

OPINION OF ADVOCATE GENERAL
KOKOTT

delivered on 29 January 2004¹

I — Introduction

1. This reference for a preliminary ruling from the Netherlands Raad van State concerns the interpretation and application of Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora² ('the habitats directive'). The case relates to the grant of authorisations for the mechanical fishing of cockles (*cerastoderma edule*) in the Netherlands Wadden Sea, which is a protected area for birds under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds³ ('the birds directive').
2. The Raad van State seeks to ascertain whether the annual authorisation of cockle fishing is to be regarded as agreement to a plan or project. This would mean that the
3. Firstly, it seeks clarification of the relationship between Article 6(3) of the habitats directive and Article 6(2) thereof, which imposes on Member States the general obligation to avoid deterioration and significant disturbance of Natura 2000 sites. Secondly, it seeks to ascertain the conditions under which it must be assumed that a plan or project is likely to have a significant effect on such a site, thus making it necessary to carry out an appropriate assessment of its implications for the site in view of the site's conservation objectives. It also raises the question whether the competent authority may authorise a plan or project where there is at least no obvious doubt as to the absence of significant adverse effects.
4. In the event that there is no plan or project within the meaning of Article 6(3) of

1 — Original language: German.

2 — OJ 1992 L 206, p. 7.

3 — OJ 1979 L 103, p. 1.

the habitats directive and therefore Article 6 (2) thereof must be applied, the Raad van State accordingly asks whether the granting of authorisation complies with the requirements of that provision as long as there is at least no obvious doubt as to the absence of significant adverse effects.

5. Thirdly, the Raad van State seeks to ascertain whether Article 6(2) and (3) of the habitats directive are directly applicable.

II — Legal framework

6. Under Article 4 of the birds directive, the Member States are to designate special protection areas for the species listed in Annex I thereto and for regularly occurring migratory species not listed therein.

7. Under Article 7 of the habitats directive, the obligations arising under Article 6(2), (3) and (4) thereof are to be applied to these special protection areas.

8. Article 6 of the habitats directive provides as follows:

‘1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

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

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to

appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.'

ostralegus) are of particular interest in the present case since cockles form a significant part of their food. Both species are present in the Wadden Sea throughout the year but their numbers are at their greatest in the winter on account of the influx of overwintering birds. There are around 150 000 eider ducks and around 200 000 oyster-catchers in the Wadden Sea at that time.

10. For many decades cockles have been fished in the Wadden Sea using the mechanical methods at issue in this case. To this end use is made of trawls, that is to say metal cages which are dragged over the seabed by a ship. The upper 4 to 5 cm of the surface are scraped into the cage by a 1 m-wide metal plate. A pipe, from which a powerful water jet emerges, is attached directly in front of the sharp edge. This pulverises the surface so that a mixture of water, sand, cockles and other organisms enter the trawl. The sieved content of the trawl is then sucked on board hydraulically.

III — Facts, procedure and questions submitted for a preliminary ruling

9. The Wadden Sea is an important habitat for many bird species. Therefore, the Netherlands has designated the majority of the Netherlands Wadden Sea a special protection area within the meaning of the birds directive. The eider duck (*somateria mollissima*) and the oyster-catcher (*haematopus*

11. Since 1975 fishing for cockles in the Wadden Sea has been subject to authorisation in order to avoid overfishing. Initially the law on nature conservation required only an exemption to which no further conditions were attached. Since 1998 this activity has required an annually renewable authorisation under Article 12 of the Natuurbeschermingswet (Nature Conservation Law).

12. On the basis of this law, the Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Secretary of State for Agriculture, Nature Conservancy and Fisheries) granted, in 1999 and 2000, the Coöperatieve Producentenorganisatie van Nederlandse Kokkelvisserij U.A. (Cooperative Producers Organisation for Netherlands Cockle Fisheries ('PO Kokkelvisserij')) an authorisation, subject to certain conditions, for the mechanical fishing of cockles in the Wadden Sea.

13. In addition to Article 12 of the Nature Conservation Law, these authorisations are based on other rules concerning cockle fishing in the Wadden Sea. Under the 'Key Planning Decision for the Wadden Sea' (Planologische Kernbeslissing Waddenzee; 'the Wadden Sea decision'), authorisation is precluded 'where, on the basis of the best available information, there appears to be obvious (in Dutch: "*duidelijke*") doubt as to the absence of a possible significant adverse effect on the ecosystem'.

14. A government decision of 21 January 1993, that is to say the Structuurnota Zee- en kustvisserij — 'Vissen naar evenwicht' (Regional economic plan for sea and coastal fishing entitled 'Fishing for Balance'; 'the regional economic plan'), contains further guidelines inter alia on cockle fishing in the Wadden Sea. Accordingly, certain sections of the Wadden Sea are closed permanently to this activity. In years in which food is scarce a total of 60% of the average food requirement of birds in the form of cockles and mussels is reserved for these birds. This quota has since been increased to 70% for years in which food is scarce on account of scientific

uncertainty as to the cause of a possible shortage of shellfish for the mass death of eider ducks in the winter of 1999/2000. The reason stated why 100% of the average food requirement is not reserved is that the birds also use alternative sources of food (e.g. Baltic clams, surf clams and shore crabs). Since 1997 work has been carried out on a comprehensive study into the effects of mollusc fishing whose conclusions are to be taken as a guide for future policy.

15. The plaintiffs, that is to say the Landelijke Vereniging tot Behoud van de Waddenzee ('Waddenvereniging') and the Nederlandse Vereniging tot Bescherming van Vogels ('Vogelbescherming'), two non-governmental organisations which have undertaken to conserve nature, are challenging the authorisations for 1999 and 2000.

16. They take the view that cockle fishing is likely to affect the Wadden Sea as a habitat in the following respects:

- adverse effects on sediment quality as a consequence of the silt being churned up and fine sediment being lost,

- destruction or impairment of the re-establishment of mussel beds and sea-grass meadows, and
 - shortage of food resources for birds as a consequence of overfishing.
- 1 a. Are the words “plan or project” in Article 6(3) of the habitats directive to be interpreted as also covering an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period, with a fresh assessment being carried out on each occasion as to whether, and if so in which sections of the area, the activity may be carried on?

17. On the basis of the information and studies before it the Raad van State concluded that when the defendant granted the authorisations in question it appraised and took account of the available scientific information in accordance with the requirements of Netherlands law. Although there was a considerable need for clarification as regards the consequences of the cockle fishing, the defendant had taken sufficient account of the precautionary principle by placing restrictions thereon, in particular by closing large sections of the Wadden Sea to cockle fishing and laying down fishing quotas having regard to the food requirement of the birds.

- b. If the answer to question 1a is in the negative, must the relevant activity be regarded as a “plan or project” if the intensity of this activity has increased over the years or an increase in it is made possible by the authorisations?

18. However, the Raad van State is uncertain whether this action complies with the requirements of the birds directive and the habitats directive. Therefore, it has submitted the following questions to the Court for a preliminary ruling:

- 2 a. If it follows from the answer to question 1 that there is a “plan or project” within the meaning of Article 6(3) of the habitats directive, is Article 6(3) of the habitats directive to be regarded as a special application of the rules in Article 6 (2) or as a provision with a separate,

independent purpose in the sense that, for example:

mean that an “appropriate assessment” has to be carried out only where there is a (sufficient) likelihood that a “plan or project” will have a significant effect?

(i) Article 6(2) relates to existing use and Article 6(3) relates to new plans or projects, or

(ii) Article 6(2) relates to management measures and Article 6(3) to other decisions, or

(iii) Article 6(3) relates to plans or projects and Article 6(2) to other activities?

b. On the basis of which criteria must it be determined whether or not a plan or project within the meaning of Article 6(3) of the habitats directive not directly connected with or necessary to the management of the site is likely to have a significant effect thereon, either individually or in combination with other plans or projects?

b. If Article 6(3) of the habitats directive is to be regarded as a special application of the rules in Article 6(2), can the two subparagraphs be applicable cumulatively?

4 a. When Article 6 of the habitats directive is applied, on the basis of which criteria must it be determined whether or not there are “appropriate steps” within the meaning of Article 6(2) or an “appropriate assessment”, within the meaning of Article 6(3), in connection with the certainty required before agreeing to a plan or project?

