

JUDGEMENT OF THE COURT (Third Chamber)

14 January 2016 (*)

Reference for a preliminary ruling — Directive 92/43/EEC — Article 6(2) to (4) — Site included in the list of sites of Community importance after a project was authorised but before it began to be carried out — Review of the project after the site was included in that list — Rules governing that review — Consequences of the completion of the project for the choice of alternatives

In Case C-399/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decision of 6 March 2014, received at the Court on 18 August 2014, in the proceedings

Grüne Liga Sachsen eV and Others

v

Freistaat Sachsen,

interveners:

Landeshauptstadt Dresden,

**Vertreter des Bundesinteresses beim
Bundesverwaltungsgericht**

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Second Chamber, acting President of the Third Chamber, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: **E. Sharpston,**

Registrar: **M. Aleksejev, Administrator,**

having regard to the written procedure and further to the hearing on 17 June 2015,

after considering the observations submitted on behalf of:

- Grüne Liga Sachsen eV and Others, by M. Gellermann, Rechtsanwalt,
- the Freistaat Sachsen, by F. Fellenberg, Rechtsanwalt,
- the Czech Government, by M. Smolek, acting as Agent,
- the European Commission, by C. Hermes and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 September 2015,

gives the following

Judgement

- 1 This request for a preliminary ruling concerns the interpretation of Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; ‘the Habitats Directive’).
- 2 The reference has been made in proceedings between Grüne Liga Sachsen eV (‘Grüne Liga Sachsen’) and Others, on the one hand, and the Freistaat Sachsen (Free State of Saxony), on the other, regarding a decision taken by the authorities of the latter approving the construction of a bridge over the Elbe in Dresden (Germany).

Legal context

EU law

- 3 The first recital in the preamble to the Habitats Directive states:

‘... the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community, as stated in Article [191 TFEU]’.
- 4 The third recital to that directive is worded as follows:

‘... the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; ... the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities’.
- 5 Article 1 of the Habitats Directive provides:

‘For the purpose of this Directive:

...

(k) *site of Community importance* (‘SCI’) means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

...

(l) *special area of conservation* means [an SCI] designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;

...’

6 Article 3(1) of that directive provides:

‘A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

...’

7 The first subparagraph of Article 4(1) of the Habitats Directive provides that Member States are to propose the list of sites mentioned in that provision on the basis of the criteria set out in Annex III (Stage 1) to that directive and relevant scientific information.

8 According to the second subparagraph of Article 4(1), the list of sites proposed must be transmitted to the European Commission within three years of notification of the directive, together with information on each site.

9 According to Article 4(2) of the Habitats Directive, the Commission is to establish, in agreement with each Member State, a draft list of SCIs drawn from the Member States’ lists identifying those which host one or more priority natural habitat types or priority species.

10 Article 4(5) of the Habitats Directive is worded as follows:

‘As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6 (2), (3) and (4).’

11 Article 6 of that directive provides:

- ‘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. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.’

German law

- 12 Section 80 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung) provides:

‘(1) Objections and actions for annulment shall have suspensive effect. ...

(2) They shall not have suspensive effect exclusively

...

3. in the other situations envisaged by Federal law or, for Regional law, by a regional law ...

...

(5) The court hearing the merits of the case may, upon application, order total or partial suspensive effect in the circumstances specified in Section 2(1) to (3), ...

...’

- 13 Paragraph 39 of the Road law of the Land of Saxony (Sächsisches Straßengesetz), entitled ‘Approval of plans’, states, in subparagraph 10:

‘Appeals against planning decisions ... shall have no suspensive effect.’

- 14 Paragraph 22b(1) to (3) of the Nature protection law of the Land of Saxony (Sächsisches Naturschutzgesetz), which transposes Article 6(3) and (4) of the Habitats Directive, essentially provides, in the version of 11 October 1994, that, before any project is authorised or implemented, an appropriate assessment should be carried out of its implications for SCIs or European bird protection sites in view of those sites’ conservation objectives. If the assessment of the implications for a site referred to in the first sentence of subparagraph 1 of that law concludes that the project is likely to cause significant harm to that site in its essential elements necessary for the objectives of conservation or protection, the project is prohibited. By way of derogation, such a project may be authorised or implemented only if it is necessary for imperative reasons of overriding public interest, including reasons of social or economic nature, and if there is no other satisfactory solution allowing the project’s desired result to be achieved on another site that causes no harm or causes less serious harm.

