-2187.

6 — Case C-378/01 [2003] ECR I-2857.

7 — See my Opinion delivered today in Case C-334/04.

8 — See my Opinion delivered today in Case C-235/04.

9 — Commission press release IP/05/45 of 14 January 2005.

10 — Heath, M.F. and M.I. Evans, *Important Bird Areas in Europe. Priority sites for conservation. Volume 2: Southern Europe*, BirdLife Conservation Series No 8, Volume II, Cambridge (2000), p. 261 et seq.

3. In the present case the Commission raises, in addition, further complaints in respect of the protection of SPAs. It claims that Ireland has failed correctly to transpose important protection provisions of the Birds Directive and of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [11] ('the Habitats Directive') or applied them erroneously in practice.

## II — Pre-litigation procedure and forms of order sought

4. The Commission's application is based on various pre-litigation procedures which the Commission initiated by invitations to submit observations pursuant to Article 226 EC (letters of formal notice) in 1998, 2000 and 2001. These were followed by a reasoned opinion in 2001 and two further reasoned opinions sent on 11 July 2003. The latter two reasoned opinions summarised all the complaints which became the subject-matter of the application. The Commission set Ireland a final period of two months within which to put an end to the alleged infringements of Community law. Ireland acknowledges that this period expired on 11 September 2003. [12]

5. The Commission was not satisfied by Ireland's further responses and therefore brought the present action on 29 September 2004. It claims that the Court should:

(1) declare that Ireland, by failing

(a) to classify, since 1981, in accordance with Article 4(1) and (2) of Directive 79/409/EEC on the conservation of wild birds, all the most suitable territories in number and size for the species listed in Annex I to Directive 79/409 as well as regularly occurring migratory species;

(b) to establish, since 1981, in accordance with Article 4(1) and (2) of Directive 79/409, the necessary legal protection regime for these territories;

(c) to ensure that, since 1981, the provisions of Article 4(4), first sentence, are applied to areas requiring classification as special protection areas under Directive 79/409;

(d) to fully and correctly transpose and apply the requirements of the second sentence of Article 4(4) of Directive 79/409;

11 — OJ 1992 L 206, p. 7.

12 — Paragraph 91 of the statement in defence.

(e) in respect of classified special protection areas under Directive 79/409, to take all the measures necessary to comply with the provisions of Article 6(2), (3) and (4) of Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna, and, in respect of recreational use of all sites intended to be subject to Article 6(2) of Directive 92/43, to take all the necessary measures to comply with the provisions of the said Article 6(2);

(f) to take all the measures necessary to comply with Article 10 of Directive 79/409,

has failed to comply with its obligations under those Articles of the said Directives; and

(2) order Ireland to pay the costs.

6. Ireland contends that the Court should:

(1) reject the forms of order sought by the Commission or, in the alternative, limit any declaration to the specific subject-matter in relation to which the Court finds that Ireland has infringed Community law;

(2) order the parties to pay their own costs.

7. The Kingdom of Spain and the Hellenic Republic have intervened in these proceedings in support of Ireland.

## III — Application

8. The individual forms of order sought shall be considered below in turn. The legal background will be set out alongside the relevant complaints made by the Commission.

### A — *First head of complaint — inadequate classification of SPAs*

9. By its first head of complaint the Commission complains that Ireland has failed to classify as SPAs adequate territories in

number and size to protect birds listed in Annex I and migratory birds not listed therein.

Legal background

10. Article 4(1) and (2) of the Birds Directive determines which areas Member States are to classify as SPAs, while Article 4(3) governs the information on classification to be sent to the Commission:

'(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.

(3) Member States shall send the Commission all relevant information so that it may take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 above form a coherent whole which meets the protection requirements of these species in the geographical sea and land area where this Directive applies.'

11. The ninth recital in the preamble to the Birds Directive explains this rule:

'... 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'.

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12. The Commission's complaint regarding inadequacy of areas classified can be divided into three parts. Firstly, Ireland failed to classify as SPAs many of the areas mentioned in IBA 2000, and the areas classified as SPAs are often too small since they do not tally with the data on area size contained in IBA 2000. Secondly, Ireland is obliged, in respect of specific species, to classify further SPAs which are not referred to in IBA 2000. Thirdly, the Commission and Ireland are in dispute as to whether specific individual areas and sub-areas should be classified as SPAs.

13. According to established 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. [13] They are the areas which appear to be the most suitable for conservation of the species in question sldjf alköjs fdlasöfdjölk jsöl. [14] As Ireland rightly points out, and the Commission does not dispute, an area's mere suitability for conservation of particular species is not sufficient to impose an obligation to classify it as an SPA.

14. Although Member States do have a certain margin of discretion with regard to the choice of special protection areas, a

13 — *Italy* (cited in footnote 6, paragraph 14), and Case C-355/90 *Commission* v *Spain* (*Santoña Marshes*) [1993] ECR I-4221, paragraphs 26, 27 and 32.

14 — *Commission* v *Netherlands* (cited in footnote 3, paragraph 62).

decision on the classification and delimitation of those areas must nevertheless be made solely on the basis of the ornithological criteria determined by the directive. Other considerations, particularly those of an economic or social nature, may play no role in the classification of the area. [15] Nor can this obligation to classify areas as SPAs be avoided by adopting other special conservation measures. [16]

1. IBA 2000

15. The Commission takes the view that the IBA 2000 list sets out at least some of the areas most suitable for the conservation of the relevant species within the meaning of Article 4(1) and (2) of the Birds Directive. Since Ireland has not even classified many IBAs as SPAs and many other SPAs within IBAs do not cover the entire territory of the relevant IBA, it is demonstrated that Ireland has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive.

16. Consequently, the success of the application in terms of both these points turns on whether the difference between IBA 2000 and the Irish classifications demonstrates that Ireland has failed adequately to meet its obligation to classify areas as SPAs.

17. An inventory of areas such as IBA 2000 can provide substantial evidence that a Member State has failed adequately to meet its obligation to classify areas as SPAs. The Court held that in view of the scientific value of IBA 89, and of the absence of any scientific evidence to show that the obligations flowing from Article 4(1) and (2) of the Directive could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area, that inventory, although not legally binding on the Member State concerned, can be used by the Court as a basis of reference for assessing whether that Member State has classified a sufficient number and area of territories as SPAs for the purposes of the abovementioned provisions of the Directive. [17]

18. IBA 89 is an inventory, submitted in 1989, of areas which are of great importance for the conservation of wild birds in the

15 — *Santoña Marshes* (cited in footnote 13, paragraph 26); Case C-44/95 *Royal Society for the Protection of Birds* (*Lappel Bank*) [1996] ECR I-3805, paragraph 26; and *Commission* v *Netherlands* (cited in footnote 3, paragraph 59 et seq.).

16 — *Commission* v *Netherlands* (cited in footnote 3, paragraph 55 et seq.).

17 — *Commission* v *Netherlands* (cited in footnote 3, paragraphs 68 to 70) and *Commission* v *Italy* (cited in footnote 6, paragraph 18).

Community. That inventory was prepared for the competent directorate-general of the Commission by the Eurogroup for the Conservation of Birds and Habitats in conjunction with the International Council of Bird Preservation and in cooperation with Commission experts. [18]

19. IBA 2000 is a more recent inventory. In particular, in relation to Ireland it lists 48 new areas compared with IBA 89. Whether the new inventory is suitable as evidence in the abovementioned sense depends on whether or not it is of a scientific quality comparable to that of its predecessor.

20. 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. [19] The increase in the number and territory of the areas stems essentially from better knowledge of the presence of birds.

21. The Commission's involvement in IBA 89 consisted almost exclusively in monitoring the ornithologists' work on the criteria. Since for the most part the criteria continue to be applied, the Commission is, at least indirectly, responsible in this respect also for IBA 2000. On the other hand, the Commission was hardly able to monitor the collection of data in the case of IBA 89 since it could not verify the existence and extent of each individual bird presence indicated. Consequently, in this regard too there is no significant difference between IBA 89 and IBA 2000.

22. The Kingdom of Spain, which is intervening in support of Ireland, objects to the fact that IBA 2000 was drawn up by non-governmental organisations. This is true, but it does not undermine the scientific quality of it. [20] It was published by BirdLife International, an association of national organisations for the protection of birds, which was involved in 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 this Council. Consequently, BirdLife provides continuity in respect of the work on the area inventories.

18 — *Commission* v *Netherlands* (cited in footnote 3, paragraph 68).

19 — For further details see my Opinion delivered today in Case C-235/04 *Commission* v *Spain*, point 70 et seq.

20 — For further details in this respect, and in particular in respect of the Spanish part of IBA 2000, see my Opinion delivered today in Case C-235/04 *Commission* v *Spain*, point 47 et seq.

23. Irish national authorities too were involved in addition to various ornithologists in the collection of data for the Irish part of IBA 2000. [21]

24. However, as Ireland points out, the Commission itself questions the quality of IBA 2000 since it requests Ireland to classify areas which are not listed in the inventory. However, this argument is not based on the consideration that IBA 2000 refers to areas that are not the most suitable. Rather, the Commission takes the view that IBA 2000 is clearly incomplete in respect of specific species and habitats in Ireland.

25. This lack of completeness does not undermine the probative value of IBA 2000. To do that it would be necessary to present scientific knowledge showing that the areas identified by IBA 2000 were not most suitable. [22] Moreover, a comparison of IBA 89 and IBA 2000 shows that increasing scientific knowledge is leading to the completion of such inventories. Consequently, the probative value of IBA 89 recognised by the Court is placed in question at most in so far as more recent inventories no longer list certain areas which were referred to in IBA 89. The same must apply to IBA 2000.