3 a. Is Article 6(3) of the habitats directive to be interpreted as meaning that there is a “plan or project” once a particular activity is likely to have an effect on the site concerned (and an “appropriate assessment” must then be carried out to ascertain whether or not the effect is “significant”) or does this provision

b. Do the terms “appropriate steps” or “appropriate assessment” have independent meaning or, in assessing these terms, is account also to be taken of Article 174(2) EC and in particular the precautionary principle referred to therein?

c. If account must be taken of the precautionary principle referred to in Article 174(2) EC, does that mean that a particular activity, such as the cockle fishing in question, can be authorised where there is no obvious doubt as to the absence of a possible significant effect or is that permissible only where there is no doubt as to the absence of such an effect or where the absence can be ascertained?

project'. The answer to this question determines the manner in which this case is considered further. If the annual grant of authorisations for cockle fishing has to be regarded as agreement to a plan or project, Article 6(3) of the habitats directive must be applied.

5. Do Article 6(2) or Article 6(3) of the habitats directive have direct effect in the sense that individuals may rely on them in national courts and those courts must provide the protection afforded to individuals by the direct effect of Community law, as was held *inter alia* in Case C-312/93 *Peterbroeck*⁴?

1. Submissions of the parties

20. Waddenvereniging, Vogelbescherming and, in the written proceedings also the Commission, take the view that the annual decision on cockle fishing in the Wadden Sea must be regarded as agreement to a plan or project. A broad interpretation must be placed on the words 'plan and project'. Vogelbescherming in particular goes so far as to contend that it must be considered that there is a plan or project in the case of any authorisation but that, conversely, the use of these words cannot be ruled out on the grounds that no authorisation is required. In the view of the Commission, it must always be considered that there is a plan or project where a particular activity is likely, by its nature, to have a significant effect on a site.

IV — Assessment

A — Question 1: the words 'plan or project'

19. By Questions 1a and 1b the Raad van State seeks clarification of the words 'plan or

21. All three parties rely on the fact that each year a fresh decision must be taken on cockle fishing and that refusal to grant authorisation is also conceivable in principle.

⁴ — Case C-312/93 [1995] ECR I-4599.

The Commission's guidelines⁵ refer explicitly to fishing even where no authorisation is necessary in that regard. The effects of cockle fishing can vary depending on a large number of factors, in particular population development.

words 'plan' and 'project' but would like — in the same way as PO Kokkelvisserij — to limit the application of Article 6(3) of the habitats directive to new plans and projects. It contends that at the time a special protection area is designated only existing plans and projects are subject to Article 6(2) of the habitats directive. This applies to activities such as cockle fishing which were already carried on in the past, irrespective of whether or not authorisations must be renewed annually.

22. Waddenvereniging and Vogelbescherming also note that the catches of 10 000 tonnes first fixed in 1999 had never been attained in previous years. Consequently an extension of fishing had been authorised. Furthermore, Vogelbescherming refers to a 1998 judgment of the Raad van State which resulted in an authorisation of the type in question being granted for the first time in 1999. In that respect Vogelbescherming also refers to the judgment in *Kraaijeveld*,⁶ according to which the decisive factor as regards the approval of a project, in the context of the directive on environmental impact assessment, is the significance of its effect on the environment.⁷

24. The Netherlands Government emphasises that the cockle fishing has no notable effect on a special protection area and the Wadden Sea was therefore designated as such in spite of the fishing. Moreover, it concludes that the authorisation to expand an existing plan or project — or an existing activity — could constitute a new plan or project which would have to be assessed under Article 6(3) of the habitats directive having regard to the effects of the previous activity.

23. The Netherlands Government also recommends a broad interpretation of the

25. PO Kokkelvisserij alone takes the view that there is no new project or plan even where existing activities are expanded. Furthermore, it contends that in any event the cockle fishing was not expanded overall but merely adapted each year to the prevailing circumstances. Between 1980 and 2000 between 0 (1991 and 1996) and 9.3 million kilograms of cockles were caught each year.

5 — Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC ('the guidelines').

6 — Case C-72/95 [1996] ECR I-5403.

7 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73, p. 5).

Seven million kilograms or more were caught in 1980, 1983, 1984, 1988, 1998, and 1999 and less than 2 million kilograms in 1987, 1991, 1996 and 1997. No increase can be discerned. On the contrary, the catches varied from year to year. The annual differences can be attributed solely to the prevailing conditions, in particular population development. Relative to biomass values of over 20% were reached in 1984, 1985, 1986 and 1990, whilst the maximum values since have been around 10%. Therefore, from this perspective it can even be concluded that there has been a reduction in fishing.

26. At the hearing the Commission pointed to the possibility that there could be a management plan within the meaning of Article 6(1) of the habitats directive which provides for the cockle fishing in part or in full. A plan or project exists only in so far as a step goes beyond this management plan since Article 6(3) of the habitats directive is expressly applicable only to steps not directly connected with or necessary to the management of the site. However, even in the absence of a management plan it can be concluded that there is a plan or project only if the annual authorisation of an activity carried on relates to new elements, for example new technologies or intensification.

2. Opinion

27. Article 6 of the habitats directive is intended to ensure that the natural wealth in the Natura 2000 network — the natural habitats and species numbers in the relevant protection areas — remains intact. To this end, Article 6(1) provides for conservation measures, that is to say positive action. In general terms Article 6(2) requires that deterioration and disturbance likely to have significant effect be avoided.

28. Article 6(3) and (4) of the habitats directive lay down particular rules on plans and projects. Under Article 6(3), a measure should, as a rule, be authorised only if it will not adversely affect the integrity of a Natura 2000 site. In order to be able to determine whether this will be the case, an appropriate assessment of its implications for the site must be made in view of the site's conservation objectives. Under Article 6(4), adverse effects on the integrity of sites are, by way of exception, permitted under certain circumstances, if compensatory measures are taken. Where no appropriate assessment is necessary, there are, under Article 6(3) and (4) of the habitats directive, no further limitations on the plan or project concerned.

29. The requirements for an appropriate assessment are laid down in the first sentence of Article 6(3) of the habitats

directive. In this multi-stage assessment the words ‘plan’ and ‘project’ are the initial filter which removes measures which are not subject to an appropriate assessment. Before an appropriate assessment becomes necessary, other limiting conditions must be assessed, namely the direct connection with the management of the site referred to by the Commission and the likelihood of significant effect on the site mentioned in the third question submitted for a preliminary ruling. Each of these criteria has its own function and justification. In that respect the words ‘plan’ and ‘project’ are primarily a formal condition for the application of Article 6(3) of the habitats directive. In view of the structure of the first sentence of Article 6(3) of the habitats directive considerations relating to nature conservation arise in principle only during the two subsequent stages of the assessment.

30. For unintentional damage to Natura 2000 sites to be avoided effectively, all potentially harmful measures must, where possible, be subject to the procedure laid down in Article 6(3) of the habitats directive. Therefore, the terms ‘plan’ and ‘project’ should be interpreted broadly, not restrictively. This is also consistent with the wording, which expressly refers to any⁸ plan or project in almost all language versions.⁹

31. The question how the words ‘plan’ and ‘project’ should be defined in detail may be left open here since mechanical cockle fishing was regarded as a plan or project when it commenced — a matter on which none of the parties has cast doubt. On account of its wide-ranging effects on the upper layer of the seabed it is in principle comparable, in terms of its environmental impact, with the extraction of mineral resources. In that respect it would therefore have to be regarded as another intervention and thus as a project within the meaning of Article 1 (2) of the directive on environmental impact assessment.

That provision defines a project as the execution of construction works or of other installations or schemes or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.¹⁰ Without wishing to apply this definition of ‘project’ definitively to the habitats directive, it is at least appropriate and adequate in the present case. In this case the question whether the authorisation relates to one or several projects, or even to a plan coordinating various projects, can be left open. It makes

⁸ — The German and Portuguese versions are exceptions.

⁹ — As regards the term ‘plan’, see also the Opinion of Advocate General Fenelly in Case C-256/98 *Commission v France* [2000] ECR I-2487, I-2489, paragraph 33.

¹⁰ — Conversely, the definition of ‘plans and programmes’ set out in Article 2(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30) contains no substantive clarification but limits the definition to the results of particular decision-making procedures.

no difference as regards the legal consequences.

32. Doubts as to the existence of a plan or a project could arise from that fact that cockle fishing has already been carried on in its present form for many years. However, neither the term 'plan' nor the term 'project' would preclude a measure renewed at regular intervals from being regarded on each occasion as a separate plan or project.

