

JUDGMENT OF THE COURT (Second Chamber)

14 January 2010 (\*)

(Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Decision of the Member State concerned to give its agreement to the draft list of sites of Community importance drawn up by the Commission – Interests and points of view which must be taken into account)

In Case C-226/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Oldenburg (Germany), made by decision of 13 May 2008, received at the Court on 26 May 2008, in the proceedings

**Stadt Papenburg**

v

**Bundesrepublik Deutschland,**

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting for the President of the Second Chamber, C.W.A. Timmermans, K. Schieman, P. Kūris and L. Bay Larsen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 26 March 2009,

after considering the observations submitted on behalf of:

- Stadt Papenburg, by K. Fűßer, Rechtsanwalt,
- Bundesrepublik Deutschland, by W. Ewer, Rechtsanwalt,
- the Commission of the European Communities, by B. Eggers and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2009,

gives the following

**Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 2(3), 4(2) and 6(3) and (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), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368) ('the Habitats Directive').
- 2 The reference was made in the course of proceedings between Stadt Papenburg (the municipality of Papenburg) and Bundesrepublik Deutschland (the Federal Republic of

Germany), concerning the agreement that that State intends to give to the draft list of sites of Community importance ('SCIs') drawn up by the Commission of the European Communities and including a site on the river Ems downriver from that municipality's local authority area.

## **Legal context**

### *Community law*

- 3 Article 2(3) of the Habitats Directive is worded as follows:

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

- 4 According to Article 3(1) of the Habitats Directive, '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'.

- 5 Article 4(1) and (2) of that directive provides:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host.  
...

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. ...

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the nine biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall 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.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the [SCIs] in their territory.

The list of sites selected as [SCIs] ... shall be adopted by the Commission in accordance with the procedure laid down in Article 21.'

- 6 Annex III to the Habitats Directive states in Stage 2, entitled 'Assessment of the Community importance of the sites included on the national lists':

'1. All the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as [SCIs].

2. The assessment of the Community importance of other sites on Member States' lists, i.e. their contribution to maintaining or re-establishing, at a favourable conservation status, a natural habitat in Annex I or a species in Annex II and/or to the coherence of Natura 2000 will take account of the following criteria:

- (a) relative value of the site at national level;
- (b) geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

- (c) total area of the site;
- (d) number of natural habitat types in Annex I and species in Annex II present on the site;
- (e) global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic or unique aspect of its features and the way they are combined.'

7 Article 6(2), (3) and (4) of the Habitats Directive provides:

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

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

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

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

#### *National law*

8 Article 28(2) of the Basic Law (Grundgesetz) is worded as follows:

'Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by law, associations of municipalities shall also have the right to administrative autonomy according to the laws. The guarantee of administrative autonomy shall extend to the basic elements of financial autonomy; these basic elements shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.'

9 The referring court interprets that provision as meaning that the administrative autonomy which is constitutionally guaranteed to the municipalities grants them a right to have their interests taken into account where measures going beyond the level of the municipal territory have a lasting effect on their development or cause lasting interference with plans which are sufficiently concrete and established. That also applies to measures implemented outside the municipal territory, in so far as the municipality is clearly and particularly affected.