26. Therefore, the IBA 89 and IBA 2000 inventories are comparable in terms of their scientific quality. Since it is based on more up-to-date data, IBA 2000 constitutes the better scientific source and therefore deserves to be given preference.

27. However, at the hearing Ireland took the view that the most suitable areas cannot be selected from the point of view of the individual Member State, but had instead to take account of the Community as a whole. As regards many species present in Ireland there are very much more suitable areas in other Member States. Therefore, in respect of certain species there is no need to classify areas in Ireland.

28. Support for this view would appear to be found in the fourth subparagraph of Article 4(1) of the Birds Directive. Under that subparagraph, account is to be taken of the protection requirements of the species listed in Annex I in the geographical sea and land area where the directive applies. That area is the Community.

21 — IBA 2000, Volume 1, p. 374.

22 — *Commission* v *Netherlands* (cited in footnote 3, paragraph 69) and *Commission* v *Italy* (cited in footnote 6, paragraph 18).

29. Most of the selection criteria for IBA 2000 take account of these arguments since they do not require a comparison within the relevant Member State. [23] The situation is different in the case of criterion C.6. According to that criterion, the five most important areas for species listed in Annex I in the relevant European region are to be regarded as the most important bird area (the so-called 'top five criterion'). [24] In respect of Ireland, the entire territory of the country was regarded as a European region. [25] If Ireland's view were to be endorsed, the top five criterion would have to be rejected since it is not based on a comparison of the entire territory of the EU.

30. However, Ireland fails to appreciate that under Article 4(1) of the Birds Directive, as interpreted by the Court, if species listed in Annex I occur on the territory of a Member State, it is obliged to define inter alia SPAs for (all of) them. [26]

31. It is precisely species coming under Annex I that require special protection in the Community for the reasons set out in the second subparagraph of Article 4(1) of the Birds Directive, that is to say, because they are rare, in danger of extinction, vulnerable to specific changes in their habitat or because they require particular attention for other reasons. In accordance with the first subparagraph of Article 4(1) the Commission takes account of the European dimension when selecting these species.

32. 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 concerned.

33. The importance of geographic distribution is demonstrated by the definition of the conservation status of species in Article 1(i) of the Habitats Directive. Under that provision, conservation status means the sum of the influences acting on the species concerned that may affect the long-term *distribution* and abundance of its populations. Although this definition is not directly applicable to the Birds Directive, it does illustrate the scientific consensus which must also have a crucial bearing on the selection of areas under the Birds Directive, which requires justification on ornithological grounds.

23 — These criteria are set out in IBA 2000, Volume 1, p. 13 et seq. and p. 850 et seq., and are compared with the criteria used in relation to the new inventories.

24 — Criterion C.6 was not referred to specifically in the list of criteria for IBA 89 but was referred to specifically in the explanatory notes thereto. See Annex 7, p. 2, to the application in Case C-3/96 *Commission* v *Netherlands* and Annex 16 to the application in Case C-378/01 *Commission* v *Italy*. Accordingly, this criterion was developed and applied in connection with the CORINE biotope project.

25 — IBA 2000, Volume 1, p. 374.

26 — *Commission* v *Netherlands* (cited in footnote 3, paragraph 56).

34. The importance of geographical distribution to the Birds Directive is demonstrated by Article 4(3). Under that provision, the Commission is to take initiatives to ensure that the areas classified as SPAs by the Member States form a coherent whole which meets the protection requirements of the species in the geographical sea and land area where the Birds Directive applies. A coherent network can be achieved only if *all* Member States classify as SPAs the most suitable areas for the Annex I species which occur in their territory. [27] Otherwise, the SPAs for many species would be concentrated in particular regions of the Community and there would be no SPAs in the peripheral areas where those species occur.

35. Consequently, the necessary European dimension does not undermine criterion C.6 which underlies the IBA 2000 inventory in conjunction with other criteria.

36. Ireland also attempts to cast doubt on the probative value of the IBA inventory in relation to the corncrake (*Crex crex*). It claims that, according to the latest knowledge, this species need no longer be regarded as being in danger internationally and the habitats suitable for it in Ireland are instead on the increase as a result of changes in agricultural use. Furthermore, Ireland is pursuing a different protection policy in relation to the corncrake. Finally, the presence of the corncrake outside the SPAs has yet to stabilise sufficiently and is therefore impossible to predict. Consequently, the Commission's requests for the classification of areas as SPAs go too far.

37. The altered classification of the corncrake on the basis of new knowledge about its presence in Eastern Europe and Russia is correct. [28] Such developments can in principle remove the basis for area inventories relating to the relevant species. However, the present classification 'near threatened' also satisfies, in exactly the same way as the previous classification 'vulnerable', the requirements for the identification of IBAs in accordance with criterion C.1. [29] Nor is the situation altered in any way as regards the application of the top five criterion (C.6). Consequently, the areas identified by IBA 2000 are not called into question.

38. Furthermore, the Commission submits — without challenge by Ireland — a study by the Irish bird protection organisation BirdWatch Ireland of April 2002. This study proposes four new SPAs for the corncrake,

27 — See *Commission* v *Netherlands* (cited in footnote 3, paragraph 58).

28 — See BirdLife International, *Birds in Europe: population estimates, trends and conservation status* (2004), http://www.birdlife.org/datazone/species/BirdsInEurope11/BiE2004Sp2878.pdf.

29 — IBA 2000, Volume 1, pp. 18 and 13.

setting out comprehensive scientific grounds therefor. Consequently, additional areas must also be classified as SPAs in relation to the corncrake.

39. As Ireland presents no further arguments to challenge the probative value of the IBA 2000 inventory, it was unable to call it into question. The difference between the Irish classification of areas and IBA 2000 thus demonstrates that Ireland has failed to fulfil its obligations under Article 4(1) and (2).

40. However, Ireland submits that in respect of various areas and species studies have been carried out, or are in preparation, which should make it possible to identify the areas most suitable for the conservation of these species and subsequently to classify them as SPAs. Greece supports these arguments and requests that the Member States be granted an adequate period within which to examine new scientific findings, such as IBA 2000, and to classify SPAs on that basis.

41. These arguments are based on a correct consideration, namely that the Member States bear sole responsibility for the classification of SPAs. They cannot relinquish their responsibility by simply adopting and implementing the findings of other bodies, including those of organisations for the protection of birds. Rather, for an area to be classified it must number among the most suitable areas for the protection of birds, as viewed by the competent authorities on the basis of the best available scientific facts. [30]

42. However, it does not follow that the obligation to classify does not apply in general where the competent authorities have failed fully to examine and verify new scientific findings. Rather, it should be recalled that the obligation to classify has existed since the expiry of the period for transposing the Birds Directive, that is to say, since 6 April 1981 in the case of Ireland. Moreover, the obligation to classify is not limited by the state of scientific knowledge at any given time. [31]

43. This obligation included a further requirement, namely to identify the most suitable areas. Therefore, Article 10 of the Birds Directive, in conjunction with Annex V thereto, calls on the Member States to support the necessary research and work. Consequently, by 1981 Ireland ought itself to have carried out a comprehensive scientific

30 — See Case C-157/89 *Commission* v *Italy* (*hunting periods*) [1991] ECR I-57, paragraph 15, and Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 27.

31 — Case C-209/04 *Commission* v *Austria* (*Lauteracher Ried*) [2006] ECR I-2755, paragraph 44.

survey of the presence of birds in its territory and classified the resulting areas as SPAs. Had it fulfilled this obligation in full, either IBA 2000 would contain only SPAs or Ireland would easily be able to reject any further calls for the classification of areas as SPAs.

44. Further requirements to classify can arise only if the presence of birds alters. In the present case this is claimed to have occurred only in respect of the corncrake. However, the new presence thereof was already known when the relevant period in this case expired on 11 September 2003. [32]

45. To grant Ireland now a further period within which to examine the best available scientific source would be tantamount to attaching to the classification of areas as SPAs a condition which is not laid down in Article 4 of the Birds Directive, namely the furnishing of proof by third parties that there are still unprotected areas which should be classified. However, such a condition would run counter not only to the wording of the provisions but also to the objectives of the Birds Directive and the responsibility, laid down therein, of the Member States — and not third parties — for the common (natural) heritage in their territory. [33] Therefore, the need to examine IBA 2000 cannot justify the failure to classify areas as SPAs.

46. With reference to IBA 2000 the Commission also levels at Ireland the complaint that many of the areas classified as SPAs are too small. It claims that Ireland has excluded significant parts. Ireland does not contradict this complaint but merely refers to ongoing processes to adjust the boundaries of the SPAs. This submission does not refute the Commission's complaint. In principle Ireland should have classified all SPAs in full and carried out the necessary bird surveys in 1981. Surveys which are now necessary and administrative processes to classify the missing areas in no way alter the fact that Ireland failed to fulfil this obligation before the expiry of the period laid down in the most recent reasoned opinion. Consequently, in this regard too Ireland must be condemned in the terms sought in the application.

47. The Commission's claim is therefore successful in so far as it is based on the difference between the Irish classifications of areas and IBA 2000.

32 — See point 4 above.

33 — See Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 39, and Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53.

2. Areas not referred to in IBA 2000

48. The Commission, however, also directs at Ireland the complaint that IBA 2000 is clearly incomplete in respect of certain species and habitats and therefore Ireland must classify as SPAs even areas which are not referred to therein.

49. The possibility that obligations exist in relation to such areas cannot be ruled out. [34] However, for that to be the case the Commission must at least demonstrate in a substantiated manner the reasons why further areas are necessary. It is evident from the application, in conjunction with the first reasoned opinion sent on 24 October 2001, that in relation to 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*) and the kingfisher (*Alcedo athis*) the Commission essentially pleads that the habitats of these species are underrepresented in Ireland's SPAs. There are also certain surveys which make it possible to identify areas for the conservation of these species.