- 15 The ‘Guide to the application of the provisions relating to the creation and protection of the Natura 2000 European ecological network’ (‘Arbeitshilfe zur Anwendung der Vorschriften zum Aufbau und Schutz des Europäischen ökologischen Netzes Natura 2000’), with which the competent Saxon authorities are required to comply pursuant to Order No 61-8830.10/6 of the Ministry of Agriculture and the Environment of the Land of Saxony of 27 March 2003, states, in Chapter 3.3:

‘Where projects or plans are liable to cause serious harm to sites potentially concerned by the Habitats Directive, it is appropriate to apply *mutatis mutandis* the provisions relating to the assessment of implications and the granting of derogations in accordance with the explanations contained in Chapter 6 et seq. The restrictions that already result therefrom in respect of ‘sites potentially concerned by the Habitats Directive’ may be disregarded under the conditions laid down in Paragraph 22b(3) to (5) of the Nature protection law of the Land of Saxony, in so far as provisional protection may not be more stringent than permanent protection. The sites notified by the Land of Saxony to the European Commission are to be regarded as sites “potentially” concerned by the Habitats Directive until the Community list has been established.’

- 16 By Order No 62-8830.10-6 of 12 May 2003, the Ministry of Agriculture and the Environment of the Land of Saxony declared that the provisional conservation objectives of the SCIs proposed in accordance with the Habitats Directive and established by the service of the Land of Saxony responsible for the environment and geology (Sächsisches Landesamt für Umwelt und Geologie) were mandatory in nature. That order, which was addressed in particular to the authority responsible for the planning approval for the construction of the Waldschlößchenbrücke bridge, stipulates:

‘In the meantime, the present ‘provisional’ conservation objectives are declared mandatory in the interests of predictability.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 17 On 25 February 2004 the Regional Council of the City of Dresden (Regierungspräsidium Dresden), now the Regional Management of Dresden (Landesdirektion Dresden), which is an authority of the defendant in the main proceedings, approved the plans for the construction of the Waldschlößchenbrücke road bridge spanning the Elbe (Elbauen) in the city centre of Dresden and the meadows along its banks.
- 18 The decision approving those plans, which was immediately enforceable, was based on a flora, fauna and habitat impact study carried out in January 2003 in relation to the implications of the construction project for the bridge in question for the protection and conservation objectives of the site ‘Elbe valley between Schöna and Mühlberg’ (‘Elbtal zwischen Schöna und Mühlberg’).
- 19 In carrying out that study, which concluded that the construction project at issue in the main proceedings would have no significant or permanent adverse effects on the preservation objectives of the site, the competent authority sought to rely on the requirements of Article 6(3) and (4) of the Habitats Directive. According to the evidence provided by the referring court, however, the study did not meet those requirements, but was merely a preliminary risk assessment.
- 20 On 15 April 2004 Grüne Liga Sachsen, a nature protection organisation authorised to be a party to legal proceedings, brought an action for annulment of the planning approval decision of 25 February 2004, which, pursuant to Section 80(2)(3) of the Code of Administrative Court Procedure, read in conjunction with Paragraph 39 of the Road law of the Land of Saxony, did not have suspensive effect. At the same time, Grüne Liga Sachsen lodged an application for interim measures on the basis of Paragraph 80(5) of the Code of Administrative Court Procedure to prevent the start of construction works.
- 21 In December 2004 the Commission included the Elbe valley between Schöna and Mühlberg site as an SCI in the list referred to in Article 4 of the Habitats Directive.