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

10 Papenburg is a port town in Lower Saxony on the river Ems, where there is a shipyard.

- 11 In order to enable ships with a draught of 7.3 metres to navigate between the shipyard and the North Sea, the Ems must be deepened by means of 'required dredging operations'. By a decision of 31 May 1994 of the Wasser und Schifffahrtsdirektion Nordwest (Waterways and Navigation Directorate for the North-West Region), Stadt Papenburg, Landkreis Emsland (the district of Emsland) and the Wasser und Schifffahrtsamt Emden (Emden Waterways and Navigation Office) were granted permission to dredge that river, where required. That decision is definitive and means, in accordance with German law, that future 'required dredging operations' are considered to have been granted permission.
- 12 On 17 February 2006, the Federal Republic of Germany indicated to the Commission that parts of the Ems situated downriver from Stadt Papenburg's local authority area, under the description 'Unterems und Außenems' (Lower Ems and Outer Ems), could be accepted as a possible SCI within the meaning of the Habitats Directive.
- 13 The Commission included those parts of the Ems in its draft list of SCIs. It requested the Federal Republic of Germany to give its agreement thereto, pursuant to the first subparagraph of Article 4(2) of the Habitats Directive.
- 14 On 20 February 2008, Stadt Papenburg brought an action before the Verwaltungsgericht Oldenburg (Administrative Court, Oldenburg) seeking to prevent the Federal Republic of Germany from giving its agreement. It claimed that an agreement on the part of that Member State would amount to a breach of the administrative autonomy which it has under German constitutional law.
- 15 According to Stadt Papenburg, as a seaport with a shipyard its planning and investments and its economic development depend on the Ems remaining navigable for large seagoing ships. It fears that, if the Lower Ems and Outer Ems were included in the list of SCIs, the dredging operations required for that purpose would in future, and in every case, have to undergo the assessment provided for in Article 6(3) and (4) of the Habitats Directive.
- 16 The Federal Republic of Germany contends that the action should be dismissed. It is of the opinion that to take into account the interests asserted by Stadt Papenburg when deciding whether to give the agreement at issue in the main proceedings would contravene Community law. Under the first subparagraph of Article 4(2) of the Habitats Directive, the Member State is permitted to take the decision whether to give agreement only on the basis of nature conservation criteria.
- 17 By order of 31 March 2008, which has become definitive, the Verwaltungsgericht Oldenburg granted Stadt Papenburg interim relief and prohibited the Federal Republic of Germany from giving its agreement until judgment has been delivered in the main proceedings.
- 18 In those circumstances, the Verwaltungsgericht Oldenburg decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
  - '(1) Does the first subparagraph of Article 4(2) of [the Habitats Directive] allow a Member State to refuse to agree to the Commission's draft list of [SCIs], in relation to one or more sites, on grounds other than nature conservation?
  - (2) If Question 1 is answered in the affirmative: Do those grounds include the interests of municipalities and associations of municipalities, in particular their plans, planning intentions and other interests with regard to the further development of their area?
  - (3) If Questions 1 and 2 are answered in the affirmative: Do the third recital in the preamble to [the Habitats Directive], Article 2(3) of the directive or other provisions of Community law even require that such grounds be taken into account by the Member States and the Commission when giving agreement and establishing the list of [SCIs]?
  - (4) If Question 3 is answered in the affirmative: Would it be possible – under Community law – for a municipality which is affected by the inclusion of a particular site in the list to claim in legal proceedings after final adoption of the list that the list infringes Community law, because its interests were not, or not sufficiently, taken into account?

- (5) Must ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of [the Habitats Directive], undergo an assessment of their implications pursuant to Article 6(3) or (4) of the directive where they are continued after inclusion of the site in the list of [SCIs]?’

### **The request to have the oral procedure reopened**

- 19 By document lodged at the Court Registry on 17 September 2009, Stadt Papenburg requested the Court to order that the oral procedure be reopened, pursuant to Article 61 of the Rules of Procedure.
- 20 In support of its request, Stadt Papenburg states that the Advocate General, in her Opinion, expressed the answer that she proposes the Court should give to the fifth question on the basis of a description of the facts which in such as to mislead the Court. In particular, Stadt Papenburg states that, contrary to what the Advocate General suggests, the approval of the Wasser- und Schifffahrtsdirektion Nordwest of 31 May 1994 by which Stadt Papenburg, Landkreis Emsland and the Wasser- und Schifffahrtsamt Emden were granted permission to dredge the Ems where required is not the first such decision concerning the navigability of the river Ems. Furthermore, the Ems cannot be considered to be a river which naturally enables ships with a draught of 6.3 metres to be navigated. Such a situation is the result of previously authorised dredging operations. Finally, Stadt Papenburg also disputes the arguments raised by the Advocate General in support of her reply to the first question referred.
- 21 The Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, *inter alia*, Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 37, and Case C-42/07 *Liça Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 31).
- 22 In the present case, it is evident that Stadt Papenburg is contending, in essence, first, that certain facts underlying the Advocate General’s assessment are incorrect, and, second, that the view expressed by the Advocate General concerning the interpretation of the first subparagraph of Article 4(2) of the Habitats Directive is incorrect.
- 23 As regards the first point, it should be noted that, under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, the latter is empowered only to give rulings on the interpretation or the validity of a Community provision on the basis of the facts which the national court puts before it (see, *inter alia*, Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 31); those facts, in conjunction with the legal material provided by the referring court, are to enable the Court to give a useful answer to the questions submitted to it (see, to that effect, *inter alia*, Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 28).
- 24 The order for reference contains all the information necessary to enable the Court to give a useful answer to the questions submitted to it and, in particular, to the first question.
- 25 With regard to the second point, suffice it to state that Stadt Papenburg’s request contains nothing to indicate that it would be useful or necessary to reopen the oral procedure.
- 26 Therefore, the Court, after hearing the Advocate General, holds that there is no need to order that the oral procedure be reopened.