50. Ireland states that surveys relating to the golden plover, the red-throated diver, the hen harrier, the merlin and the peregrine falcon have now been presented which make it possible to identify the most suitable areas. Thus, Ireland acknowledges that further SPAs are necessary for these species either by classifying new areas or by including these species in the protection objectives for existing areas.

51. However, Ireland rejects the suggestion of classifying areas as SPAs for the kingfisher. This species is widespread in rather low densities and therefore unsuitable for the classification of areas as SPAs. In this respect Ireland relies on surveys of breeding birds dating from 1988 to 1991. The current population level is unknown, but an Irish organisation for the protection of birds is planning a survey. When it identifies specific most suitable areas, classifications of particular areas can then be considered.

52. None the less, it follows 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 in particular to define SPAs for them. [35] Accordingly, specific species listed in Annex I cannot be excluded completely from SPAs.

34 — See *Lauteracher Ried* (cited in footnote 31, paragraph 44). In that judgment the Court held that certain areas had to be classified as SPAs even though they did not appear in the IBA inventory relevant to Austria.

35 — *Commission* v *Netherlands* (cited in footnote 3, paragraph 56).

53. On the contrary, in relation to the species which occur in rather low densities too the most suitable areas must be identified and classified as SPAs. In the case of widespread species it may be necessary to identify centres of density. The fact that this is possible also in the case of the kingfisher is demonstrated by the surveys presented by Ireland which contain a map showing clear kingfisher concentrations in Ireland. [36]

54. The identification and demarcation of SPAs on the basis of such concentrations may initially require further surveys of the presence of the species. However, as demonstrated above, such gaps in research cannot justify the failure to classify areas since the Member State concerned should have carried out all the necessary surveys before the obligation to classify arose. Therefore, the Commission is right to point out that Ireland itself concedes that it does not have sufficient knowledge about the kingfisher.

55. Consequently, Ireland's obligations to classify further areas as SPAs is not limited to the areas referred to in IBA 2000 but may also include additional areas for species not included in this inventory to an adequate degree.

36 — See Annex D.2 to the statement in defence, page 63.

3. Individual areas

(a) Cross Lough (Killadoon)

56. Ireland disputes in particular the claim that it is obliged to classify IBA No 50 Cross Lough (Killadoon) as an SPA. This IBA covering around one hectare consists of a lagoon with a small island. Colonies of the sandwich tern (*Sterna sandvicensis*), a species mentioned in Annex I to the Birds Directive, bred on this island from 1937 to at least 1995. This species has not used this area for a number of years. Ireland infers from the fact that the sandwich tern has abandoned this area that there is no obligation to classify it as an SPA.

57. The Irish position would doubtless be justified if Cross Lough (Killadoon) had never numbered among the most suitable areas for the sandwich tern since 6 April 1981 when the obligation to classify began. However, it is evident from IBA 89 and IBA 2000 that Cross Lough (Killadoon) was, by the criteria of the IBA inventory, one of the areas most suitable for the protection of the sandwich tern, at least in 1984 and 1995. Ireland does not challenge these facts in this case. Consequently, it is established that the area numbered among the most suitable areas for the protection of the sandwich tern after 6 April 1981 and therefore Ireland should have classified it as an SPA.

58. This obligation does not necessarily cease to apply if the area is no longer most suitable. If it should have been classified as an SPA earlier, the Member State concerned should, at least under the first sentence of Article 4(4) of the Birds Directive, have taken appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds in the areas, in so far as they would be significant having regard to the objectives of that article. [37]

59. Consequently, a Member State which has failed to classify as an SPA an area that should *undisputedly* [38] have been classified earlier must prove that this area has, *irrespective* of possible conservation measures, lost its suitability if it does not subsequently classify it on account of its lack of suitability. [39] If that were not so, Member States could with impunity escape their obligation to classify the most suitable areas as SPAs and to maintain them in a condition in which they continue to be the most suitable for the protection of birds.

60. Ireland has not furnished such proof. Rather, the Commission even puts forward unchallenged grounds for the conclusion that conservation measures were possible. The American mink (*Mustela vison*), which is spreading in Ireland, probably robbed the nests of ground-breeding sandwich terns and thus led to the abandonment of the area. In at least one other area this was prevented. It must therefore be concluded that Cross Lough (Killadoon) would have continued to number among the most suitable areas for the protection of the sandwich tern if Ireland had fulfilled its obligation under Article 4 of the Birds Directive in relation to this area.

61. However, there would be no point in classifying the area as an SPA if it could not be restored to an area most suitable for the protection of birds. In that case classification of it as an SPA would also be unnecessary. However, as the Commission submits, without contradiction, there is a genuine chance that the sandwich tern may resettle the area of Cross Lough (Killadoon). This species frequently changes its colony site [40] and continues to use sites near the area. Therefore, if appropriate measures were taken against the mink, renewed use of the area would be possible.

37 — *Santoña Marshes* (cited in footnote 13, paragraph 22) and Case C-374/98 *Commission* v *France* (*Basses Corbières*) [2000] ECR I-10799, paragraphs 47 and 57.

38 — If, on the other hand, the obligation to classify were disputed, the Commission would have to prove that the area had previously been most suitable.

39 — See my Opinion in Case C-191/05 *Commission* v *Portugal* (*Moura, Mourão, Barrancos*) [2006] ECR I-6853, point 14.

40 — See also, in this respect, the British Joint Nature Conservation Committee's explanatory notes on the census of sandwich terns carried out as part of the project Seabird 2000, http://www.jncc.gov.uk/page-2890.

62. Consequently, Cross Lough (Killadoon) must also be classified as an SPA. [41]

(b) Lands in the areas of the Sandymount Strand and Tolka Estuary SPA

63. The demarcation of the boundaries of the Sandymount Strand and Tolka Estuary SPA is also disputed. The Commission complains that Ireland has not based this definition solely on ornithological criteria but has instead taken account of projects relating to Dublin Port in the case of two inter-tidal mudflats.

64. The first section of land consists of 2.2 hectares of sand and gravel banks at the western end of the estuary of the River Tolka which is earmarked for the Dublin Port Tunnel project. Ireland has classified as an SPA only the area upstream of the area concerned, namely from a road crossing over the river. As regards this section of land, Ireland submits it can be used as a feeding ground for the wading birds to be protected for only a relatively short time at low water. Furthermore, it is used by only a small number of birds. Therefore, it is not significant enough to be included in the SPA.

65. This submission is based on an incorrect understanding of the requirements of Article 4 of the Birds Directive relating to the definition of SPA boundaries. The Court has already held that this definition must be based solely on ornithological criteria. [42] As the Commission correctly submits, the definition of the area's boundaries cannot be based solely on a one-off examination of the sections of land at issue but must instead be guided by whether they form part of the whole area from an ornithological point of view. If that were not so a whole area could be divided into any number of sub-areas, each of which individually would be used only by insignificant sections of the bird population. The exclusion on those grounds of a large number of individually insignificant sub-areas could seriously affect the function of the SPA overall, or even destroy it.

66. The section of land in dispute in the west of the estuary of the River Tolka is separated from the rest of the classified estuary by a road crossing. However, the bridge forms no obstacle to birds. Furthermore, in terms of

41 — Furthermore, irrespective of the Commission's claim, there may be an obligation to make good the consequences of any lack of conservation measures, that is to say, measures that restore the suitability of the area as a colony site for the sandwich tern.

42 — *Lappel Bank* (cited in footnote 15, paragraph 26) and *Moura, Mourão, Barrancos* (cited in footnote 39, paragraph 10).

its characteristics this section is similar to the area as a whole. It consists of inter-tidal mudflats.

67. According to the environmental impact assessment (EIA) on which both parties rely,[43] this section of land is used by some of the overall population of the SPA. As regards oystercatchers (*Haematopus ostralegus*), IBA 2000 indicates 1 067 examples in respect of IBA No 109 Dublin Bay in 1995.[44] The EIA refers to a maximum of 3 787 examples of oystercatchers in 1984 to 1987. However, this figure was already 10 years old at the time of the EIA, whilst the figures in IBA 2000 date from 1995 and were therefore up-to-date.[45] The EIA refers to between 0 and 8 examples in 1995 and 1996, that is to say, between 0% und 0.8 % of the total population according to IBA 2000, and up to 0.2% thereof according to the EIA figures. In the case of the redshank (*Tringa totanus*), which had a population of 1 900 according to IBA 2000 and 1 721 according to the EIA, between 0 and 10 examples were found, that is to say, up to 0.5% of the total population. In the case of the curlew (*Numenius arquata*), which had a population of 1 007 according to IBA 2000 and 1 865 according to the EIA, between 0 and 5 examples appeared, that is to say, up to 0.5% or 0.26% of the total population, depending on the basis taken. These are three of the nine species which are relevant to the classification of Dublin Bay as an SPA.

68. The section of land at issue accounts for less than 0.1% of the Dublin Bay IBA (3 000 hectares). Even when account is taken of the fact that each of these figures is a peak value and that the statistical relevance of these figures is unclear, it would appear that the use of this section by these species is at least within the average to be expected, if not above it. Therefore, this section certainly constitutes an integral part of the area as a whole.

69. Consequently, the section of land at issue here should also have been classified as an SPA.

70. The second section of land at issue consists of 4.5 hectares which were removed retrospectively from a proposal to extend the Sandymount Strand and Tolka Estuary SPA. This land lies at the south-eastern end of the estuary of the River Tolka, that is to say, on the side facing the open sea. The Port is planning an extension by infilling in this area. In so far as the Commission refers to further sections of land in this area in its reply, its submission is inadmissible since this area did not form the subject-matter of the application.