- 22 By an act of 19 October 2006, the Regional Council of the City of Dresden declared that site, with the exception of that part of the meadows along the banks of the Elbe that was situated in the city centre of Dresden, a special area of conservation for birds or their habitats.
- 23 Construction work on the Waldschlößchenbrücke road bridge began in November 2007 after the Sächsisches Obergerverwaltungsgericht (Higher Administrative Court of Saxony), by decision of 12 November 2007, definitively dismissed the application for interim measures filed by Grüne Liga Sachsen.
- 24 By a supplementary amending decision of 14 October 2008, the Regional Management of Dresden carried out a new limited assessment of the effects of the project at issue in the main proceedings, its objective being to verify, first, whether that project was likely to have a significant effect on the site concerned within the meaning of Article 6(3) of the Habitats Directive and, second, whether the conditions for derogation under paragraph 4 of that article were fulfilled as regards the adverse effects identified in relation to certain habitats and species. That assessment resulted in the authorisation of the project in question by the derogation procedure provided for in Article 6(4) of that directive by means of additional measures.
- 25 By a judgement of 15 December 2011, the Sächsisches Obergerverwaltungsgericht dismissed Grüne Liga Sachsen's action for annulment of 15 April 2004.
- 26 That organisation lodged an appeal before the Bundesverwaltungsgericht (Federal Administrative Court).
- 27 In 2013 the construction work on the bridge at issue was completed. The bridge was opened to traffic the same year.
- 28 The referring court is essentially of the view that adjudication of the case before it first requires answers to the question of under what conditions a project authorised before the inclusion of the site in question in the list of SCIs must undergo a subsequent review of its implications, under Article 6(2) of the Habitats Directive, and what criteria should then be applied. It explains that that clarification is necessary for it to verify the legality of the supplementary procedure that took place in 2008.
- 29 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Is Article 6(2) of the Habitats Directive to be interpreted as meaning that a construction project for a bridge which does not directly serve the management of the site and was authorised before that site was included in the list of SCIs must be the subject of a review of its implications before it is carried out, if the site was included in that list after authorisation was granted but before work began and only a risk assessment/preliminary assessment was undertaken before the authorisation was granted?
- (2) If Question 1 is answered in the affirmative:
- When undertaking a subsequent review, must the national authority observe the provisions of Article 6(3) and (4) of the Habitats Directive where it wished to use those provisions as a precautionary basis for the risk assessment/preliminary assessment preceding the grant of the authorisation?
- (3) If Question 1 is answered in the affirmative and Question 2 in the negative:

What requirements should be applied under Article 6(2) of the Habitats Directive to a subsequent review of an authorisation granted for a project and to what date should the review relate?

- (4) In the context of supplementary proceedings seeking to remedy an error found in a subsequent review under Article 6(2) of the Habitats Directive or in an impact assessment under Article 6(3) of the Habitats Directive, is account to be taken, by appropriate amendments to the review requirements, of the fact that the structure was permitted to be constructed and put into service because the planning decision was immediately enforceable and proceedings for interim measures had been dismissed with final effect? In any event, does that apply to an alternative subsequent review which is necessary in the context of a decision under Article 6(4) of the Habitats Directive?

Consideration of the questions referred for a preliminary ruling

The first question

- 30 By its first question, the referring court essentially asks whether Article 6(2) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site which was authorised, following a study that did not meet the requirements of Article 6(3) of that directive, before the site in question was included in the list of SCIs must be the subject of a subsequent review, by the competent authorities, of its implications for that site before it is implemented.
- 31 In order to provide the referring court with a useful answer, it is necessary to determine, as a first step, whether Article 6(2) of the Habitats Directive is applicable to the facts in the main proceedings. Second, it is necessary to examine whether there may be an obligation, on the basis of that provision, to carry out a subsequent review of the implications for the site in question of a project such as that at issue in the main proceedings.
- 32 According to Article 4(5) of the Habitats Directive, as interpreted by the Court, the protective measures prescribed in Article 6(2) to (4) of that directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of that directive, are placed on the list of sites selected as SCIs as adopted by the Commission under the procedure laid down in Article 21 of the same directive (judgements in *Dragaggi and Others*, C-117/03, EU:C:2005:16, paragraph 25, and *Bund Naturschutz in Bayern and Others*, C-244/05, EU:C:2006:579, paragraph 36).
- 33 The Court has nevertheless held that, even if a project was authorised before the system of protection laid down by the Habitats Directive became applicable to the site in question and, accordingly, such a project was not subject to the requirements relating to the procedure for prior assessment according to Article 6(3) of that directive, its implementation nevertheless falls within the scope of Article 6(2) of that directive (see, to that effect, judgements in *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraphs 48 and 49, and *Commission v Spain*, C-404/09, EU:C:2011:768, paragraphs 124 and 125).
- 34 In the present case, it is clear from the chronology of the events in the main proceedings that construction of the Waldschlößchenbrücke bridge took place between 2007 and 2013, that is to say, after the site in question was placed on the list of SCIs in December 2004. Account being taken of the case-law cited in paragraphs 32 and 33 of the present judgement, it may be inferred that the implementation of that project falls, after that listing, within Article 6(2) of the Habitats Directive.
- 35 With regard to whether Article 6(2) of the Habitats Directive imposes an obligation to review the implications of a plan or project, such as that at issue in the main proceedings, which was