33. Netherlands law also appears to proceed from this basis. Cockle fishing cannot be carried on without the annual grant of an authorisation. Therefore, it requires authorisation by the competent authorities. However, the procedure for authorising plans and projects arises from Article 6(3) of the habitats directive. Nevertheless, the applicability of Article 6(3) of the habitats directive cannot be based solely on the fact that the Netherlands has granted no permanent authorisation but rather renews the authorisation annually. If the need for an appropriate assessment turned solely on whether national law provided for permanent authorisation or annually renewable authorisation for the relevant measure, there would be an incentive to grant authorisations relating to special protection areas for an unlimited period in order to circumvent the application of Article 6(3) of the habitats directive.

34. However, such circumvention of Article 6(3) of the habitats directive would be incompatible with Community law. In the same way as other directives on the environment, the habitats directive provides that certain measures require authorisation by the authorities.¹¹ The legislature clarified this matter subsequently in the directive on environmental assessment.¹²

35. Since the habitats directive does not stipulate which activities are to be authorised in which form, it is primarily for the Member States to lay down the relevant rules. However, in laying down the requirements relating to authorisation they must take account of the likelihood of Natura 2000 sites being affected. Temporary authorisations which have to be reviewed on a regular basis are particularly appropriate where the possible effects cannot be assessed with sufficient accuracy at the time of the initial authorisation but instead depend on variable circumstances.

11 — See Case C-360/87 *Commission v Italy* [1991] ECR I-791, paragraph 31, and Case C-230/00 *Commission v Belgium* [2001] ECR I-4591, paragraph 16, in which the Court declared tacit authorisation or refusal of requests for authorisation as incompatible with the requirement relating to examination laid down in various other directives on the environment.

12 — See Article 2(1) of the directive on environmental assessment which was introduced by Directive 97/11.

36. Cockle fishing in the Wadden Sea appears to be a typical example of an activity whose authorisation should be reviewed annually. The availability of cockles varies from year to year depending on weather conditions. It does not appear possible to rule out the possibility of overfishing.¹³ In winter cockles are very important as a food for eider ducks and oyster-catchers. Therefore, at least annual management is necessary to balance exploitation of the cockle stocks and the food requirement of the birds. Consequently, the Netherlands practice of renewing authorisations for cockle fishing annually satisfies the requirements of Article 6(3) of the habitats directive.

37. However, in principle the need, in terms of nature conservation, for an authorisation requirement is not a condition for regarding an activity subject to authorisation as a plan or project. Such considerations are necessary only where, in the absence of such a requirement, there are grounds for assuming that such activity should be classified as a plan or project.

38. Precisely in the case of repeated measures this interpretation of the terms 'plan' and 'project' does not, furthermore, lead to disproportionate harm. If the effects remain the same from year to year, at the next stage of the assessment it can easily be determined, with reference to the assessments in previous years, that no significant effect is likely.

However, where such reference is not possible on account of changing circumstances, the need to carry out more comprehensive fresh assessments cannot be ruled out and is actually also justified.

39. The answer to the first question must therefore be that the words 'plan and project' in Article 6(3) of the habitats directive also cover an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period.

40. In view of this conclusion there is no need to comment on Question 1b which asks whether any difference is made by the fact that the activity increases or authorisation opens up the possibility of an increase. However, it should be noted that the extension of an existing activity, which must be regarded as a plan or project, can in principle be classified as a new plan or new project. Therefore, such extension would have to be assessed to ascertain whether it was likely to have a significant effect on a Natura 2000 site, either individually or together with other plans or projects (including the existing activity). If necessary, the further stages in the procedure laid down in Article 6(3) and (4) of the habitats directive would have to be carried out.

¹³ — This is emphasised by the fact that natural mussel beds in the Netherlands Wadden Sea have obviously declined.

B — *Question 2: the relationship between Article 6(2) and 6(3) of the habitats directive*

41. The second question relates to the relationship between Article 6(2) and Article 6(3) of the habitats directive. The Raad van State seeks to ascertain how a distinction is to be drawn between these two provisions and whether they can be applied cumulatively. It proposes various possible ways of drawing a distinction, that is to say

- Article 6(2) relates to existing use and Article 6(3) relates to new plans or projects,
- Article 6(2) relates to management measures and Article 6(3) to other decisions, or
- Article 6(3) relates to plans or projects and Article 6(2) to other activities.

another in terms of their nature and scope. Article 6(3) lays down the procedure for authorising projects at a particular time, whilst Article 6(2) imposes a permanent obligation to take positive action to avoid deterioration of sites.

43. It considers that the alternative interpretations put forward by the Raad van State are inadequate. The first alternative raises difficult questions concerning the distinction to be drawn between existing plans or projects. The second alternative fails to appreciate that administrative measures can be of different kinds and would primarily fall within the scope of Article 6(1). Furthermore, not all measures necessary to conserve the site could be based on Article 6(3). The third alternative is correct in so far as it subjects plans and projects to Article 6(3), but fails to understand that Article 6(2) cannot be limited to activities. On the contrary, natural developments could also give rise to obligations to act under Article 6(2).

1. Submissions of the parties

42. Vogelbescherming takes the view that these provisions differ clearly from one

44. In the view of Vogelbescherming and Waddenvereniging, the two subparagraphs could also be applied cumulatively, for example where, in spite of an appropriate assessment, a project authorised under subparagraph 3 subsequently had unforeseen adverse effects on a site which necessitated

measures under subparagraph 2. However, Vogelbescherming considers that it would not make sense simultaneously to apply subparagraph 2 in connection with authorisation under subparagraph 3.

ing in so far as this provision relates to plans and projects, whilst subparagraph 2 concerns a general obligation to avoid deterioration and significant disturbance. Subparagraph 2 applies to activities which require no prior authorisation. In any event subparagraph 3 is not a special rule vis-à-vis subparagraph 2.

45. In the view of the Netherlands Government, the purpose of both provisions is to conserve the relevant sites, with subparagraph 2 concerning all measures and subparagraph 3 only new plans and projects likely to have a significant effect on the relevant sites. A special regime was expressly provided for in respect of such sites. However, it does not make sense to apply the two provisions cumulatively.

2. Opinion

46. PO Kokkelvisserij essentially refers to the Commission's comments in its guidelines.¹⁴ Accordingly, it concludes that plans or projects must be assessed under subparagraph 3 and other measures under subparagraph 2. Although both provisions relate to the conservation objectives of the site concerned, they cannot be applied cumulatively.

48. The fields of application of Article 6(2) and (3) are evident from the wording thereof. Subparagraph 2 relates to deterioration and disturbance and subparagraph 3 to plans and projects. Accordingly, the possibility of an overlap between the two fields of application cannot be ruled out.

47. Finally, the Commission takes the view that subparagraph 3 has independent mean-

49. However, subparagraph 3 could — where appropriate, in conjunction with subparagraph 4 — lay down a definitive special rule on plans and projects which excludes the application of Article 6(2). This would mean that following authorisation under Article 6(3) or (4) plans and projects could no longer be subjected to further requirements by virtue of the adverse effect on protection areas.

¹⁴ — Cited in footnote 5 above, pp. 8, 30 and 64.

50. A strong argument against applying Article 6(2) of the habitats directive to plans and projects would appear to follow from Article 6(4). If Article 6(2) were applicable to plans and projects which were authorised under this provision in spite of the adverse effect on protection areas, this derogating authorisation would have no practical effect. Member States would normally be required to prevent such plans and projects as they would result in the deterioration of protection areas. It must therefore be concluded that Article 6(2) cannot be applied in such cases. If Article 6(3) and (4) were construed as a uniform system for authorising plans and projects, it would be consistent to exclude the application of Article 6(2) also in the case of authorisation under Article 6(3).

51. The initiators of plans and projects and the competent authorities would enjoy considerably enhanced legal certainty if Article 6(3) and (4) of the habitats directive alone applied to plans and projects. In the case of new plans and projects definitive authorisation would ensure that considerations relating to protection of a site could no longer affect the implementation of the scheme in question. Furthermore, the existence of previous authorisations for plans and projects which were not granted pursuant to Article 6(3) would not be called into question on account of adverse effects on protection areas.

52. However, such exclusive application of Article 6(3) of the habitats directive is not imperative under the general scheme of Article 6. In any event, the normal authorisation procedure with the appropriate assessment and the derogating authorisation are to be found in different subparagraphs.