43 — Annex A-17 to the application.

44 — IBA 2000, Volume 1, p. 405 et seq.

45 — Page 324 of the annex to the application.

71. Ireland submits that the section of land at issue dries for only a short time at low water on a spring tide, that is to say, approximately every 14 days, and is otherwise beyond the use of wading birds. Therefore, it has never had sufficient value to birds and had only inadvertently formed part of the extension proposal.

72. In response to these arguments the Commission produces, without being challenged, a paper calling, on the basis of an EIA relating to the infilling project, for these sections of land to be included in the SPA. It shows that various species make above-average use of the land which dries infrequently. Furthermore, at least parts of this land dry also on less extreme tides and can be used by birds. Finally, this section is used not only by wading birds but also by terns, for example, which do not rely on the land drying.

73. The Commission's arguments are more convincing also in relation to this section. The sub-area clearly forms part of the estuary and is undisputedly used as a feeding habitat by the relevant bird species. Although such use does not occur daily, it does occur with a certain regularity. The fact that an above-average number of birds are to be found there even indicates that the amount of food available is rather high. That would be logical since these food resources are only rarely exposed to the birds. It is therefore probable that this section makes a significant contribution to the overall availability of food in this area.

74. Consequently, in this area too the definition of the boundaries of the Sandymount Strand and Tolka Estuary SPA fails to satisfy the requirements of Article 4 of the Birds Directive.

75. In addition, it should be noted that the integration of these sections of land into the SPA does not necessarily pose an obstacle to the project concerned. Instead, appropriate consideration can be taken both of the importance to birds of the sections of land concerned and the interest in the relevant plan in the project authorisation procedure laid down in Article 6(3) and (4) of the Habitats Directive, in conjunction with Article 7 thereof. If sections of land requiring classification were not classified as SPAs, it would be necessary to apply, instead of these provisions, the stricter first sentence of Article 4(4) of the Birds Directive, [46] which forms a higher barrier to plans having adverse effects.

46 — *Basses Corbières*, cited in footnote 37.

4. Interim conclusion

76. Ireland has therefore infringed the Birds Directive by failing to classify, since 6 April 1981, in accordance with Article 4(1) and (2), all the most suitable territories in number and size for the species listed in Annex I as well as regularly occurring migratory species, in particular by failing to classify the Cross Lough (Killadoon) area and to integrate two sections of the estuary of the River Tolka into the Sandymount Strand and Tolka Estuary SPA.

B — *Transposition of Article 4(1) and (2) of the Birds Directive*

77. The Court has held that Article 4(1) and (2) of the Birds Directive [47] 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. [48] In particular, 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. [49]

78. The parties appear to agree that a provision of Irish law, namely Regulation 13 of Statutory Instrument No 94/1997, European Communities (Natural Habitats) Regulations, 1997 (the '1997 Regulations'), would adequately transpose Article 4(1) and (2) of the Birds Directive if it were applicable to SPAs.

79. However, the Commission has doubts as to whether this application is guaranteed. Regulation 13 is applicable only to conservation areas under the Habitats Directive. In response Ireland argues that another provision provides for the application of Regulation 13 to SPAs. Under Regulation 34, this Regulation 13, inter alia, is, where appropriate, to be applied with the necessary modifications to areas classified pursuant to Article 4(1) and (2) of the Birds Directive. [50]

47 — The wording of the provisions is set out in point 10 above.

48 — Case C-166/97 *Commission* v *France* (*Seine Estuary*) [1999] ECR I-1719, paragraph 21.

49 — Case C-6/04 *Commission* v *United Kingdom* (*Conformity*) [2005] ECR I-9017, paragraph 34.

50 — Regulation 34 states: '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 paragraphs 1 and 2 of Article 4 of the Birds Directive.'

80. The Court cannot rule whether and in what form Regulation 13 is applicable to SPAs pursuant to Regulation 34. That is a matter of Irish law which must ultimately be resolved by Irish courts. The Court must, however, consider whether the Commission has substantiated its complaint that Regulation 34 does not guarantee the application of Regulation 13 to SPAs. In this respect it is enough for the Commission to raise legitimate doubts as to whether there has been correct transposition. Transposition must guarantee the full application of the directive in a sufficiently clear and precise manner. [51] Faithful transposition becomes particularly important in the case of the Birds Directive since management of the common heritage is entrusted to the Member States in their respective territories. [52]

81. However, in the present case the Commission fails to raise legitimate doubts.

82. The Commission submits that the 1997 Regulations were — according to the introduction thereto — adopted solely to transpose the Habitats Directive and not to transpose provisions of the Birds Directive. However, it is unclear why this should prevent the Irish legislature from nevertheless also transposing the provisions of the Birds Directive. Furthermore, it is irrelevant that measures in relation to the SPAs required by the Commission are partly governed by Article 6(1) of the Habitats Directive, which is not applicable to SPAs. If appropriate measures under Article 4(1) and (2) of the Birds Directive must be applied also to SPAs, the national legislature is naturally not prevented from creating a single provision to transpose the rules of two directives. In so far as the Commission basis its doubts on the authority for the 1997 Regulations, the submission is not substantiated to a sufficient degree.

83. Doubts as to whether there has been sufficient transposition could be attached at most to the wording of Regulation 34. The provisions referred to therein are to be applied to SPAs only 'with any necessary modifications' and 'where appropriate'. The Commission states that it regards these phrases as provisos which are incompatible with unconditional, mandatory transposition. However, it is more natural to regard these phrases as an instruction to apply the provisions *mutatis mutandis*.

84. Moreover, if these phrases are compared with the transposing provisions, namely Article 4(1) and (2) of the Birds Directive, it is clear that they too contain no uncondi-

51 — Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7; Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 15; Case C-58/02 *Commission* v *Spain* [2004] ECR I-621, paragraph 26; and *Commission* v *United Kingdom* (*Conformity*) (cited in footnote 49, paragraph 21).

52 — See the references referred to in footnote 33.

tional rules on when positive measures are to be taken, for example when management plans are to be drawn up. They form only part of the conservation measures to be defined. [53] Whether and to what extent positive measures are to be taken can be determined only on the basis of the specific state of the area concerned, that is to say, the measures must be appropriate and accordingly variable. The phrases 'with any necessary modifications' and 'where appropriate' express nothing else.

85. Consequently, this complaint raised by the Commission must be rejected.

*C — Transposition of the first sentence of Article 4(4) of the Birds Directive in respect of areas not classified as SPAs*

86. The Commission complains that Ireland has failed to transpose the first sentence of Article 4(4) of the Birds Directive in respect of areas that have not been classified as SPAs but ought to have been so classified. Under this provision:

'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.'

87. This obligation applied not only to areas classified as SPAs but also to areas that have not been classified as SPAs but ought to have been so classified. [54] Under Article 7 of the Habitats Directive, obligations arising under Article 6(2), (3) and (4) of the Habitats 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) or similarly recognised under Article 4(2) thereof, as from the date of implementation of the directive — that is to say, as from June 1994 [55] — or the date of classification or recognition by a Member State under the Birds Directive, where the latter date is later. In *Basses Corbières* the Court made it clear that 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. [56]

53 — *See Santoña Marshes* (cited in footnote 13, paragraph 30).

54 — *Santoña Marshes* (cited in footnote 13, paragraph 22).

55 — The *Seine Estuary* judgment (cited in footnote 48, paragraph 5) refers only to June 1994. It is difficult to determine precisely when the transposition period expired. Under Article 191(2) of the EC Treaty (now, following amendment, Article 254 EC) it is based on the date on which it was notified to the Member States. EUR-Lex gives the end of the period as 10 June 1994, whilst in Case C-329/96 *Commission* v *Greece* [1997] ECR I-3749, paragraph 2, and Case C-83/97 *Commission* v *Germany* [1997] ECR I-7191, paragraph 2, the Court concluded that the expiry date was 5 June 1994.

56 — Cited in footnote 37.

88. At first sight it seems surprising to require the transposition of a rule which can be inferred only indirectly, by means of the Court's case-law based on the objectives of the directive, from the wording of the provision to be transposed. Nevertheless, according to this case-law there is an obligation to protect areas which are not classified but require classification. It must therefore be implemented in the interest of legal certainty, which is of particular importance precisely in connection with the Birds Directive. [57]

89. In addition, transposition is also necessary so that the obligation of protection can be invoked against private persons. In the absence of transposition a directive may not of itself impose obligations on an individual. [58] According to the information provided by the Commission, in at least one case the Irish Supreme Court has ruled that even local or regional authorities are not bound by the Birds Directive. [59]

90. In connection with this complaint Ireland comments only on certain illustrative statements by the Commission, but does not contradict them in essence. The Commission statements made by way of illustration are not sufficiently substantiated to be regarded as pleas warranting separate examination. Therefore, they merely constitute arguments which need not be considered further because Ireland has failed to convert this obligation of protection into binding regulations.

91. Therefore, Ireland has failed to ensure that, since 6 April 1981, the provisions of Article 4(4), first sentence, of the Birds Directive are applied to areas requiring classification as special protection areas under that directive but which were not classified as such.

D — *Second sentence of Article 4(4) of the Birds Directive*

92. The Commission further complains that Ireland has failed to transpose or apply in practice the second sentence of Article 4(4) of the Birds Directive. Under that rule:

'Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

57 — See point 80 above.

58 — Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; Case C-201/02 *Wells* [2004] ECR I-723, paragraph 56; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 108. The extent to which the judgment in Case C-144/04 *Mangold* [2005] ECR I-9981 is compatible with this established case-law need not be clarified in order to establish the need for transposition.

