

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 28 June 2011¹

Table of contents

| | |
|--|-----------|
| I — Introduction | I - 11858 |
| II — Legal framework | I - 11858 |
| A — The EIA Directive | I - 11858 |
| B — The Wild Birds Directive | I - 11860 |
| C — The Habitats Directive | I - 11861 |
| III — Facts, pre-litigation procedure and forms of order sought | I - 11863 |
| IV — Legal assessment | I - 11867 |
| A — Authorisation of the ‘Nueva Julia’ and ‘Ladrones’ projects in relation to the ‘Alto Sil’ bird protection area | I - 11867 |
| 1. The need for an assessment of the projects | I - 11868 |
| 2. Assessment of the implications for the conservation objectives of the ‘Alto Sil’ SPA | I - 11870 |
| B — The adverse effects on the ‘Alto Sil’ bird protection area | I - 11873 |
| 1. The application of Article 6(2) of the Habitats Directive | I - 11873 |
| 2. The effects of the projects | I - 11876 |

¹ — Original language: German.

| | | |
|------|--|-----------|
| a) | Land surface occupation | I - 11876 |
| b) | The effects on adjacent land surfaces | I - 11878 |
| c) | The barrier effect of opencast mining projects | I - 11879 |
| d) | Interim conclusion | I - 11880 |
| 3. | Spain's liability | I - 11880 |
| 4. | The justification for the adverse effects on the capercaillie | I - 11881 |
| 5. | Interim conclusion on the second limb of the second plea in law | I - 11884 |
| C — | The provisional protection of the 'Alto Sil' proposed site of Community interest (SCI) | I - 11884 |
| D — | The authorisation of projects in relation to the 'Alto Sil' SCI | I - 11886 |
| E — | Adverse effect on the 'Alto Sil' SCI | I - 11887 |
| 1. | The destruction of land surfaces that host protected habitat types | I - 11888 |
| 2. | The disturbance of adjacent land surfaces and the barrier effect | I - 11889 |
| 3. | Interim conclusion on the second limb of the fourth plea in law | I - 11891 |
| F — | The EIA Directive | I - 11891 |
| 1. | The need for an environmental impact assessment | I - 11891 |
| 2. | The environmental impact examined | I - 11892 |
| V — | Costs | I - 11895 |
| VI — | Conclusion | I - 11896 |
| | | I - 11857 |

I — Introduction

1. In these proceedings for failure to fulfil obligations, the European Commission complains that, when authorising and monitoring the operation of various opencast mining projects in the Castilla y León region, the Kingdom of Spain infringed the EIA Directive² and the Habitats Directive.³ The projects are located within an area protected under the Habitats Directive and the Wild Birds Directive.⁴ The Commission criticises the assessment of the environmental impact of certain projects and their adverse effects on the area in question.

Habitats Directive.⁵ There is also some uncertainty as to what must be included in an environmental impact assessment under the EIA Directive.⁶ Furthermore, the case is primarily concerned with the difficulties involved in assessing the complex facts at issue.

II — Legal framework

A — *The EIA Directive*

2. Many of the legal questions raised may be resolved by reference to existing case-law. However, there has to date been no clarification of the extent of the obligation to avoid the deterioration of sites and the disturbance of species laid down in Article 6(2) of the Habitats Directive in relation to the impact of projects authorised prior to the entry into force of the protective provisions under the

3. Article 2(1) defines the objective of the EIA Directive:

2 — 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 (OJ 1997 L 73, p. 5).

3 — 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 last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

4 — Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), consolidated by Directive 2009/147/EC of 30 November 2009 (OJ 2010 L 20, p. 70).

‘Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a

5 — In this regard, see in particular points 68 et seq. and 106 et seq. below.

6 — In this regard, see in particular point 168 et seq. below.

requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.’

25 hectares are to be made subject to an assessment in accordance with Articles 5 to 10.

4. Article 3 of the EIA Directive describes the subject-matter of the environmental impact assessment:

6. Article 5 of the EIA Directive specifies what information is to be supplied in connection with an environmental impact assessment:

‘The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

‘1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

— human beings, fauna and flora;

— soil, water, air, climate and the landscape;

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

— material assets and the cultural heritage;

— the interaction between the factors mentioned in the first, second and third indents.’