53. Furthermore, there is a fundamental difference between plans and projects authorised under Article 6(3) of the habitats directive and plans and projects which are to be authorised only by way of exception under Article 6(4) thereof. Normal authorisation is based on the assumption that a plan or project will not adversely affect the integrity of protection areas, whereas the derogating authorisation assumes that such adverse effect will occur.

54. Therefore, even after the conclusion of the normal authorisation procedure under Article 6(3) of the habitats directive the general obligation laid down in Article 6(2) must apply to avoid deterioration and significant disturbance attributable to the implementation of a plan or project.

55. This is consistent with the particular function of Article 6(3) of the habitats directive in comparison with Article 6(2). Article 6(3) primarily establishes an author-

isation procedure which uses the opportunity to assess the impact of a plan or a project in light of the conservation objectives of the protection area concerned before it has any adverse effects on that area. However, a preliminary check is not incompatible with the application of the general rule relating to protection laid down in Article 6(2).

56. Where the provisions are complied with, there is, following the authorisation procedure under Article 6(3) of the habitats directive, no need for subsequent measures under Article 6(2). An ideal appropriate assessment would identify precisely any adverse effect which occurred subsequently. Therefore, authorisation would be granted only where the plan or the project did not adversely affect the integrity of the site concerned. For the purpose of providing a consistent standard of protection this would also exclude the possible occurrence of deterioration or disturbance which could be significant in relation to the objectives of the directive. At the same time the practical effectiveness of authorisation under Article 6(3) of the habitats directive would be safeguarded since the effects expressly permitted therein could not constitute an infringement of Article 6(2).

57. However, practical consequences relating to authorised projects and plans would arise from Article 6(2) of the habitats directive if they resulted in deterioration or

significant adverse effects in spite of an appropriate assessment. In that case the Member State concerned would be obliged to take the necessary preventative measures in spite of the fact that authorisation had been given.

58. This obligation is appropriate since otherwise habitats areas and species numbers within Natura 2000 network could be lost forever. It is further justified, at least in the case of new plans and projects, by the fact that in such cases the Member States have accepted either an inadequate appropriate assessment or scientific uncertainty as to the effects of the measure concerned. However, it is also unacceptable for habitats areas and species numbers to be reduced as a consequence of old plans and projects to which Article 6(3) of the habitats directive did not apply *ratione temporis*.

59. The continuing application of Article 6(2) of the habitats directive to plans and projects would also be consistent with the Court's judgment in Case C-117/00.¹⁵ In that case it ruled that Ireland had not fulfilled its obligations under Article 6(2) of the habitats directive in respect of the Owenduff-Nephin Beg Complex. That case concerned overgrazing resulting in erosion

¹⁵ — Case C-117/00 *Commission v Ireland* [2002] ECR I-5335, paragraph 22 et seq.

and a decline in heath land and also the planting of conifers. In that context the Court did not raise the question whether there were plans or projects which required the application of Article 6(3) of the habitats directive and, possibly, precluded the application of Article 6(2).

60. Accordingly, the answer to the second question must be that Article 6(3) of the habitats directive lays down the procedure for authorising plans and projects which do not affect the integrity of protection sites, whereas Article 6(2) thereof lays down permanent obligations, irrespective of the authorisation of plans and projects, to avoid deterioration and disturbance which could be significant in relation to the objectives of the directive.

C — Question 3: the possibility of significant adverse effect

61. By its third question the Raad van State seeks to clarify two conditions for carrying out an appropriate assessment under the first sentence of Article 6(3) of the habitats

directive. It asks, one, what requirements must be placed on the *likelihood* of significant adverse effect and, two, when it must be considered that the possible adverse effect is *significant*.

62. It should first be pointed out that the possibility of significant adverse effect is primarily a question of nature conservation which must be answered on the basis of the circumstances of the individual case. However, the Court may provide guidance.

1. Possibility of an adverse effect

a) Submissions of the parties

63. Waddenvereniging considers that it is always necessary to carry out an appropriate assessment where the absence of significant adverse effects cannot clearly be excluded.

64. Vogelbescherming dismisses the idea of limiting the appropriate assessment to cases in which significant effects will occur with a sufficient degree of probability. On the

contrary, it is sufficient that such effects could occur. The likelihood of adverse effects occurring can be assessed only when the actual appropriate assessment is carried out.

68. PO Kokkelvisserij also considers that an appropriate assessment is necessary only where it can be presumed that the plan or project will have significant adverse effect.

65. Vogelbescherming understands the question submitted by the Raad van State as asking whether the possibility of measures to minimise damage could be taken into account as earlier as this stage of the application of Article 6(3) of the habitats directive. However, such measures can be taken effectively only on the basis of an appropriate assessment. In the present case the questions posed in connection with an ongoing government study already show that cockle fishing is likely to have significant effect.

b) Opinion

69. As regards the degree of probability of significant adverse effect, the wording of various language versions is not unequivocal. The German version appears to be the broadest since it uses the subjunctive '*könnte*' (could). This indicates that the relevant criterion is the mere possibility of an adverse effect. On the other hand, the English version uses what is probably the narrowest term, namely 'likely', which would suggest a strong possibility. The other language versions appear to lie somewhere between these two poles. Therefore, according to the wording it is not necessary that an adverse effect will certainly occur but that the necessary degree of probability remains unclear.

66. The Commission considers that in addition to the fundamental ability of a plan or project to adversely affect a site the occurrence of significant adverse effect must also be sufficiently likely. This must be assessed in a preliminary assessment. According to the precautionary principle, doubt as to the absence of such effects is sufficient to give rise to an obligation to carry out an appropriate assessment.

67. The Netherlands Government takes the view that an appropriate assessment is necessary only where significant adverse effects are sufficiently likely. This must be determined in a preliminary assessment.

70. Since the normal authorisation procedure is intended to prevent protection areas being affected by plans or projects, the requirements relating to the probability of an adverse effect cannot be too strict. If the possibility of an appropriate assessment were ruled out in respect of plans and projects which had only a 10% likelihood of having a significant adverse effect, statistically speaking one in ten measures precisely under this limit would have significant effects. However,

all such measures could be authorised without further restrictions. Consequently, such a specific probability standard would give rise to fears that Natura 2000 would slowly deteriorate. Furthermore, the appropriate assessment is also precisely intended to help establish the likelihood of adverse effects. If the likelihood of certain adverse effects is unclear, this militates more in favour than against an appropriate assessment.

taken, on the one hand, of the likelihood of harm and, on the other, also of the extent and nature of such harm. Therefore, in principle greater weight is to be attached to doubts as to the absence of irreversible effects or effects on particularly rare habitats or species than to doubts as to the absence of reversible or temporary effects or the absence of effects on relatively common species or habitats.

71. In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment.

74. Therefore, an appropriate assessment is always necessary where reasonable doubt exists as to the absence of significant adverse effects.

72. On the other hand, it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment. Adverse effects, which are not obvious in view of the site's conservation objectives, may be disregarded. However, this can be assessed and decided on only on a case-by-case basis.

2. Significance

a) Submissions of the parties

73. In that regard the criterion must be whether or not reasonable doubt exists as to the absence of significant adverse effects. In assessing doubt, account will have to be

75. Waddenvereniging proposes various criteria for assessing significance. The effects of comparable schemes on other sites and population development — in this case the decline of eider ducks — could provide guidance. The size of the areas and the project cannot be taken into consideration since otherwise sections of protection areas could in practice lose their protected status.

76. Vogelbescherming proposes the following stages of assessment:

- would irrevocably destroy a vital component of the ecosystem which characterises the site and is essential to its integrity or its importance to the coherence of Natura 2000.

- Are adverse effects conceivable?

- Do the areas covered by the plan or project overlap with the areas covered by the natural habitats or species?

78. The Netherlands Government would also like to avoid an arbitrary or casual assessment of significance and expects account to be taken not only of the features of the site concerned but also of the cumulative effects connected with other plans and projects.

- If the answer to both questions is in the affirmative, it is necessary to examine whether or not there is the slightest risk of an adverse effect on the integrity of the site concerned.