59 — The Commission refers to the judgment of 24 March 1998 in the case of *Raymond McBride* v *Galway Corporation*.

93. In this context it should be recalled that although Article 4(1) of the Birds Directive necessarily requires the classification of areas as SPAs for birds in Annex I, it also requires the application of other special conservation measures in respect thereof. The fourth subparagraph of Article 4(1) requires that the Member State classify *in particular* certain areas as SPAs, whilst the first subparagraph requires special conservation measures irrespective of classification.

94. Therefore, the effort required under the second sentence of Article 4(4) of the Birds Directive must include such special conservation measures, which are independent of any area, for birds listed in Annex I. Under Article 4(2), similar measures are to be taken in respect of regularly occurring migratory birds.

95. The second sentence of Article 4(4) of the Birds Directive is not limited to the habitats of birds listed in Annex I and migratory birds but instead refers, without limitation to specific species, to habitat protection. However, on account of its systematic placing in Article 4 it must be concluded that it concerns only the species included therein, that is to say, the species listed in Annex I and regularly occurring migratory birds. On the other hand, the Member States must strive to protect other species pursuant to Article 3 of the Birds Directive. [60]

1. Legal transposition

96. Although the second sentence of Article 4(4) of the Birds Directive does not necessarily require that certain results be guaranteed, the Member States must seriously set themselves the objective of protecting habitats outside the SPAs. The notion of striving implies that all reasonable measures must be taken to achieve the success that is sought.

97. Account should be taken of this objective not only in general but also in relation to individual measures. [61] In order for the Member State's authorities at all levels to be aware of this objective in relation to their activities, in particular in connection with

60 — Case C-117/00 *Commission* v *Ireland* (*Owenduff-Nephin Beg Complex*) [2002] ECR I-5335, paragraph 15. See also *Commission* v *Netherlands* (cited in footnote 3, paragraph 57).

61 — For example, in the *Seine Estuary* judgment (cited in footnote 55, paragraph 48 et seq.), the Court examined whether a specific project infringes the second sentence of Article 4(4) of the Birds Directive.

authorisation procedures, but not only in that respect, it must be set out in sufficiently clear terms in national law.

98. Ireland puts forward no provision that would satisfy these requirements.

99. It is unclear how the regulations on integrated pollution prevention, put forward in general terms by Ireland, would transpose the second sentence of Article 4(4) of the Birds Directive. After all, they are based on a different directive with different objectives. [62] In addition, these regulations apply — as the Commission submits — only to a limited category of programmes. They do not cover a great deal of potential pollution and deterioration of bird habitats.

100. Ireland submits further that so-called 'cross compliance' pursuant to Regulation No 1782/2003 [63] contributes to compliance with the second sentence of Article 4(4) of the Birds Directive in the agricultural field. In fact, under Article 4 of and Annex III to that regulation this provision is one of the statutory requirements on the working of agricultural holdings which recipients of direct payments must satisfy.

101. Since these requirements have applied only as from 1 January 2005, that is to say, long after the expiry of the relevant period for assessing the complaints raised by the Commission, they cannot invalidate these complaints. Furthermore, as the Commission correctly emphasises, under Article 4(2) of the regulation the provisions of a directive are to be complied with only as implemented by the Member States. Consequently, any defects in transposition are not reduced by this reference but rather adopted wholesale.

102. In so far as Ireland refers to nationally defined minimum requirements on good agricultural and environmental conditions under Article 5 of Regulation No 1782/2003, it is also the case here that they had not been laid down at the material time and apparently do not exist even now. Therefore, this argument too is irrelevant to the present case.

62 — Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26).

63 — 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) 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).

103. Nor is it clear how far the Rural Environment Protection Scheme, an Irish programme to promote environmentally friendly agriculture, and the Farm Waste Management Scheme, a programme to deal with agricultural waste, transpose the second sentence of Article 4(4) of the Birds Directive. Both programmes may have favourable effects on the conservation of bird habitats but do not constitute legal transposition.

104. Finally, Ireland makes general reference to the Wildlife Act 1976, which it submitted, but specifically mentioned only one provision, namely section 11(1), during the course of the pre-litigation proceedings. Under that provision, it is the function of the Minister to secure the conservation of wildlife. However, this provision is not specific enough to ensure compliance with the second sentence of Article 4(4) of the Birds Directive.

105. Therefore, Ireland has failed fully and correctly to transpose in national law the requirements of the second sentence of Article 4(4) of the Birds Directive.

2. Practical application

106. The Commission does not limit this plea to the legal transposition of the second sentence of Article 4(4) of the Birds Directive but also complains that Ireland has failed to apply it adequately in practice. In this respect it relies primarily on a study by BirdWatch Ireland, the Irish organisation for the protection of birds, and the British Royal Society for the Protection of Birds. [64] According to this study, there are grounds for concern about certain widespread species that are suffering from changed agricultural practices. The Commission mentions the migratory birds cuckoo (*Cuculus canorus*), swallow (*Hirundo rustica*) and sand martin (*Riparia riparia*), and also skylark (*Alauda arvensis*), some of the northern populations of which may winter in Ireland. It also refers to a report by the Irish Environmental Protection Agency dating from 2004 which attributes habitat decline to a number of developments.

107. Although Ireland does not challenge the content of these documents, it should be noted that according to BirdLife International the skylark is on the increase in Ireland. [65]

64 — *Birds of Conservation Concern in Ireland*, 1999.

65 — See the species factsheet which is probably based on the same survey as the Commission figures http://www.birdlife.org/datazone/species/BirdsInEuropeII/BiE2004Sp7105.pdf.

108. The Commission concludes from the population falls and habitat decline that Ireland has not sought to avoid pollution and deterioration of habitats to a sufficient degree. This complaint is extremely ambitious. If the Commission's submission proves that Ireland has infringed Community law, the same complaint probably applies to many other Member States since similar developments are to be seen there. [66]

109. The obligation to seek to avoid damage which flows from the second sentence of Article 4(4) of the Birds Directive does not mean that the damage to be avoided must be prevented. It is not an obligation as to the result to be achieved but rather a duty of diligence, or to be more precise, a duty to use best endeavours.

110. As regards the Commission's submission, it follows that the loss and deterioration of habitats cannot provide conclusive proof of failure to fulfil the obligation to strive to avoid damage. However, they do provide evidence that Ireland is not making endeavours or is not doing so to an adequate degree. In view of this evidence it is for Ireland to demonstrate that it is nevertheless striving to avoid such damage to an adequate degree. [67]

111. Adequate endeavours cannot be proven by the fact that some measures or other were taken. Serious endeavours, namely the taking of all reasonable measures to achieve the success being sought, require targeted action. The framework for determining what is reasonable is set out in Article 2 of the Birds Directive. Under that article, Member States are to take the requisite measures to maintain the population of all European bird species which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.

112. Consequently, the measures taken in connection with endeavours made pursuant to the second paragraph of Article 4(4) of the Birds Directive must be arranged — on an ornithological basis — in such a way that they — in conjunction with other measures required under the directive — restore or maintain the level of the relevant species

66 — See the figures on the decline of farmland birds in BirdLife International (2005), *A Biodiversity Indicator for Europe: Wild Bird Indicator Update 2005*, http://www.birdlife.org/action/science/indicators/pdfs/2005_pecbm_indicator_update.pdf, and the relevant factsheets relating to the species mentioned by the Commission in BirdLife: http://www.birdlife.org/action/science/species/birds_in_europe/species_search.html.

67 — See the *Seine Estuary* judgment (cited in footnote 55, paragraph 48 et seq.), in which the Court rejected the Commission's evidence of an infringement on the basis of the French challenge.

required under Article 2. When making the evaluation pursuant to Article 2, account must be taken of the extent to which and the condition in which the species rely on habitats and how the conservation thereof relates to the other requirements referred to in Article 2.

113. In the present case Ireland documents its previous endeavours to conserve habitats, in particular through administrative practices relating to integrated pollution prevention and schemes to promote environmental protection in agriculture and to manage farm waste.

114. The Commission acknowledges that at least the Rural Environment Protection Scheme is benefiting birds. Furthermore, although the other measures are not expressly based on ornithological criteria, they too appear to be helping indirectly to conserve bird populations.

115. None the less, Ireland has failed to show that these endeavours were designed to achieve any ornithological objective on the basis of Article 2 of the Birds Directive. Instead, the Irish submission appears to consist of a more or less arbitrarily compiled list of environmental measures which somehow also promote the conservation of bird populations. However, they cannot provide proof that Ireland has in fact made adequate endeavours in accordance with the second sentence of Article 4(4) of the Birds Directive.

116. Therefore, Ireland has failed fully and correctly to apply the requirements of the second sentence of Article 4(4) of the Birds Directive.

E — *Transposition of Article 6(2) of the Habitats Directive*

117. Under Article 7 of the Habitats Directive, Article 6(2) to (4) of the Habitats Directive is to replace the protection provision contained in the first sentence of Article 4(4) of the Birds Directive as from the date of classification of an area as an SPA. Under Article 6(2) of the Habitats Directive:

'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.'

118. In the view of the Commission, Ireland has failed properly to transpose Article 6(2) of the Habitats Directive in two respects. Firstly, there has not been adequate transposition of Article 6(2) of the Habitats Directive in general and, secondly, SPAs are not protected against damage by third parties, in particular through leisure uses. As an example of the practical inadequacies of the Irish regulations, the Commission refers to a case of unauthorised mollusc fishing in the Bannow Bay SPA.

1. General transposition

119. In the view of the Commission, Article 6(2) of the Habitats Directive is essentially transposed by Regulation 14 of the 1997 Regulations.