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

5. Pursuant to Article 4(1) of, and point 19 of Annex I to, the EIA Directive, opencast mines where the surface of the site exceeds

2. ...

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

- a description of the project comprising information on the site, design and size of the project,
- a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,
- the data required to identify and assess the main effects which the project is likely to have on the environment,
- an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,
- a non-technical summary of the information mentioned in indents 1 to 3.

4. A description (1) of the likely significant effects of the proposed project on the environment resulting from:

- the existence of the project,
- the use of natural resources,
- the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the developer of the forecasting methods used to assess the effects on the environment.

...

(1) This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.'

4. ...'

7. The information referred to in Article 5(1) of the EIA Directive is specified in Annex IV:

'...

B — *The Wild Birds Directive*

8. Article 4(1) and (2) of the Wild Birds Directive provides that Member States are to designate the territories most suitable for the

protection of the birds mentioned in Annex I to the Directive and migratory birds as special protection areas ('SPAs').

Annex III (Stage 2), the Commission is to draw up from those proposals a list of sites of Community importance ('SCIs').

9. Annex I to the Wild Birds Directive refers in particular to the capercaillie (*Tetrao urogallus*).

12. Some of the species and habitat types to be protected under the Habitats Directive are to be regarded as having priority status. In accordance with Article 1(d) and (h), they are characterised as species and habitat types which are under threat and for the conservation of which the Union has particular responsibility.

10. The first sentence of Article 4(4) of the Wild Birds Directive governs the protection of SPAs:

13. In this case, the following non-priority habitat types in Annex I to the Habitats Directive are relevant:

'In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article.'

- 4030 – European dry heaths;
- 4090 – Endemic oro-Mediterranean heaths with gorse;
- 6160 – Oro-Iberian *Festuca indigesta* grasslands;
- 6510 – Lowland hay meadows (*Alopecurus pratensis*, *Sanguisorba officinalis*);
- 8230 – Siliceous rock with pioneer vegetation of the *Sedo-Scleranthion* or of the *Sedo albi-Veronicion dillenii*; and

C — *The Habitats Directive*

11. In accordance with Article 4(1) of, and Annex III (Stage 1) to, the Habitats Directive, Member States are to propose to the Commission sites which host natural habitat types in Annex I and native species in Annex II. Pursuant to Article 4(2) and

- 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*. integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

14. Mention must also be made of the brown bear (*Ursus arctos*), which is listed in Annex II to the Habitats Directive as a priority species.

15. The provisions governing the protection of sites are laid down in Article 6(2) to (4) of the Habitats Directive:

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.

...

‘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.

16. In that connection, recital 10 in the preamble to the Habitats Directive states:

‘Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future’

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

17. Article 7 of the Habitats Directive applies the abovementioned provisions to SPAs under the Wild Birds Directive:

‘Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in

respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.’

18. That provision is explained as follows by the seventh recital in the preamble to the Habitats Directive:

‘Whereas all the areas designated, including those classified now or in the future as special protection areas pursuant to ... Directive 79/409/EEC ..., will have to be incorporated into the coherent European ecological network.’

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

19. The ‘Alto Sil’ site, situated at the upper reaches of the river Sil, covers an area of over 43 000 hectares and is located in the north west of the Spanish region of Castilla y León, close to the regions of Galicia and Asturias. It is part of a chain of extensive protection areas

which stretch almost one after the other from Galicia to Cantabria.⁷

20. Spain proposed ‘Alto Sil’ as an SCI under the Habitats Directive in 1998 and designated it as an SPA under the Wild Birds Directive in 2000. On 7 December 2004, the Commission placed the site – under No ES0000210 – on the list of SCIs under the Habitats Directive.⁸

21. The standard data form used to notify the site to the Commission makes reference *inter alia* to 10 to 15 specimens of the brown bear and 42 to 47 male specimens of the Cantabrian subspecies of the capercaillie (*Tetrao urogallus cantabricus*), as well as, in particular, to the following habitat types:

— 4030 – European dry heaths (50 % of the site, i.e. over 21 000 hectares);

— 4090 – Endemic oro-Mediterranean heaths with gorse (6 % of the site, i.e. approximately 2 600 hectares);

7 — See <http://natura2000.eea.europa.eu/N2KGisViewer.html#siteCode=ES0000210>.