77. The Commission calls for an objective interpretation which, in terms of its application, must, however, be guided by the particular features of the site concerned. Adverse effects are significant in particular where they

79. PO Kokkelvisserij refers to the Commission's guidelines¹⁶ and the adverse effects which formed the subject-matter of the judgment concerning the Santoña Marshes.¹⁷ According to that judgment, the effects must be considerable, relatively serious, irreparable or difficult to repair. In view of the complexity of environmental assessments, it dismisses the idea of an exhaustive list of criteria. However, it does consider that in each case it is necessary to take account of the nature and extent of the site and the actual and foreseeable effects of the plan or project, in particular whether these effects are structural or temporary or can be avoided by natural means. Consideration should also be given to the conservation objectives of the site and other environmental characteristics or consequences.

- render the implementation of the conservation objectives impossible or unlikely, or

16 — Cited in footnote 5 above, point 4.4.1, p. 36 et seq.

17 — Case C-355/90 *Commission v Spain* [1993] ECR I-4221.

b) Opinion

80. Restricting the appropriate assessment to plans and projects which are likely to have significant effect prevents unnecessary appropriate assessments. A rough assessment must be made of this requirement as part of a preliminary assessment without anticipating the actual appropriate assessment.

81. The term 'significant' describes two comparison parameters, in this case the relationship between certain adverse effects on a protection area. The protection area is defined by its conservation objectives. The seriousness of the adverse effects is evident from the extent and nature of the possible harm. Not only the ability to reverse or offset the effects but also the rarity of the habitats or species concerned are relevant in this respect.

82. Of the parties, only the Commission seeks to define precisely the threshold beyond which effects become significant. However, the criteria which it proposes — the defeat of the conservation objectives or destruction of essential components of the site — set this threshold very high.

83. At the hearing Vogelbescherming and Waddenvereniging correctly pointed out that this standard does not reflect the Court's

case-law, in particular that concerning the birds directive. For example, it follows from the judgment concerning the Leybucht that any reduction in a special protection area, for example by the construction of a road,¹⁸ is to be equated at least with a considerable adverse effect.¹⁹ In the judgment concerning the Santoña Marshes the Court also recognised that a marine-farming scheme²⁰ and the discharge of waste water²¹ constituted significant adverse effects without considering cumulative effects. However, it cannot be assumed that these actions would in themselves have been capable of defeating the conservation objectives of the special protection areas concerned or of destroying essential components thereof.

47

84. However, I must concur with the Commission in so far as it refers to the conservation objectives of the site. These objectives demonstrate its importance within Natura 2000. Therefore, each of these objectives is relevant to the network. If adverse effects resulting from plans and projects were accepted on the grounds that they merely rendered the attainment of these objectives difficult but not impossible or unlikely, the species numbers and habitat areas covered by Natura 2000 would be

18 — *Santoña* judgment, cited in footnote 17 above, paragraph 36.

19 — Case C-57/89 *Commission v Germany* [1991] ECR I-883, paragraph 20 et seq.

20 — *Santoña* judgment cited in footnote 17 above, paragraphs 44 and 46. See also Case C-96/98 *Commission v France (Pottou)* [1999] ECR I-8531, paragraph 39.

21 — *Santoña* judgment, cited in footnote 17 above, paragraph 52 et seq.

eroded by them. It would not even be possible to foresee the extent of this erosion with any degree of accuracy because no appropriate assessment would be carried out. These losses would not be offset because Article 6(4) of the habitats directive would not apply.

determine whether, in the present case, the competent authorities carried out an appropriate assessment and drew the necessary conclusions or took appropriate steps to avoid deterioration and disturbance.

85. Thus, in principle any adverse effect on the conservation objectives must be regarded as a significant adverse effect on the integrity of the site concerned. Only effects which have no impact on the conservation objectives are relevant for the purposes of Article 6(3) of the habitats directive.

86. The answer to this part of the third question must therefore be that any effect on the conservation objectives has a significant effect on the site concerned.

1. The appropriate assessment

88. In so far as it concerns the appropriate assessment, the fourth question relates, on the one hand, generally to the requirements concerning an appropriate assessment and, on the other, specifically to whether it is justified to refuse cockle-fishing authorisations only where there is 'obvious doubt' as to the absence of significant adverse effects. In this connection the Raad van State raises the question whether the precautionary principle must be observed.

a) Submissions of the parties

D — Question 4: the appropriate assessment and appropriate steps

i) General remarks

87. By its fourth question the Raad van State seeks to obtain the clarifications necessary to

89. PO Kokkelvisserij proposes deriving the requirements relating to the appropriate

assessment from Article 2(2) and (3) of the habitats directive under which, on the one hand, natural habitats and species of wild fauna and flora of Community interest are to be maintained or restored at favourable conservation status but, on the other, account is to be taken of economic, social and cultural requirements and regional and local characteristics.

gives sufficiently concrete expression to the precautionary principle and therefore renders unnecessary the reference to Article 174(2) EC.

iii) Doubt as to the absence of adverse effects

90. The other parties agree that an appropriate assessment must relate to the effects of plans or projects on the conservation objectives of the site concerned. In that regard they propose methods with varying degrees of detail.

92. The Commission refers to the English and French language versions of the second sentence of Article 6(3) of the habitats directive, under which the competent authorities must be certain that the integrity of the site concerned will not be adversely affected. In the same way as Vogelbescherming and Waddenvereniging it consequently concludes that there may be no doubt that such adverse effects are unlikely.

ii) The precautionary principle

91. Waddenvereniging, the Commission, the Netherlands Government and PO Kokkelvisserij take the view that the precautionary principle laid down in Article 174(2) EC must be taken into account in interpreting Article 6(2) and (3) of the habitats directive. Vogelbescherming considers that Article 6(2) and (3) of the habitats directive already

93. The Netherlands Government takes the view that criterion relating to obvious doubt must apply to Article 6(2) and (3) of the habitats directive. For the purpose of applying the first sentence of Article 6(3), obvious doubts are necessary to give rise to an appropriate assessment. Within the scope of the second sentence of Article 6(3) authorisation must be possible where there is no absolute certainty, but only a high degree of certainty that adverse effects can be ruled out. Absolute certainty can rarely be attained. Accordingly, the authorisation of a plan or project can be denied only where obvious doubts remain after an appropriate assessment has been carried out.

94. PO Kokkelvisserij takes the view that the precautionary principle would be stretched too far if authorisation had to be denied where there was any doubt as to the absence of adverse effects. Referring also to the principle of proportionality, it proposes that where there is scientific uncertainty appropriate steps must be taken which cannot normally rule out all risks.

96. Most languages versions, and also the 10th recital in the preamble to the German version, expressly require an *appropriate* assessment. As the Commission in particular correctly states, it is also clear from the wording of Article 6(3) of the habitats directive that an appropriate assessment must precede agreement to a plan or project and that it must take account of cumulative effects which arise from combination with other plans or projects.

b) Opinion

i) Appropriate assessment

95. It should first be noted that the habitats directive does not lay down any methods for carrying out an appropriate assessment. In this respect it may be helpful to refer to the relevant documents of the Commission,²² even though they are not legally binding. The Court can in no way draw up, in abstract terms, a particular method for carrying out an appropriate assessment. However, it is possible to derive certain framework conditions from the directive.

97. This assessment must, of necessity, compare all the adverse effects arising from the plan or project with the site's conservation objectives. To that end, both the adverse effects and the conservation objectives must be identified. The conservation objectives can be deduced from the numbers within the site. However, it will often be difficult to encompass all adverse effects in an exhaustive manner. In many areas there is considerable scientific uncertainty as to cause and effect. If no certainty can be established even having exhausted all scientific means and sources, it will consequently be necessary also to work with probabilities and estimates. They must be identified and reasoned.

²² — See, for example, the guidelines cited in footnote 5 and the document entitled 'Assessment of plans and projects significantly affecting Natura 2000 sites, Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC', November 2001.

98. Following an appropriate assessment, a reasoned judgment must be made as to

whether or not the integrity of the site concerned will be adversely affected. In that respect it is necessary to list the areas in which the occurrence or absence of adverse effects cannot be established with certainty and also the conclusions drawn therefrom.

ii) Taking account of the precautionary principle and permissible doubts as regards the authorisation of plans and projects

99. As regards the decision on authorisation, the second sentence of the German version of the second sentence of Article 6(3) of the habitats directive provides that such decision is to be taken only when, in the light of the conclusions of the assessment of the implications for the site, the competent authorities have ascertained that it will not adversely affect the integrity of the site concerned. As the Commission correctly emphasises, the other language versions go further than a mere 'ascertainment' in that they require that the competent authorities establish certainty in this respect. Therefore, it must be concluded that the ascertainment required for agreement in the German version can be made only when, in the light of the conclusions of the assessment of the implications for the site, the competent authorities are certain that it will not adversely affect the integrity of the site concerned.²³ Therefore, as regards the

decision the decisive factor is not whether such adverse effect can be proven but — conversely — that the authorising authorities ascertain that there are no such effects.