120. Regulation 14 provides that certain activities may be carried out only with the consent of the Minister or in accordance with the terms of a management agreement. What these activities are is clear from a notice issued under Regulation 4(2) when the relevant area is selected. Under Regulations 15 and 16, the consent of the Minister is to be given only on the conditions laid down in Article 6(3) and (4) of the Habitats Directive. This transposition of Article 6(3) and (4) is supplemented by Regulations 27 to 32, which expressly provide for a project authorisation procedure in respect of certain plans.

121. Consequently, the Commission appears to be proceeding on the basis that Article 6(2) of the Habitats Directive is transposed in Ireland primarily by the conservation mechanisms provided for in Article 6(3) and (4).

122. Since previous SPAs were not classified pursuant to the 1997 Regulations, there are there no notices stating which activities may be carried out only in accordance with Article 6(3) and (4) of the Habitats Directive. The Commission levels at Ireland the complaint that in respect of these activities Irish law lacks the legal instrument necessary to ensure that Article 6(2) is completely effective.

123. In response Ireland argues that Article 6(2) of the Habitats Directive is transposed also by Regulation 13(3). This provision reproduces Article 6(2) almost verbatim.

The only difference is that it is for the Minister, rather than the Member States, to take the necessary measures.

124. The Commission rightly highlights the doubts as to whether Regulation 13(3) forms a basis for specific conservation measures. In addition to Regulation 13(3) there are a number of specific enabling provisions whose application is subject to a number of very precise conditions. Therefore, it is more natural to regard Regulation 13(3) as a mere definition of duties, whilst the instruments relating to the performance of duties are set out elsewhere.

125. If the mechanisms laid down in Article 6(3) and (4) of the Habitats Directive are not applicable, the only apparent instruments for the performance of this duty are Regulations 17 and 18. Irrespective of any notice, these provisions enable the Minister to have the environmental impact of any activities assessed on his own initiative. If the Minister, having regard to the conclusions of the environmental impact assessment, is of the opinion that the integrity of the site concerned will be adversely affected, he is to make application to a court of competent jurisdiction to prohibit the continuance of the activity concerned.

126. As Article 6(3) and (4) of the Habitats Directive demonstrates, granting protection to a particular area is intended to ensure that activities are permitted only where it has been ascertained that they will not have a significant effect on it. The protection afforded under Article 6(2) of the Habitats Directive may not fall below this standard since otherwise there would be reason to fear serious adverse effects on the SPA. [68]

127. Regulations 17 and 18 do not satisfy these requirements. Inevitably, they can take effect only when the activity concerned has already been commenced and consequently any adverse effects have already been caused. In addition, both enabling provisions require that an environmental impact assessment be carried out before an application can be made for a court prohibition. The reactive protection of SPAs can be delayed considerably by these procedural steps.

128. Furthermore, the limitations imposed by Irish law are not justified by protection of individuals since they are to be prevented in advance from carrying out potentially harmful activities by means of area protection, that is to say, they may act only where there is no possibility of harm to the area.

129. In so far as Ireland relies on the provisions of the Foreshore Act, these

68 — On the relationship between paragraphs (2) and (3) of Article 6 of the Habitats Directive, see Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* [2004] ECR I-7405, paragraph 31 et seq., in particular paragraph 36.

cannot, irrespective of their content, ensure the full transposition of Article 6(2) of the Habitats Directive since they are applicable only in respect of coastal areas. Even though these provisions are intended, in this connection, to protect flora and fauna, Ireland has further failed to demonstrate how they ensure that Article 6(2) of the Habitats Directive is effective.

130. Consequently, in the absence of a notice of activities subject to authorisation, there is no legal instrument which would ensure that transposition of Article 6(2) of the Habitats Directive is fully effective.

131. Ireland has therefore failed, in respect of the special protection areas classified under the Birds Directive prior to the adoption of Statutory Instrument No 94/1997, European Communities (Natural Habitats) Regulations, 1997, to take all the measures necessary to comply with the provisions of Article 6(2) of the Habitats Directive.

2. Adverse effects caused by third parties

132. The Commission further objects that the Irish system of protection based on notices imposes preventative measures only on landowners. In respect of interventions by third parties, in particular in relation to leisure uses, there is only the possibility of reactive measures, as provided for in Regulation 17 in particular.

133. In response Ireland argues that the prohibition on carrying on without authorisation activities notified as subject to authorisation concerns not only landowners but all persons. This is evident from Regulation 14(3). However, the Commission doubts whether notices could be relied on against third parties who were not notified. In this regard it relies in particular on the principle *nullum crimen, nulla poena sine lege.*

134. Ireland's submission is unconvincing. Even if the penalty contained in Regulation 14(3) observed the principle of legality, the question arises as to whether third parties could not put forward the defence that they had no knowledge of the notice. For example, under Regulation 14(3) for an offence to have been committed there must be no 'reasonable excuse'. Lack of knowledge of unpublished notices could constitute such an excuse. Therefore, the transposition of Article 6(2) of the Habitats Directive is at least not sufficiently clear.

135. For the abovementioned reasons, the possibility of reactive measures under Regulations 17 or 18 likewise does not constitute adequate transposition of Article 6(2) of the Habitats Directive since these measures become effective only retrospectively and possibly with considerable delay.

136. In so far as Ireland cites the Wildlife Act, the prohibitions laid down therein transpose only protection of species under Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive. Article 6(2), by contrast, requires much more comprehensive protection of habitats, regardless of whether or not the protected species are located there precisely. Furthermore, Article 6(2) does not cover only species which enjoy protection as such.

137. Finally, Ireland relies on the rules on trespassing. Under those rules, various acts involving entry upon another person's land are liable to prosecution. However, none of these acts is connected specifically with deterioration of natural habitats and the habitats of species or disturbances affecting the species. Although it cannot be excluded that this could be covered by the offence of trespassing under Irish law, transposition of the Habitats Directive specifically must be so clear and precise that individuals and State authorities can recognise their obligations without any doubt.[69] The rules on trespassing do not satisfy those requirements.

138. Therefore, Ireland has failed, in respect of adverse effects on all SPAs intended to be subject to Article 6(2) of the Habitats Directive caused by persons who are not the owners of the land at issue, to take all the necessary measures to comply with that provision.

3. Events in the Bannow Bay SPA

139. In respect of the Bannow Bay SPA the Commission submits that it approached the Irish Government in the winter of 1997/98 in connection with a complaint relating to mechanical mollusc fishing. The Irish Government informed it that prohibiting this activity would require comprehensive public consultation. However, in subsequent communications the Irish Government stated that the competent authorities had intervened without delay and the mollusc fishing had been terminated within 24 hours.

69 — *Commission* v *United Kingdom* (*Conformity*) (cited in footnote 49, paragraph 25 et seq.).

140. It is unclear what complaint the Commission is raising at this juncture. It must therefore be concluded that this is mere illustrative use which does not make these events the subject-matter of the application.

141. If the Commission wishes to complain that Ireland was deficient in its practical application of Article 6(2) of the Habitats Directive, it would have at least to put forward evidence, such as witnesses, to support its version of events. However, the Irish Government's initial observations, which were at least unclear as regards the duration of the mollusc fishing, are insufficient as evidence on account of the subsequent clarification. Therefore, any similar complaint would have to be rejected for lack of evidence.

F — *Transposition and application of Article 6(3) and (4) of the Habitats Directive*

142. As regards Article 6(3) and (4) of the Habitats Directive, the Commission submits that plans are covered inadequately in the transposition and that administrative practices relating to the authorisation of aquaculture programmes do not comply with these provisions, and it raises particular objections to measures to maintain drainage ditches affecting the Glen Lake SPA.

143. In so far as is relevant here, Article 6(3) and (4) of the Habitats Directive is worded as follows:

'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.

...'

1. Inclusion of plans

144. The Commission submits that plans are not covered in Irish law. By contrast, Ireland submits that each individual project is, irrespective of plans, subject to the procedure laid down in Article 6(3) and (4) of the Habitats Directive. Therefore, it is not necessary also to make plans subject to these requirements.

145. In so far as the Commission submits in its application, with reference to a reforestation programme — by its own admission for the first time — that not all projects are subject to the procedure laid down in Article 6(3) and (4) of the Habitats Directive, this would, as an independent plea, constitute an impermissible expansion of the subject-matter of the proceedings. On the other hand, as an argument against the Irish submission it need not be examined since the need to cover plans in transposing Article 6(3) and (4) is evident from the grounds set out below.

146. With regard to the United Kingdom the Court has already held that plans must also be subject to the requirements laid down in Article 6(3) and (4) of the Habitats Directive where subsequent individual programmes would be subject to that procedure. This is conditional on there being a probability or a risk that it will have a significant effect on the site concerned. In the light of the precautionary principle, such a risk exists if it cannot be ruled out, on the basis of objective information, that the plan will have a significant effect on the site concerned. This is the case where plans are carried out by means of subsequent individual programmes.[70]

147. It must be concluded that the relevant plans also exist in Ireland since otherwise planning would make no sense. For example, section 15 of the Planning and Development Act 2000 provides that the planning authority must take the necessary steps for securing the development objectives of the development plan.[71]

148. Contrary to the view taken by Ireland, not even environmental impact assessments and strategic environmental assessments can

70 — *Commission* v *United Kingdom* (*Conformity*) (cited in footnote 49, paragraph 54 et seq.).