approved before the site in question was placed on the list of SCIs, on the basis of a preliminary risk assessment not consistent with the requirements of Article 6(3) of that directive, it must be held that such an obligation cannot be inferred unequivocally from the wording of Article 6(2).

- 36 Unlike Article 6(3) of the Habitats Directive, which introduces, by its wording, a procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the site's integrity (see, to that effect, judgement in *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 28 and the case-law cited), Article 6(2) of that directive does not expressly provide for precise protective measures such as an obligation to examine or review the implications of a plan or project for natural habitats and species.
- 37 That provision establishes a general obligation of protection consisting of taking appropriate protective measures so as to avoid deterioration as well as disturbance which could have significant effects in the light of the directive's objectives (see, to that effect, judgements in *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 38; *Commission v Italy*, C-304/05, EU:C:2007:532, paragraph 92, and *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 33). As the Advocate General pointed out in point 43 of her Opinion, that obligation is ongoing in nature.
- 38 With regard to projects which do not meet the requirements under Article 6(3) of the Habitats Directive, the Court has already held that an obligation to carry out a subsequent review of the implications of existing plans or projects for the site in question may be based on Article 6(2) of that directive (see, to that effect, judgement in *Commission v United Kingdom*, C-6/04, EU:C:2005:626, paragraphs 57 and 58).
- 39 Nevertheless, as the Advocate General stated in points 48 and 49 of her Opinion, the obligation to carry out such a subsequent review cannot be absolute.
- 40 The term 'appropriate steps' contained in Article 6(2) of the Habitats Directive implies that Member States enjoy discretion when applying that provision.
- 41 It should nevertheless be recalled that an activity complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives (judgement in *Commission v Spain*, C-404/09, EU:C:2011:768, paragraph 126 and the case-law cited).
- 42 The Court has also held that the very existence of a probability or risk that an economic activity on a protected site might cause significant disturbances for a species is capable of constituting an infringement of Article 6(2) of the Habitats Directive, without a cause and effect relationship between that activity and significant disturbance to the species having to be proved (see, to that effect, judgement in *Commission v Spain*, C-404/09, EU:C:2011:768, paragraph 142 and the case-law cited).
- 43 Accordingly, implementation of a project likely to affect the site concerned significantly and not subject, before being authorised, to an assessment in compliance with the requirements of Article 6(3) of the Habitats Directive, may be pursued, after that project is placed on the list of SCIs, only on the condition that the probability or risk of deterioration of habitats or disturbance of species, which could be significant in view of the objectives of that directive, has been excluded.
- 44 Where such a probability or risk might appear because a subsequent review of the implications or a plan or project for the site concerned on the basis of the best scientific knowledge was not carried out — in the form of an 'appropriate step' within the meaning of Article 6(2) of the

Habitats Directive — the general obligation of protection referred to in paragraph 37 of this judgement entails an obligation to carry out that review.

- 45 It is for the national court to verify, on the basis of information available to it, and for it alone to assess, whether a new assessment of a plan or project capable of affecting an SCI constitutes the only appropriate step, within the meaning of Article 6(2) of the Habitats Directive, for avoiding the probability or risk of deterioration of habitats or disturbance of species that could be significant in view of the objectives of that directive.
- 46 Having regard to the foregoing considerations, the answer to the first question is that Article 6(2) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site, and authorised, following a study that did not meet the requirements of Article 6(3) of that directive, before the site in question was included in the list of SCIs must be the subject of a subsequent review, by the competent authorities, of its implications for that site if that review constitutes the only appropriate step for avoiding that the implementation of the plan or project referred to results in deterioration or disturbance that could be significant in view of the objectives of that directive. It is for the referring court to verify whether those conditions are met.