100. This rule gives concrete expression to the precautionary principle laid down in Article 174(2) EC in relation to a protection area covered by Natura 2000. The precautionary principle is not defined in Community law. It is examined in case-law primarily in so far as protective measures may be taken, where there is uncertainty as to the existence or extent of risks, without having to wait until the reality and seriousness of those risks become fully apparent.²⁴ Therefore, the decisive factor is the element of scientific uncertainty as to the risks involved.²⁵ However, in each particular case the action associated with the protective measures must be proportionate to the assumed risk. In that regard the Commission stated in its communication on the precautionary principle that judging what is an 'acceptable' level of risk for society is an eminently political responsibility.²⁶ Such responsibility can be met only where the

23 — See, to this effect, also the Opinion of Advocate General Léger in Case C-209/02 *Commission v Austria (Wörschach golf course)* [2004] ECR I-1211, paragraph 40 et seq. The German version of the opinion is based, as regards paragraph 30, on the difference set out between the German version of the directive and the other language versions.

24 — Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 63; Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraph 99; and Case C-236/01 *Monstanto Agricoltura Italia* [2003] ECR I-8105, paragraph 111.

25 — For example, the Ministerial Declaration of the Sixth Trilateral Governmental Conference on the Protection of the Wadden Sea, Esbjerg, 13 November 1991, defined the precautionary principle as follows: 'to take action to avoid activities which are assumed to have significant damaging impact on the environment, even where there is no sufficient scientific evidence to prove a causal link between activities and their impact.'

26 — Communication from the Commission on the precautionary principle of 2 February 2000 (COM/2000/0001), point 5.2.1.

scientific uncertainty is minimised before a decision is taken by using the best available scientific means.

remaining risks may not undermine this certainty.

101. Accordingly, the rulings of the Court did not concern a ‘failure to observe’ the precautionary principle in abstract terms, but the application of provisions which give expression to the precautionary principle in relation to certain areas.²⁷ On the one hand, these provisions normally provide for a comprehensive scientific assessment and, on the other, specify the acceptable level of risk which remains after this assessment in each case or the margin of discretion of the relevant authorities.

103. However, it could be contrary to the principle of proportionality, which is cited by PO Kokkelvisserij, to require certainty as to the absence of adverse effects on the integrity of the site concerned before an authority may agree to a plan or project.

102. Article 6(3) of the habitats directive constitutes such a rule. In order to avoid adverse effects on the integrity of Natura 2000 sites as a result of plans and projects, provision is firstly made for the use of the best available scientific means. This is done by means of a preliminary assessment of whether there are likely to be significant effects and then, where necessary, an appropriate assessment is carried out. The level of risk to the site which is still acceptable after this examination is set out in the second sentence of Article 6(3). According to that provision, the authorising authority can grant authorisation only when it is certain that the integrity of the site concerned will not be adversely affected. Consequently,

104. It is settled case-law that the principle of proportionality is one of the general principles of Community law. A measure is proportionate only where it is both appropriate and necessary and not disproportionate to the objective pursued.²⁸ This principle is to be taken into account in interpreting Community law.²⁹

105. The authorisation threshold laid down in the second sentence of Article 6(3) of the habitats directive is capable of preventing adverse effects on sites. No less stringent means of attaining this objective with comparable certainty is evident. There could be doubts only as regards the relationship

27 — See Case C-6/99 *Greenpeace France and Others* [2000] ECR I-1651, paragraph 44 et seq., and *Monsanto*, cited in footnote 24, paragraph 112 et seq., both of which relate to genetic engineering rights.

28 — See, for example, Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraph 54; Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 89; and Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 62.

29 — Case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraph 28.

between the authorisation threshold and the protection of the site which can be achieved thereby.

particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.

106. However, disproportionate results are to be avoided in connection with the derogating authorisation provided for in Article 6(4) of the habitats directive. Under this provision, plans or projects may be authorised, by way of derogation, in spite of a negative assessment of the implications for the site where there are imperative reasons of overriding public interest, there are no alternative solutions and all compensatory measures necessary to ensure that the overall coherence of Natura 2000 have been taken. Thus, in Article 6(3) and (4) of the habitats directive the Community legislature itself set out the relationship between nature conservation and other interests. Consequently, no failure to observe the principle of proportionality can be established.

108. Such a conclusion of the assessment is tenable only where the deciding authorities at least are satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned. As in the case of a preliminary assessment — provided for in the first sentence of Article 6(3) of the habitats directive — to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring and the extent and nature of the anticipated harm.³⁰ Measures to minimise and avoid harm can also be of relevance. Precisely where scientific uncertainty exists, it is possible to gain further knowledge of the adverse effects by means of associated scientific observation and to manage implementation of the plan or project accordingly.

107. However, the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of Article 6(3) of the habitats directive that the competent authorities must take a decision having assessed all the relevant information which is set out in

109. In any event, the decisive considerations must be set out in the authorisation.

³⁰ — See paragraph 73 above.

They may be reviewed at least in so far as the authorising authorities' margin of discretion is exceeded. This would appear to be the case in particular where the findings of an appropriate assessment on possible adverse effects are contested without cogent factual arguments.³¹

ever, this finding merely means that serious adverse effects cannot be ascertained with certainty, not that they certainly do not exist.

110. It is uncertain whether the Netherlands rule on the need for obvious doubt complies with the level of acceptable risk thus defined. It classifies as acceptable a risk of adverse effects which can still give rise to doubts which are reasonable but not obvious. However, such reasonable doubts would preclude the certainty that the integrity of the site concerned will not be adversely affected which is necessary under Community law. The Raad van State's comments on the available scientific knowledge confirms this assessment. It refers to an expert report which concludes that there are gaps in knowledge and that the majority of the available research findings which are cited do not point unequivocally to serious adverse (irreversible) effects on the ecosystem. How-

111. In summary, the answer to the fourth question — in so far as it relates to Article 6(3) of the habitats directive — must be that an appropriate assessment must

- precede agreement to a plan or project,
- take account of cumulative effects, and
- document all adverse effects on conservation objectives.

The competent authorities may agree to a plan or project only where, having considered all the relevant information, in particular the appropriate assessment, they are certain that the integrity of the site concerned will not be adversely affected. This presupposes that the competent authorities are satisfied that there is no reasonable doubt as to the absence of such adverse effects.

31 — In his Opinion on *Wörschach golf course* (see footnote 23 above, paragraph 39) Advocate General Léger considered that the fact that the competent authorities had agreed to the project concerned even though the appropriate assessment had identified a not insignificant risk of serious disturbance constituted an infringement of the second sentence of Article 6(3) of the habitats directive.

2. Article 6(2) of the habitats directive

112. The fourth question concerns not only an interpretation of Article 6(3) of the habitats directive but also the possible application of Article 6(2) which would be possible if the annual authorisation of the cockle fishing were not classified as a plan or project.

a) Submissions of the parties

113. As regards 'appropriate steps' within the meaning of Article 6(2) of the habitats directive, the Netherlands Government, PO Kokkelvisserij and Vogelbescherming conclude that account must be taken not only of the needs of the relevant site, but also of economic, social and cultural requirements and regional and local characteristics, pursuant to Article 2(3) of the habitats directive.

114. The Netherlands Government takes the view that obvious doubt as to the absence of adverse effects is required to trigger preventative measures also within the scope of Article 6(2) of the habitats directive.

115. The Commission emphasises that Article 6(2) of the habitats directive requires preventative measures to avoid deterioration and significant disturbance.

b) Opinion

116. In my view, there is no need to answer the fourth question as regards Article 6(2) of the habitats directive. When a plan or project has been authorised, this provision has no function of its own in addition to Article 6(3) of the habitats directive.³² However, if the Court should conclude that the annual authorisation of cockle fishing is not to be regarded as a plan or project, the question would arise as to which requirements on this authorisation follow from Article 6(2) of the habitats directive.