71 — 'It shall be the duty of a planning authority to take such steps within its powers as may be necessary for securing the objectives of the development plan.' Under section 10, development objectives form part of the development plan.

substitute for the inclusion of plans in the transposition of Article 6(3) and (4) of the Habitats Directive. Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [72] and 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 [73] contain rules on the decision-making procedure without binding the Member States by the decision. By contrast, under the second sentence of Article 6(3) of the Habitats Directive a plan or project may be agreed to only if the integrity of the site concerned will not be adversely affected. Exceptions are permitted only under Article 6(4) of the Habitats Directive, that is say, where there are imperative reasons of overriding public interest and in the absence of alternative solutions and where all necessary compensatory measures are taken. Therefore, assessments under Directive 85/337 or Directive 2001/42 cannot substitute for the procedure under Article 6(3) and (4) of the Habitats Directive. [74]

149. Consequently, it is necessary also to include plans in the transposition of Article 6(3) and (4) of the Habitats Directive.

72 — OJ 1985 L 175, p. 40.

73 — OJ 2001 L 197, p. 30.

74 — See Case C-407/03 *Commission* v *Finland* (not published in the ECR and available only in Finnish and French). Finland had acknowledged that an environmental impact assessment cannot substitute for application of Article 6(3) and (4) of the Habitats Directive. See also my Opinion in *Lauteracher Ried* (cited in footnote 31, point 70 et seq.) regarding the studying of alternatives.

150. Ireland has therefore, in respect of plans, failed to take all the necessary measures to comply with the provisions of Article 6(3) and (4) of the Habitats Directive.

2. Administrative practices relating to the authorisation of aquaculture programmes

151. In the pre-litigation proceedings the Commission raised doubts as to whether these provisions had been properly transposed in respect of aquaculture programmes. However, it has since dropped this complaint. Regulation 31 of the 1997 Regulations provides that the transposition provisions corresponding to Article 6(3) and (4) apply also to authorisations under the Fisheries Act relevant to aquaculture programmes.

152. The Commission still criticises Ireland on the ground that aquaculture programmes, that is to say up to now only mollusc farms within the SPA, were authorised in a procedure which does not ensure the practical application of Article 6(3) and (4) of the Habitats Directive.

153. According to the Court's case-law, a failure to fulfil obligations may arise due to

the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law. [75] The Commission must establish failure to fulfil obligations by means of sufficiently documented and detailed proof of the alleged practice of the national administration, for which the Member State concerned is answerable. [76] That administrative practice must be, to some degree, of a consistent and general nature. [77]

154. According to the information provided by the Irish Government, the authorisation of aquaculture programmes falls within the competence of the Ministry of Communications, Marine and Natural Resources. It is aware of its responsibility for nature conservation and is required under section 61(e) of the Fisheries Amendment Act 1997 to take account of the likely effects on wild fisheries, natural habitats and flora and fauna when approving aquaculture programmes. Extensive consultation is also necessary, in particular with the nature conservation authority. These consultations make it possible to assess the merits of the relevant application and to take full account of negative environmental impact. Anyone may bring an appeal against authorisation of an aquaculture programme before a special tribunal which also applies section 61 of the Fisheries Amendment Act 1997.

155. The Commission essentially bases its complaints on a study by an Irish non-governmental organisation. [78] Ireland has not challenged the findings of this study. It covered 271 authorisations for aquaculture programmes and 46 applications yet to be decided on dating from the period June 1998 to December 1999. 72 authorisations and 9 ongoing procedures related to areas within or in the vicinity of SPAs. They were all mollusc farms, in particular oyster and clam farms. Consequently, the study is based on all Irish administrative practices in this area over a period of one and a half years. Therefore, it enables conclusions to be drawn as to general practice.

156. The Commission deduces from the study that mollusc farms are not subject to the necessary assessments under Article 6(3) of the Habitats Directive, in particular the preliminary assessment to establish whether a programme is subject to (extensive) assessment of its implications for the SPA in view of its conservation objectives. Such an assessment of its implications must be

75 — Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 47 and the references cited therein.

76 — *Commission* v *Germany* (cited in footnote 75, paragraph 49).

77 — *Commission* v *Germany* (cited in footnote 75, paragraph 50 and the references cited therein).

78 — Birdwatch Ireland, *Review of the Aquaculture Licensing System in Ireland*, 2000, Annex A-39 to the application. The Irish Heritage Council, a public advisory body, supported this study.

carried out where the establishment of a mollusc farm is a project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, whether individually or in combination with other plans or projects.

157. It is not disputed that mollusc farms are measures subject to authorisation under Irish law, that is to say, projects within the meaning of Article 6(3) of the Habitats Directive. At least as a rule they are not, and presumably are never, directly connected with or necessary to the management of the site.

158. Therefore, under the first sentence of Article 6(3) of the Habitats Directive an assessment of the mollusc farm's implications for the site in view of the site's conservation objectives is necessary 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. [79]

159. In principle, it cannot be ruled out that any aquaculture programme may have a significant effect on a site. The study submitted by the Commission refers in particular to the loss of or change in feeding habitats, in particular in connection with mollusc harvesting, together with disturbances affecting birds in connection with the operation of the mollusc farm.

160. Even Ireland did not claim in the pre-litigation proceedings that *all* aquaculture programmes are harmless but instead insists that *not every* such programme will necessarily adversely affect an SPA. Therefore, it concedes that aquaculture programmes can adversely affect an SPA.

161. Furthermore, at Ireland's request the Commission supported a programme which is intended inter alia to structure the assessment of aquaculture programmes and to divide SPAs into areas of different sensitivity in relation to such programmes. [80] As a result of this support project both parties consequently concluded that mollusc farms can significantly affect SPAs.

162. Accordingly, the authorisation procedure must ensure either that *each individual* aquaculture programme is subject to an impact assessment if it cannot be ruled out

79 — *Waddenzee* (cited in footnote 68).

80 — LIFE96 NAT/IRL/003240 — Management planning, monitoring, auditing of management and land acquisition for SPAs in Ireland. Information on this support project can be obtained at http://ec.europa.eu/environment/life/project/Projects/index.cfm.

on the basis of objective information that it will not seriously affect the relevant SPA. This is doubtful in the case of Ireland because thus far there has not been a single case in which a full impact assessment has been carried out on an aquaculture programme even though the study states that in around 25% of cases such schemes are located within or in the vicinity of SPAs. Furthermore, neither the submission by Ireland nor the study submitted by the Commission allow the inference to be drawn that proper consideration is given to the need for an impact assessment.

163. The surprising aspect of the submission by Ireland is that, although the applicability of Regulation 31 of the 1997 Regulations was set out initially, when the proceedings are actually set out there is no indication of how the requirements laid down in this provision, that is to say, inter alia, the requirements laid down in the first sentence of Article 6(3) of the Habitats Directive, are to come into play in the authorisation procedure. It would appear from this account that the authorising authority is required to take full consideration, to consult and to make an assessment. However, it is not claimed that it must carry out an impact assessment where significant effects cannot be excluded on the basis of objective information.

164. This study highlights these doubts, in particular because it demonstrates that the authorising authority takes on board the advice given by the specialist nature conservancy authority to only a limited degree. Where the nature conservancy authority submitted observations on mollusc farms within SPAs, the authorising authority concurred with these observations in 64% of cases. However, the authorising authority granted the environmental authority's requests not to grant authorisation in just one case.[81] In 8% of cases the authorising authority took no account of the nature conservancy authority's observations because it failed to observe the six-week time-limit. However, the first sentence of Article 6(3) of the Habitats Directive sets no time-limit on the preliminary assessment. This is all the more serious because an internal document of the Irish authority which the Commission submitted with the reply[82] shows that failures to observe time-limits were due to staff shortages at the nature conservancy authority.

165. Furthermore, the authorisations for aquaculture programmes in SPAs never mentioned that the scheme was situated within an SPA and what significance this fact

81 — According to the figures, it would appear that rejection was requested in five cases but four of these applications were approved.

82 — Annex B-15 to the reply, p. 179.

had. In the case of 86% of the authorisations within SPAs no mention was made of vulnerable habitats, species or disturbances. Access to the mollusc farms was specified in the case of only 28% of the authorisations within SPAs and the precise location was specified in less than half of the cases.

166. Therefore, there are considerable doubts as to whether the nature conservancy authority is able to bring to bear its expertise in aquaculture programme authorisation procedures and whether sufficient account is taken of this expertise where it finds expression in observations. Nor is it evident that the authorising authority is drawing similar expertise from other sources. There would thus appear to be no guarantee that an impact assessment will not be carried out in connection with the authorisation of an aquaculture programme only where it can be ruled out, on the basis of objective information, that there may be a significant effect on SPAs.

167. In view of these legitimate doubts concerning compliance with the first sentence of Article 6(3) of the Habitats Directive, Ireland should have demonstrated that the first sentence of Article 6(3) thereof is complied with in practice where aquaculture programmes are authorised. This could have been done, for example, by means of the objective information on the basis of which it was possible to rule out, in the four cases in which it authorised mollusc farms within SPAs contrary to the advice of the nature conservancy authority and without an impact assessment, that those schemes could have a significant effect on the SPA concerned. The sources from which the authorising authority draws the ornithological expertise which enables it to exclude the possibility of serious adverse effects on the SPA, without the advice of the nature conservancy authority or without taking account thereof, could also have been indicated. Nothing of this kind was done.

168. Consequently, it must be concluded that, in respect of the authorisation of aquaculture programmes within SPAs, compliance with the first sentence of Article 6(3) of the Habitats Directive is not ensured in Irish administrative practice. There is, however, insufficient evidence that other provisions of Article 6(3) and (4) of the Habitats Directive have been infringed.

169. Therefore, Ireland has failed, in respect of the authorisation of aquaculture programmes which could seriously affect areas classified as SPAs under the Birds Directive, to take all the measures necessary to comply

with the provisions of the first sentence of Article 6(3) of the Habitats Directive.

172. With regard to this complaint it should first be noted that the Habitats Directive was not yet applicable to measures taken in 1992. Consequently, in this respect the complaint is unfounded.