### **The questions referred for a preliminary ruling**

#### *The first question*

- 27 The first subparagraph of Article 4(2) of the Habitats Directive provides that, on the basis of the criteria set out in Annex III (Stage 2) to that directive, the Commission is to establish, in agreement with each Member State, a draft list, drawn from the Member States' lists, of SCIs for each of the biogeographical regions referred to in Article 1(c)(iii) of the directive.
- 28 Annex III to the Habitats Directive, which relates to the criteria for selecting sites eligible for identification as SCIs and designation as special areas of conservation, lists, so far as concerns Stage 2 in that annex, criteria for assessing the Community importance of the sites included on the national lists.
- 29 Those assessment criteria were defined on the basis of the objective of conserving the natural habitats or the wild fauna and flora listed respectively in Annex I or Annex II to the Habitats Directive, and of the objective of coherence of Natura 2000, namely the European ecological network of special areas of conservation which is provided for in Article 3(1) of the Habitats Directive.
- 30 It follows that the first subparagraph of Article 4(2) of the Habitats Directive, as such, does not provide for requirements other than those relating to the conservation of natural habitats and wild fauna and flora or to the setting up of the Natura 2000 network to be taken into account when the Commission, in agreement with each of the Member States, draws up a draft list of SCIs.
- 31 If, in the phase of the classification procedure that is governed by the first subparagraph of Article 4(2) of the Habitats Directive, the Member States were permitted to refuse to give their agreement on grounds other than environmental protection, the achievement of the objective referred to in Article 3(1) of the Habitats Directive would be put in danger, namely the setting up of the Natura 2000 network, which is composed of sites hosting the natural habitat types listed in Annex I to the directive and habitats of the species listed in Annex II and which must 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.
- 32 That would, in particular, be the case were the Member States able to refuse to give their agreement on the basis of economic, social and cultural grounds and regional and local characteristics as referred to in Article 2(3) of the Habitats Directive, a provision which, moreover, as was stated by the Advocate General in point 38 of her Opinion, does not constitute an autonomous derogation from the general system of protection put in place by that directive.
- 33 The answer to the first question is therefore that the first subparagraph of Article 4(2) of the Habitats Directive must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of SCIs drawn up by the Commission.

*The second, third and fourth questions*

- 34 In the light of the answer given to the first question, it is not necessary to reply to the second, third and fourth questions.

*The fifth question*

- 35 By its fifth question, the referring court asks, in essence, whether ongoing maintenance works in respect of the navigable channel of the estuary at issue in the main proceedings, which are not directly connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they are likely to have a significant effect on the site concerned, undergo an assessment of their implications for the site pursuant to Article 6(3) and (4) of the Habitats Directive where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of Article 4(2) of that directive.
- 36 Under the first sentence of Article 6(3) of the Habitats Directive, a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment

of its implications for the site (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 22).