The third question

- 47 By its third question, which should be dealt with second, the referring court essentially asks what requirements must be met by a subsequent review carried out under Article 6(2) of the Habitats Directive and concerning the implications for the site concerned of a plan or project which began to be put in hand after that site had been included in the list of SCIs. The referring court also asks to what date that review should relate.
- 48 As a preliminary point, it should be noted that Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (judgement in *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 26 and the case-law cited).
- 49 According to settled case-law, the appropriate assessment of the implications for the site that must be carried out pursuant to Article 6(3) implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field (see, to that effect, judgements in *Commission v France*, C-241/08, EU:C:2010:114, paragraph 69; *Commission v Spain*, C-404/09, EU:C:2011:768, paragraph 99, and *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraphs 112 and 113).
- 50 The assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (judgement in *Briel and Others*, C-521/12, EU:C:2014:330, point 27).
- 51 However, the wording of Article 6(2) of the Habitats Directive does not define any particular criterion for implementing the measures to be taken on the basis of that provision.
- 52 Nevertheless, it must be stated that the provisions of Article 6(2) and (3) of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive and that those provisions are designed to ensure the same level of protection of natural habitats and habitats of species (see, to that effect, judgements in

Sweetman and Others, C-258/11, EU:C:2013:220, paragraph 32, and *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 19).

- 53 Where Article 6(2) of the Habitats Directive lays down an obligation to carry out a subsequent review of the implications for the site concerned of a plan or project, such a review must enable the competent authority to guarantee that the implementation of the plan or project referred to will not cause deterioration or disturbance which could be significant in relation to the objectives of that directive.
- 54 Therefore, should a subsequent review, on the basis of Article 6(2) of the Habitats Directive, prove, in the present case, to be an ‘appropriate step’ within the meaning of that provision, that review must define what risks of deterioration or disturbance likely to be significant within the meaning of that provision are entailed by the implementation of the plan or project, and that review must be carried out in accordance with the requirements of Article 6(3) of that directive.
- 55 In addition, it should be noted that, according to the case-law of the Court, the possibility cannot be excluded that a Member State, by analogy with the procedure in derogation provided for in Article 6(4) of the Habitats Directive, may invoke reasons of public interest and, if the conditions laid down by that provision are essentially satisfied, authorise a plan or project which could otherwise have been regarded as prohibited by Article 6(2) (see, to that effect, judgement in *Commission v Spain*, C-404/09, EU:C:2011:768, paragraph 156).
- 56 However, a review meeting the requirements of Article 6(3) of the Habitats Directive is necessary in every case where, by analogy with Article 6(4) of that directive, a project incompatible with the conservation objectives of the site concerned must be implemented for imperative reasons of overriding public interest (see, to that effect, judgement in *Nomarchiaki Aftodioikisi Aitolokarnanias and Others*, C-43/10, EU:C:2012:560, paragraph 114).
- 57 Article 6(4) is applicable only after the implications of a plan or project have been studied in accordance with Article 6(3) of the Habitats Directive. Thus, knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for the application of Article 6(4), since, in the absence of those elements, no condition for the application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (judgement in *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 74).
- 58 With regard to the date to which a subsequent review must relate, such as that referred to in paragraph 54 of the present judgement, it should be pointed out that, according to Article 4(5) of the Habitats Directive, a site is protected under that directive only as from the date on which it was placed on the list of SCIs.
- 59 Therefore, any step taken on the basis of Article 6(2) of that directive cannot relate to a date going back to a period in which the site in question was not in the list of SCIs.
- 60 Moreover, the objective of that provision would be attained only incompletely if such a step relied upon the conservation status of habitats and species disregarding or obscuring factors that have caused or that are likely to continue to cause significant deterioration or disturbance after the date on which the site concerned was included in the list in question.
- 61 It follows that a procedure for a subsequent review of a plan or project likely to have a significant effect on the site in question, which has become necessary pursuant to Article 6(2) of the Habitats Directive, must take into account all factors existing at the date of the inclusion

of that site in the list of SCIs and all implications arising or likely to arise following the partial or total implementation of the plan or project on the site in question after that date as well.