3. The measures relating to Glen Lake

170. The Commission complains that, in respect of the Glen Lake SPA, Ireland carried out measures to maintain drainage ditches in breach of Article 6(2), (3) and (4) of the Habitats Directive. The SPA covers an area of around 80 hectares and the area was classified in 1995. It is important in particular on account of its water. The whooper swan (*Cygnus cygnus*) winters there in internationally significant numbers.

171. The Commission submits that in 1992 and 1997 the Office of Public Works, an Irish State authority, carried out measures to maintain drainage ditches. Since then the SPA's wetlands have been drained more heavily. The vegetation is changing and the wetland habitats are being lost. These measures were not authorised in accordance with the procedure laid down in Article 6(3) and (4) of the Habitats Directive and at the same time Article 6(2) has been infringed as a result of the deterioration of the area.

173. The remaining complaint concerning the measures taken in 1997 raises the question whether particular activities can infringe both Article 6(2) and Article 6(3) and (4) of the Habitats Directive. Paragraphs 2 and 3 are both aimed at preventing the conservation objectives for a protection area from being undermined. [83] 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). [84] On the other hand, where the authorisation procedure was not conducted, both the procedural provisions of Article 6 (3) and (4) and the substantive requirements relating to site protection stemming from all three paragraphs could be infringed in relation to this scheme.

174. Since an examination of Article 6(3) and (4) of the Habitats Directive can include the procedural aspects and the substantive requirements relating to site protection,

83 — *Waddenzee* (cited in footnote 68, paragraph 36).

84 — *Waddenzee* (cited in footnote 68, paragraph 35).

these provisions should be examined first. For those provisions to have been infringed, the measures to maintain the drainage ditches must constitute a project or projects 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.

175. For a definition of 'project' the Court has already based itself on the definition set out in Article 1(2) of the directive on environmental impact assessment. [85] Under that provision, 'project' means the execution of construction works or of other installations or schemes and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. Maintenance measures too can constitute interventions in the natural surroundings and landscape, in particular where — as in the present case — they give rise to deterioration of a habitat most suitable for the conservation of birds. Consequently, the measures concerned constitute a project.

176. It is common ground that the measures were not directly connected with or necessary to the management of the site.

177. They should therefore have been subject to an appropriate assessment of their implications for the SPA in view of the SPA's conservation objectives if it could not be excluded on the basis of objective information that they would have a significant effect on that area, either individually or in combination with other plans or projects. [86] Therefore, 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, in case of doubt as to the absence of significant effects an impact assessment must be carried out. [87]

178. In the view of Ireland, there was no cause for doubt since the drainage ditches have been in existence for almost 50 years and have also been maintained several times during that period without consequently undermining the special importance to birds of Glen Lake. Consequently, the competent authorities could legitimately take the view that maintenance measures in 1992 and 1997 would not give rise to deterioration of the SPA.

179. This argument is unconvincing. Drainage measures are clearly likely to have a serious effect on wetlands in their catchment area. Experience of maintenance measures in

85 — *Waddenzee* (cited in footnote 68, paragraph 24).

86 — *Waddenzee* (cited in footnote 68, paragraph 45).

87 — *Waddenzee* (cited in footnote 68, paragraph 44).

the past can dispel such doubts only where they are documented with adequate precision and prove beyond doubt that the planned measures likewise will not adversely affect the characteristics important to birds. In the present case it is not evident that experiences of the past had this quality. On the contrary, the Commission rightly points out that it is not known whether or not the measures have adversely affected the area in the past.

180. Consequently, the first sentence of Article 6(3) of the Habitats Directive was infringed since an assessment of the implications of the maintenance measures for the SPA in view of the SPA's conservation objectives should have been made before those measures were carried out.

181. Under the second sentence of Article 6(3) of the Habitats Directive, the Irish authorities, taking account of the conclusions of the appropriate assessment of the implications of the maintenance measures for the site concerned in the light of the site's conservation objectives, should have authorised this activity only if they had made certain that it would not adversely affect the integrity of that site, that being the case if there remained no reasonable scientific doubt as to the absence of such effects. [88]

88 — *Waddenzee* (cited in footnote 68, paragraph 67).

182. In the absence of an impact assessment, authorisation under the second sentence of Article 6(3) of the Habitats Directive would not have been permitted. However, Ireland's submission shows that authorisation was not possible also on account of the adverse effects on the SPA. Ireland acknowledges that the seawater level is of crucial importance in particular to the staging of whooper swans since they rely on a large water surface. It also concedes that the maintenance of the drainage ditches in 1997 accelerated the fall in the water level and shortened the staging periods of the whooper swan. Therefore, even according to Ireland's own submission, the work on the drainage ditches did, at least temporarily, detract from the suitability of the Glen Lake SPA as a wintering area for whooper swans. 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).

183. The possibility of authorisation under Article 6(4) of the Habitats Directive is also excluded. As justification Ireland merely submits that maintenance of the drainage ditches is a statutory obligation which has existed for some time. It is inherent in this submission that Ireland considers that there is a public interest in the drainage. However, such an interest, even if it outweighed the interest in protecting the SPA, can justify deterioration under Article 6(4) of the Habitats Directive only where no alternative exists. In the present case Ireland itself submits that a dyke could avert the disadvantages of drainage but does not submit

that there were insurmountable obstacles to the construction of a dyke before the maintenance measures were carried out. Therefore, there was at least one alternative to carrying out the measure in the manner which adversely affected the area.

184. Consequently, the maintenance measures as carried out were incompatible with Article 6(3) and (4) of the Habitats Directive. Since the infringement of these provisions also results from adverse effects to the integrity of the SPA, Article 6(2) was infringed at the same time.

185. Therefore, Ireland has, in respect of measures to maintain drainage ditches in the area covered by the Glen Lake SPA, failed to take all the measures necessary to comply with the provisions of Article 6(2), (3) and (4) of the Habitats Directive.

G — *Article 10 of the Birds Directive*

186. Finally, the Commission complains that Ireland has failed to fulfil its obligations relating to scientific research under Article 10 of the Birds Directive.

187. Under Article 10 of the Birds Directive:

'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.'

188. Annex V refers to the following research topics:

'(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.'

189. Under Irish law — section 11(3) of the Wildlife Act 1976 — there is merely a possibility, but not an obligation, to carry out or encourage such research. There are also shortcomings in the practical conduct of research. For example, Ireland has conceded that it does not have sufficient data to identify SPAs for the golden plover or the merlin.

190. On the other hand, Ireland relies on Irish case-law, according to which the wording selected in respect of ornithological research — 'the Minister may ...' — can also be construed as an obligation. Furthermore, research has been carried out in Ireland beyond the obligations laid down in Article 10 of the Birds Directive.

191. However, as the Commission correctly emphasises, there is merely a possibility that section 11(3) of the Wildlife Act 1976 will, despite its open wording, be construed as an obligation. Ireland has not submitted any court ruling applying this interpretation. Consequently, section 11(3) of the Wildlife Act 1976 is not worded in sufficiently clear and unambiguous terms to satisfy the requirements of Article 10 of the Birds Directive.

192. Furthermore, Ireland has not invalidated the complaint that it has not made

adequate efforts to carry out research. Consequently, this point must be deemed to have been conceded.

193. It is clear from the overall context of the action that similar shortcomings exist in relation to the kingfisher and have existed for at least some time in relation to other species. They are evident in particular in the inadequate classification of areas as SPAs. Moreover, the research topics referred to in Annex V are not mentioned in section 11 of the Wildlife Act.

194. Ireland has thus failed to take all the measures necessary to comply with Article 10 of the Birds Directive.

## IV — Costs

195. 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 by the successful party. Since Ireland has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the Commission.

196. Pursuant to Article 69(4) of the Rules of Procedure, the Kingdom of Spain and the Hellenic Republic shall bear the costs resulting from their respective interventions.

## V — Conclusion

197. I therefore propose that the Court should declare that:

(1) Ireland has infringed Directive 79/409/EEC on the conservation of wild birds and Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, by failing:

(a) to classify, since 6 April 1981, in accordance with Article 4(1) and (2) of Directive 79/409, all the most suitable territories in number and size for the species listed in Annex I to Directive 79/409 as well as regularly occurring migratory species, in particular by failing to classify the Cross Lough (Killadoon) area and to integrate two sections of the estuary of the River Tolka into the Sandymount Strand and Tolka Estuary special protection area;

(b) to ensure that, since 6 April 1981, the provisions of Article 4(4), first sentence, are applied to areas requiring classification as special protection areas under Directive 79/409 but which have not been classified as such;

(c) to fully and correctly transpose into national law and apply the requirements of the second sentence of Article 4(4) of Directive 79/409;

(d) in respect of the special protection areas classified under Directive 79/409 prior to the adoption of Statutory Instrument No 94/1997, European Communities (Natural Habitats) Regulations, 1997, to take all the measures necessary to comply with the provisions of Article 6(2) of Directive 92/43;

(e) in respect of adverse effects on all special protection areas intended to be subject to this provision caused by persons who are not the owners of the land at issue, to take all the necessary measures to comply with Article 6(2) of Directive 92/43;

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

(g) in respect of the authorisation of aquaculture programmes, to take all the measures necessary to comply with the provisions of the first sentence of Article 6(3) of Directive 92/43;

(h) in respect of measures to maintain drainage ditches in the area covered by the Glen Lake special protection area, to take all the measures necessary to comply with the provisions of Article 6(2), (3) and (4) of Directive 92/43; and

(i) to take all the measures necessary to comply with Article 10 of Directive 79/409.

(2) The remainder of the application is dismissed.

(3) Ireland shall pay the costs.

(4) The Kingdom of Spain and the Hellenic Republic shall bear their own respective costs.