117. In this respect it should be borne in mind that where a plan or project is authorised the ascertainment — referred to in the second sentence of Article 6(3) of the habitats directive — that the integrity of the site concerned will not be adversely affected must also exclude deterioration and signifi-

³² — See paragraph 56 above.

cant disruption under Article 6(2) of the habitats directive.³³ It would be equally unacceptable for a measure which adversely affects the integrity of a Natura 2000 site not to be regarded as deterioration or significant disruption. The substantive standard of protection provided for by subparagraphs (2) and (3) of Article 6 of the habitats directive is identical. Consequently, the appropriate steps referred to in Article 6(2) of the habitats directive must ensure that the integrity of a Natura 2000 site will not be adversely affected.

118. This obligation is permanent, that is to say even where it is necessary to take a decision on authorisation of a scheme which is not to be regarded as a plan or project. However, unlike Article 6(3) of the habitats directive, Article 6(2) contains no specific rules on how protection of the site is to be afforded in the authorisation procedure. Therefore, the competent authorities can also take measures other than those provided for in Article 6(3) of the habitats directive to safeguard the objective of protection. However, such measures may be no less effective than the procedure under Article 6(3) of the habitats directive. This standard of protection would not be provided if authorisation were granted even though reasonable doubts existed as to the absence of adverse effects on the integrity of the site concerned.

119. For the sake of completeness, it should be noted that in some circumstances the criteria set out in Article 6(4) of the habitats directive would have to apply to authorise, by way of exception, a scheme which would adversely affect the integrity of the site. Thus, pursuant to Article 2(3) of the habitats directive account could be taken of economic, social and cultural requirements and regional and local characteristics and at the same time the principle of proportionality could be given concrete expression.

120. The answer to this part of the fourth question must therefore be that where Article 6(2) of the habitats directive applies to the authorisation of a scheme, such authorisation must, in substantive terms, provide the same standard of protection as authorisation granted pursuant to Article 6(3) of the habitats directive.

E — Question 5: direct applicability of Article 6(2) and (3) of the habitats directive

121. Finally, the Raad van State seeks to ascertain whether, in the absence of transpo-

33 — See paragraph 56 above.

sition into Netherlands law, Article 6(2) and Article 6(3) of the habitats directive have direct effect in the sense that individuals may rely on them in national courts and those courts must afford them protection.

124. The Netherlands Government also states that the two provisions could establish a sufficiently clear obligation at least in cases in which the limits of discretion granted to Member States are reached. However, it leaves the decision to the Court.

1. Submission of the parties

122. Waddenvereniging and Vogelbescherming take the view that Article 6(2) and (3) of the habitats directive are sufficiently clear and unconditional to be directly applicable.

125. The Commission considers that the direct applicability of Article 6(2) of the habitats directive is unlikely since the decision on which measures are to be taken is left to the Member States. On the other hand, Article 6(3) of the habitats directive is sufficiently clear and also unconditional, at least once a special protection area has been designated.

123. Vogelbescherming further points out that the Raad van State itself already considers that Article 6(2) of the habitats directive is directly applicable by referring to the judgments in *WWF*³⁴ and *Linster*.³⁵ At any rate, it is possible to ascertain, in accordance with these judgments, that the discretion available to the Member States has been exceeded.

126. PO Kokkelvisserij considers that the two provisions are not directly applicable. This follows from the fact that the Commission has still not drawn up a list of sites of Community importance within the meaning of Article 4(2) of the habitats directive. Moreover, the two provisions grant the Member States a margin of discretion and are not sufficiently clear. Furthermore, the present case relates not to the use of the provisions in question as rights of prohibi-

34 — Case C-435/97 [1999] ECR I-5613.

35 — Case C-287/98 [2000] ECR I-6917.

tion but as grounds for entitlements. Finally, at the hearing PO Kokkelvisserij took the view that direct application would inevitably result in horizontal application to the detriment of third parties.

129. Under Article 23 of the habitats directive, Member States are required to implement it within two years of its notification. The directive was notified on 5 June 1992 and therefore the period laid down for its implementation expired on 5 June 1994.³⁷

2. Opinion

127. The question submitted by the Raad van State requires consideration of three partial aspects. It is to be ascertained whether Article 6(2) and (3) of the habitats directive satisfy the requirements for direct application, to whom and under what conditions they may be invoked in the Member States and whether the indirect burden on the shellfish catchers precludes direct applicability.

130. Both provisions are unconditional, at least in respect of the Wadden Sea. Contrary to the opinion of PO Kokkelvisserij, the fact that there is no list of sites of Community importance within the meaning of Article 4 (2) of the habitats directive is irrelevant. Under Article 7 of the habitats directive, Article 6(2) to (4) thereof must be applied to the Wadden Sea as a special protection area, irrespective of whether or not this list has been drawn up.³⁸

a) Direct applicability

128. As the Court has consistently held, a provision of a directive is directly applicable on expiry of the period laid down for implementation where, as its subject-matter is concerned, it is unconditional and sufficiently precise.³⁶

131. As regards the precision of the provisions, Article 6(3) of the habitats directive lays down a body of rules made up of several

³⁶ — See, *inter alia*, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25, and the case-law cited therein.

³⁷ — 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.

³⁸ — The extent to which these provisions are to be applied to sites within the meaning of the habitats directive before this list is drawn up will have to be examined in Case C-117/03 *Società Italiana Dragaggi*, OJ 2003 C 146, p. 19.

stages which sets out clearly the requirements and legal consequences at each stage. Therefore, in the light of the authorising authorities' discretion set out above, this provision is capable of having direct effect.

defining the framework for the action to be taken by the Member States regarding the treatment of waste and not as requiring, in itself, the adoption of specific measures or a particular method of waste disposal.⁴¹

132. Furthermore, Article 6(2) of the habitats directive also contains clearly defined requirements, namely deterioration or significant disturbance of sites. There is, however, a margin of discretion as regards the appropriate steps to avoid such effects.

134. However, on closer examination, Article 4 of Directive 75/442 on waste and Article 6(2) of the habitats directive are hardly comparable. Article 6(2) does not set out the objectives of the habitats directive, nor is this provision given concrete expression by other provisions.

133. This discretion could preclude direct application.³⁹ In the view of the Commission, a judgment of the Court relating to Article 4 of Directive 75/442 on waste⁴⁰ also militates in favour of this conclusion. This provision is couched in general terms in a similar way to Article 6(2) of the habitats directive. The Court ruled that Article 4 of Directive 75/442 on waste indicates a programme to be followed and sets out the objectives which the Member States must observe in their performance of other more specific obligations imposed on them by the directive. This provision must be regarded as

135. The parallels with judgments in which the Court acknowledged direct applicability in spite of the Member States' discretion are much stronger. For example, in *WWF* the Court held that in national proceedings too individuals may plead that the national legislature has, in implementing a directive, exceeded the discretion granted to it by Community law.⁴² Otherwise the binding effect of the directive would be undermined.

39 — As pointed out by Advocate General Fenelly in his Opinion in Case C-256/98, cited in footnote 9 above, paragraph 16.

40 — Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32).

41 — Case C-236/92 *Comitato di coordinamento per la difesa della Cava and Others* [1994] ECR I-483, paragraph 8 et seq.

42 — Cited in footnote 34 above, paragraph 69 et seq. See also *Lunster*, cited in footnote 35 above, paragraph 32; *Kraayeveld and Others*, cited in footnote 6 above, paragraph 56; and Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraphs 22 to 24. See also the Opinion of Advocate General Albers in Case C-157/02 *Rieser* [2004] ECR I-1477, paragraph 71.

136. The implementation of Article 6(2) of the habitats directive does not necessarily involve legislative measures. However, the courts can establish *a fortiori* whether or not the discretion has been exceeded in selecting the appropriate measures. It is relatively easy to declare misuse of power in particular where no steps were taken to avoid imminent deterioration or significant disturbance or where no further measures were adopted despite the obvious ineffectiveness of the measures taken previously.

137. Therefore, Article 6(2) of the habitats directive is directly applicable in so far as misuse of power is claimed.

b) The question whether an individual may rely on Article 6(2) and (3) of the habitats directive

138. It does not inevitably follow from the direct applicability of a provision of Community law that any individual may bring an action before the courts where there is failure to comply with it. In the present case the question arises as to whether and under

what conditions individuals — or non-governmental organisations — may rely on provisions relating to the conservation of natural habitats and species.