- 62 In view of the foregoing considerations, the answer to the third question is that Article 6(2) of the Habitats Directive must be interpreted as meaning that if, in circumstances such as those in the main proceedings, a subsequent review of the implications for the site concerned of a plan or project which began to be put in hand after that site was included in the list of SCIs proves necessary, that review must be carried out in accordance with the requirements of Article 6(3) of that directive. Such a review must take into account all factors existing at the date of that inclusion and all implications arising or likely to arise following the partial or total implementation of the plan or project on the site in question after that date as well.

The second question

- 63 In the light of the answer given to the third question, from which it follows that, as far as a subsequent review such as that in the case in the main proceedings is concerned, the competent administrative authority is bound by the requirements of Article 6(3) of the Habitats Directive, the second question need not be answered.

The fourth question

- 64 By its fourth question, the referring court essentially wishes to ascertain whether the Habitats Directive must be interpreted as meaning that, where a new assessment of the implications for the site concerned is carried out in order to rectify errors identified in relation to the prior assessment conducted before the inclusion of that site in the list of SCIs or in relation to the subsequent review under Article 6(2) of the Habitats Directive, even though the plan or project has already been implemented, the requirements of a check made in the context of such a review may be amended on account of the fact that the planning decision approving that plan or project was immediately enforceable, that an application for interim measures had been dismissed and that that dismissal decision was no longer open to appeal.
- 65 The referring court also wishes to know whether Article 6(4) of the Habitats Directive must be interpreted as meaning that the requirements of the check carried out in the context of the review of alternative solutions may be amended on account of the fact that the plan or project has already been implemented.
- 66 As is clear from the grounds of the order for reference, the referring court is of the view that it was not possible to take into account, in a subsequent review of the alternatives, the fact that the bridge at issue in the case in the main proceedings had already been constructed on the basis of an authorisation, not only would immediate enforcement of the planning decision approving that structure give rise to incalculable risk — which was clearly not desired by the legislator — for the structure referred to and its developer, but the economic and ecological consequences linked to a subsequent realisation of an alternative would not be fully taken into account. The referring court therefore asks whether it is permissible to incorporate into the examination of alternatives also the costs, ecological implications, particularly for the habitats and species protected under the Habitats Directive, and the economic consequences of removing a structure the construction of which has already been authorised and completed.
- 67 In that regard, it should be noted, as is shown in paragraph 54 of the present judgement, that a subsequent review under Article 6(2) of the Habitats Directive must meet the requirements of Article 6(3) of that directive.
- 68 Those requirements may not be amended solely because the structure in question was constructed pursuant to a planning decision immediately enforceable under national law or

because an application for interim measures to prevent the start of construction works had been dismissed and that dismissal decision was no longer open to appeal.

- 69 As the Advocate General essentially observes in point 64 of her Opinion, and in view of the objective of conserving natural habitats and wild fauna and flora, as stated in the first recital to the Habitats Directive, the effectiveness of that directive would be compromised if national procedural law could be used to curtail the need to comply with the requirements of that directive.
- 70 As the Commission argues, a new assessment of the implications for the site concerned of a plan or project already implemented must take into account the assumption that the risks of deterioration or disturbance that could be significant, within the meaning of Article 6(2) of the Habitats Directive, have already appeared on account of the completion of the works in question. In addition, that assessment must enable it to be established whether such risks are likely to materialise if those works continue to be used.
- 71 Should a new assessment conclude that the construction or entry into service of the bridge at issue in the main proceedings has already caused or risks causing deterioration or disturbance that could be significant in relation to the objectives of the Habitats Directive, the possibility nevertheless remains, as noted in paragraphs 55 to 59 of the present judgement, of applying Article 6(4) of that directive by analogy.
- 72 Pursuant to Article 6(4) of the Habitats Directive, if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (judgement in *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 72 and the case-law cited).
- 73 However, as the Court has repeatedly held, Article 6(4) of the Habitats Directive must, as an exception to the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly (judgement in *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 73 and the case-law cited).
- 74 As regards, in the present case, the review of alternative solutions in the context of an application by analogy of Article 6(4) of the Habitats Directive, it should be pointed out that the search for an alternative may not disregard any deterioration or disturbance caused by the construction and entry into service of the structure at issue or any advantages it offers. Therefore, the examination of alternative solutions requires weighing the environmental consequences of maintaining or restricting the use of the works at issue, including closure or even demolition, on the one hand, against the important public interest that led to their construction, on the other.
- 75 With regard to the steps that may be considered in the review of alternatives, including the possibility of demolishing a structure such as that at issue in the main proceedings, it must be stated that if a step were to entail risks of deterioration or disturbance which could be significant, within the meaning of Article 6(2) of the Habitats Directive, such a step would, as the Commission argued during the hearing, be contrary to the objective of that provision and therefore could not be regarded as an alternative solution within the meaning of Article 6(4) of that directive.
- 76 Nevertheless, as the Advocate General observes in point 69 of her Opinion, should a weighing-up of interests and priorities lead to the view that the works already completed must be demolished, any proposal for demolition must be regarded — just as the original proposal to