- 37 Therefore, it is necessary, first, to assess whether the dredging works at issue in the main proceedings are covered by the concept of 'plan' or 'project' referred to in the first sentence of Article 6(3) of the Habitats Directive.
- 38 It should be recalled that the Court, after noting that the Habitats Directive does not define the terms 'plan' and 'project', has stated that the definition of 'project' in the second indent of Article 1(2) of 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) is relevant to defining the concept of 'plan' or 'project' as provided for in the Habitats Directive (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 23, 24 and 26).
- 39 An activity consisting of dredging works in respect of a navigable channel may be covered by the concept of 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337, which refers to 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.
- 40 Therefore, such an activity may be considered to be covered by the concept of 'project' in Article 6(3) of the Habitats Directive.
- 41 Next, the fact that that activity has been definitively authorised under national law before the expiry of the time-limit for transposition of the Habitats Directive does not constitute, in itself, an obstacle to regarding it, at the time of each intervention in the navigable channel, as a distinct project for the purposes of the Habitats Directive.
- 42 If it were otherwise, those dredging works in respect of the channel concerned, which are not directly connected with or necessary to the management of the site, would, in so far as they are likely to have a significant effect on the latter, automatically be excluded from any prior assessment of their implications for that site within the meaning of Article 6(3) of the Habitats Directive, and from the procedure provided for in Article 6(4).
- 43 Furthermore, the objective of the conservation of natural habitats and of wild fauna and flora pursued by the Habitats Directive would be at risk of not being fully achieved.
- 44 Contrary to what Stadt Papenburg and the Commission claim, no reason based on the principle of legal certainty or the principle of protection of legitimate expectations precludes the dredging works at issue in the main proceedings, although they have been permanently authorised under national law, from being subject to the procedure provided for in Article 6(3) and (4) of the Habitats Directive as distinct and successive projects.
- 45 With regard to the principle of legal certainty, this requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80). The Habitats Directive fulfils those requirements with regard to the situation in the main proceedings.
- 46 With regard to the principle of the protection of legitimate expectations, it follows from settled case-law that a new rule applies immediately to the future effects of a situation which arose under the old rule and that the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules (see, inter alia, Case C-162/00 *Pokrzęptowicz-Meyer* [2002] ECR I-1049, paragraphs 50 and 55).
- 47 Finally, if, having regard in particular to the regularity or nature of the maintenance works at issue in the main proceedings or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that



purpose, those maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.

- 48 In that case, as such a project has been authorised before the expiry of the time-limit for transposing the Habitats Directive, it would not be subject to the requirements relating to the procedure for prior assessment of the implications of the project for the site concerned, set out in that directive (see, to that effect, Case C-209/04 *Commission v Austria* [2006] ECR I-2755, paragraphs 53 to 62).
- 49 Nevertheless, if the site concerned were, pursuant to the third subparagraph of Article 4(2) of the Habitats Directive, included in the list adopted by the Commission of sites chosen as SCIs, the implementation of such a project would be covered by Article 6(2) of that directive, a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 37 and 38, and Case C-117/03 *Dragaggiand Others* [2005] ECR I-167, paragraph 25). Before the Commission adopts that list, in so far as such a site is already included in a national list transmitted to the Commission for the purpose of being included in the Community list, it must not, by virtue of Article 4(1) of the Habitats Directive, be subject to interventions which risk seriously compromising its ecological characteristics (Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, paragraphs 44 and 47).
- 50 In the light of the above, the answer to the fifth question is that Article 6(3) and (4) of the Habitats Directive must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of Article 4(2) of that directive.
- 51 If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.

### Costs

- 52 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 (Second Chamber) hereby rules:

1. **The first subparagraph of Article 4(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006, must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of sites of Community importance drawn up by the European Commission.**
2. **Article 6(3) and (4) of Directive 92/43, as amended by Directive 2006/105, must be interpreted as meaning that ongoing maintenance works in respect of**



the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing Directive 92/43, as amended by Directive 2006/105, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of sites of Community importance pursuant to the third subparagraph of Article 4(2) of that directive.

If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of Directive 92/43, as amended by Directive 2006/105.

[Signatures]