139. According to the established case-law, wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State.⁴³

140. Accordingly, the Court draws a distinction between the directly applicable provisions of a directive in terms of rights of prohibition and grounds for entitlements. Whereas rights of prohibition may be invoked against any conflicting national provision, entitlements must be laid down in the relevant provision.⁴⁴

43 — Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 98, and the references contained therein.

44 — See Case C-441/99 *Gharehveran* [2001] ECR I-7687, paragraph 45.

141. As regards the aspect of rights of prohibition, the possibility of invoking them stems from the action (contrary to Community law) which is to be prohibited. Where avenues of legal redress against such action exist under national law, all relevant directly applicable provisions of the directive must be complied with within that framework. Therefore, in this regard an individual may rely on Article 6(2) and (3) of the habitats directive where avenues of legal redress against measures infringing the abovementioned provisions are available to him.⁴⁵

142. In so far as directly applicable provisions of a directive establish entitlements, national law is subject to minimum standards of Community law as regards the availability of legal redress. It follows from the settled case-law of the Court that although, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, such rules may not be less favourable than those governing similar domestic actions (the principle of equivalence) and may not render

practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness).⁴⁶

143. However, there is no evidence to suggest that rights of an individual are established. The objective of protection laid down by Article 6(2) and (3) of the habitats directive is to conserve habitats and species within areas which form part of Natura 2000. Unlike in the case of rules on the quality of the atmosphere or water,⁴⁷ the protection of common natural heritage is of particular interest⁴⁸ but not a right established for the benefit of individuals. The close interests of individuals can be promoted only indirectly, as a reflex so to speak.

144. The answer to the fifth question must therefore be that individuals may rely on Article 6(2) and (3) of the habitats directive

45 — See in particular Case C-118/94 *Associazione Italiana per il WWF and Others* [1996] ECR I-1223, paragraph 19, relating to the birds directive and also, for example, *Lunster*, cited in footnote 35 above, paragraph 31 et seq.

46 — Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 60, and *Peterbroeck*, cited in footnote 4 above, paragraph 12.

47 — Case C-361/88 *Commission v Germany* (air quality — sulphur dioxide and suspended particulates) [1991] ECR I-2567, paragraph 16; Case C-59/89 *Commission v Germany* (air quality — lead) [1991] ECR I-2607, paragraph 19; Case C-58/89 *Commission v Germany* (surface water) [1991] ECR I-4983, paragraph 14; and Case C-298/95 *Commission v Germany* (shellfish waters) [1996] ECR I-6747, paragraph 16.

48 — Case 236/85 *Commission v Netherlands* [1987] ECR 3989, paragraph 5; Case 247/85 *Commission v Belgium* [1987] ECR 3029, paragraph 9; and Case 252/85 *Commission v France* [1988] 2243, paragraph 5.

in so far as avenues of legal redress against measures infringing the abovementioned provisions are available to them under national law.

c) Burden imposed on third parties by the direct application of Article 6(2) and (3) of the habitats directive

145. In the present case the direct application of Articles 6(2) and (3) of the habitats directive could be precluded by the disadvantages to cockle fishermen stated by PO Kokkelvisserij.

146. It is true that, according to case-law, a directive which has not been transposed does give rise to obligations on individuals either in regard to other individuals or, *a fortiori*, in regard to the Member State itself.⁴⁹ This case-law is based on the fact that under Article 249 EC a directive is binding upon each Member State to which it is addressed but not upon the individual. It could be understood as meaning that any burden on citizens as a result of directly applicable directives must be excluded.

49 — Case 14/86 *Pretore di Salò v X* [1987] ECR 2545, paragraph 19. See also Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20 et seq.

147. In this regard, it should be noted, firstly, that in any event the provisions of the relevant national law must, as far as possible, be interpreted in such a way that the purposes of Community law, and in particular of the relevant provisions of the directive, are achieved.⁵⁰ The Raad van State itself states that such an interpretation, in accordance with the directive, of Article 12 of the Netherlands Natural Conservation law is possible. Moreover, any discretion which may exist must be exercised to this effect.

148. Secondly, on closer examination the case-law does not necessarily preclude any burden on citizens resulting from directly applicable directives. The judgments rejecting direct applicability concerned, on the one hand, the application of directives in the civil law relationship between citizens,⁵¹ and on the other, citizen's obligations towards the State, in particular in the field of criminal law.⁵² Moreover, it can be inferred from *Busseni*, which concerned the status of a Community claim in bankruptcy proceedings,⁵³ that directly applicable directives cannot undermine vested rights.

50 — Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20; and *Faccini Dori*, cited in footnote 49 above, paragraph 26.

51 — *Faccini Dori*, cited in footnote 49 above, and Case 152/84 *Marshall* [1986] ECR 723, paragraph 48.

52 — Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 6 et seq., and *Pretore di Salò v X*, cited in footnote 49 above.

53 — Case C-221/88 [1990] ECR I-495, paragraph 23 et seq.

149. However, where an activity requires authorisation before it can be carried on, direct application of the provisions of a directive does not, as regards the decision on such authorisation, result in a direct obligation on individuals, nor would it encroach on vested rights. On the contrary, it merely precludes granting an advantage to an individual which would involve a State decision in his favour. This decision would be based on provisions of national law contrary to the requirements of the directive. Therefore, by adopting such a decision the Member State would be failing to fulfil its obligations under the directive. However, Member States may not adopt such a decision which grants an advantage to an individual but infringes Community law. Either the relevant provisions of national law underlying the grant of such advantage must be interpreted and applied in conformity with the directive, or — where interpretation in conformity with the directive is not possible — they must not be applied. At least as long as legal positions protected by Community law are not affected, such an indirect burden on citizens does not preclude State authorities from being bound by directly applicable directives.

burden on individuals by the direct application of directives.⁵⁴ The Court recently confirmed this view when it ruled that mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned.⁵⁵

151. In summary, the answer to the fifth question must therefore be that individuals may rely on Article 6(3) of Directive 92/43 is so far as avenues of legal redress against measures infringing the abovementioned provisions are available to them under national law. They may, under the same conditions, rely on Article 6(2) of Directive 92/43 in so far as error of assessment is claimed. An indirect burden on citizens which does not encroach on legal positions protected by Community law does not preclude the recognised (vertical) binding of State authorities to directly applicable directives.

150. This view can be based on other cases in which the Court permitted an indirect

54 — Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 52; Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 28, both concerning public procurement; and Case C-201/94 *Smith & Nephew and Primcrown* [1996] ECR I-5819, paragraph 35 et seq., concerning the licensing of medicinal products. See also the Opinion of Advocate General Léger in Case C-201/02 *Wells* [2004] ECR I-723, paragraph 65 et seq., concerning the directive on environmental impact assessment.

55 — Case C-201/02 *Delena Wells* [2004] ECR I-0000, paragraph 57.

V — Conclusion

152. I propose that the Court answer the questions referred for a preliminary ruling by the Raad van State as follows:

- (1) The words ‘plan and project’ in Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora also cover an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period.

- (2) Article 6(3) of Directive 92/43 lays down the procedure for authorising plans and projects which do not affect the integrity of protection sites, whereas Article 6(2) thereof lays down permanent obligations irrespective of the authorisation of plans and projects, namely to avoid deterioration and disturbance which could be significant in relation to the objectives of the directive.

- (3) An appropriate assessment is always necessary where reasonable doubt exists as to the absence of significant adverse effects. Any effect on the conservation objectives has a significant effect on the site concerned.

- (4) An appropriate assessment must
 - precede agreement to a plan or project,

- take account of cumulative effects, and

- document all adverse effects on conservation objectives.

The competent authorities may agree to a plan or project only where, having considered all the relevant information, in particular the appropriate assessment, they are certain that the integrity of the site concerned will not be adversely affected. This presupposes that the competent authorities are satisfied that there is no reasonable doubt as to the absence of such adverse effects.

Where Article 6(2) of Directive 92/43 applies to the authorisation of a scheme such authorisation must, in substantive terms, provide the same standard of protection as authorisation granted pursuant to Article 6(3) of the habitats directive.

- (5) Individuals may rely on Article 6(3) of Directive 92/43 in so far as avenues of legal redress against measures infringing the abovementioned provisions are available to them under national law. They may, under the same conditions, rely on Article 6(2) of Directive 92/43 in so far as error of assessment is claimed. An indirect burden on citizens which does not encroach on legal positions protected by Community law does not preclude the recognised (vertical) binding of State authorities to directly applicable directives.