build that structure had to be regarded — as a ‘plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon’ within the meaning of Article 6(3) of the Habitats Directive, which has to be subject to the scrutiny required by that provision before it may be carried out.

- 77 So far as concerns the economic cost of the steps that may be considered in the review of alternatives, including the demolition of the works already completed, as relied on by the referring court, it must be stated, as the Advocate General states in point 70 of her Opinion, that that is not of equal importance to the objective of conserving natural habitats and wild fauna and flora pursued by the Habitats Directive. Therefore, account being taken of the strict interpretation of Article 6(4) of that directive, as noted in paragraph 73 of the present judgement, it cannot be accepted that the economic cost of such measures alone may be a determining factor in the choice of alternative solutions under that provision.
- 78 In the light of the foregoing considerations, the answer to the fourth question is that:
- the Habitats Directive must be interpreted as meaning that, where a new assessment of the implications for a site carried out in order to rectify errors identified in relation to the prior assessment conducted before the inclusion of that site in the list of SCIs or in relation to the subsequent review under Article 6(2) of the Habitats Directive, even though the plan or project has already been implemented, the requirements of a check made in the context of such a review may be amended on account of the fact that the planning decision approving that plan or project was immediately enforceable, that an application for interim measures had been dismissed and that that dismissal decision was no longer open to appeal. Moreover, that review must take into account the risks of deterioration or disturbance that could be significant, within the meaning of Article 6(2) of that directive, which may have arisen because the plan or project has been carried out.
 - Article 6(4) of the Habitats Directive must be interpreted as meaning that the requirements of the check made in the context of the review of alternative solutions may not be amended on account of the fact that the plan or project has already been implemented.

Costs

- 79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site, and authorised, following a study that did not meet the requirements of Article 6(3) of that directive, before the site in question was included in the list of SCIs must be the subject of a subsequent review, by the competent authorities, of its implications for that site if that review constitutes the only appropriate step for avoiding that the implementation of the plan or project referred to results in deterioration or disturbance that could be significant in view of the objectives of that directive. It is for the referring court to verify whether those conditions are met.**
2. **Article 6(2) of the Habitats Directive must be interpreted as meaning that if, in circumstances such as those in the main proceedings, a subsequent review of the implications for the site concerned of a plan or project which began to be put in hand**

after that site was included in the list of SCIs proves necessary, that review must be carried out in accordance with the requirements of Article 6(3) of that directive. Such a review must take into account all factors existing at the date of that inclusion and all implications arising or likely to arise following the partial or total implementation of the plan or project on the site in question after that date as well.

3. The Habitats Directive must be interpreted as meaning that, where a new assessment of the implications for a site carried out in order to rectify errors identified in relation to the prior assessment conducted before the inclusion of that site in the list of SCIs or in relation to the subsequent review under Article 6(2) of the Habitats Directive, even though the plan or project has already been implemented, the requirements of a check made in the context of such a review may be amended on account of the fact that the planning decision approving that plan or project was immediately enforceable, that an application for interim measures had been dismissed and that that dismissal decision was no longer open to appeal. Moreover, that review must take into account the risks of deterioration or disturbance that could be significant, within the meaning of Article 6(2) of that directive, which may have arisen because the plan or project has been carried out.
4. Article 6(4) of the Habitats Directive must be interpreted as meaning that the requirements of the check made in the context of the review of alternative solutions may not be amended on account of the fact that the plan or project has already been implemented.

[Signatures]

* Language of the case: German