8 — Commission Decision of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region (notified under document number C[2004] 4032) (OJ 2004 L 387, p. 1 [25]).

- 6160 – Oro-Iberian *Festuca indigesta* grasslands (1 % of the site, i.e. approximately 430 hectares);
- 8230 – Siliceous rock with pioneer vegetation of the *Sedo-Scleranthion* or of the *Sedo albi-Veronicion dillenii* (13 % of the site, i.e. over 5 500 hectares); and
- 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica* (6 % of the site, i.e. approximately 2 600 hectares).

22. In 2001, the Commission learned of a number of opencast coal mining projects which were likely to have an adverse effect on the ‘Alto Sil’ site.

23. Following initial investigations, it asked Spain for the first time, in 2003, to submit observations on possible infringements of the Habitats Directive and the EIA Directive. In 2005, the Commission issued a first reasoned opinion to Spain. In reply, Spain submitted *inter alia* a study examining the impact of the various projects and proposing measures to protect the site (‘the 2005 study’).⁹

24. Following two judgments given by the Court,¹⁰ the Commission reassessed the facts and asked Spain for the second time, on 29 February 2008, to submit observations. Following a reply on 7 May 2008 and after further contacts, the Commission, on 1 December 2008, issued a supplementary reasoned opinion in which it gave Spain until 1 February 2009 to put an end to the infringement of European Union (EU) law. Thereafter, Spain continued to provide additional information until 30 July 2009.

25. On the basis of the information available, the opencast mining projects can be divided into two groups.

26. To the north of the Sil and the municipality of Villablino, a number of hilltops and ridges are being mined. Most of these projects are separated by stream valleys, so that they are situated approximately one to two kilometres from each other. The Commission objects to the ‘Feixolín’ opencast mine (95.86 hectares, which was authorised in 1986 and has since been renaturalised), the adjoining ‘Ampliación de Feixolín’ (‘Feixolín’ extension, 93.9 hectares) and the ‘Fonfría’ opencast mine (350 hectares, authorised on 21 July 1999). In addition, further opencast mines

9 — Informe relativo a la queja 2001/4914 – Análisis de afectaciones y propuesta de medidas, p. 184 et seq. of the annexes to the application.

10 — Case C-117/03 *Dragaggi and Others* [2005] ECR I-167 and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445.

are planned to the east and west of those projects. They all fall within the 'Alto Sil' site.

view that EU law was infringed, and therefore claims, by the present action, the application in which was received at the Court on 20 October 2009, that the Court should:

27. The situation is particularly complicated in relation to the 'Feixolín' extension. Although that project had not yet been authorised when the deadline laid down in the reasoned opinion expired, it had already been partly implemented over an area of 35.24 hectares. Consequently, on 9 November 2009, the Spanish authorities imposed a fine and ordered that specific measures be adopted.¹¹ However, authorisation to operate that mine over a subarea of 39.62 hectares had been given on 11 June 2009 and specific measures to limit and offset the mine's effects on the environment had been ordered on 7 October 2009.

28. The other projects about which the Commission has complained, 'Salgeuro-Prégame-Valdesegadas' (196 hectares, authorised in 1986, already largely renaturalised), 'Nueva Julia' (405 hectares, authorised in 2003) and 'Ladrones' (117 hectares, authorised in 2003), are located some 10 to 15 kilometres away, to the south of the river Sil, in the south west of the municipality of Villa Seca de Laciano. These projects – and a further scheduled project – are directly adjacent to one another. Only the 'Ladrones' mine is located within the 'Alto Sil' site.

29. Despite the information provided by Spain, the Commission continues to take the

1. declare that

(a) by authorising the opencast mines 'Fonfría', 'Nueva Julia' and 'Los Ladrones' but failing to subject that authorisation to an assessment in order to identify, describe and assess in an appropriate manner the direct, indirect and cumulative effects of the existing opencast mining projects, the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3 and 5(1) and (3) of the EIA Directive;

(b) from 2000, the date of the classification of the 'Alto Sil' as an SPA,

— by having authorised the opencast mines 'Nueva Julia' and 'Los Ladrones' but failing to subject that authorisation to an appropriate assessment of the possible effects of those projects; and in any event failing to comply with the conditions under which the execution of a project is permitted, in spite of the risk which those projects represented for

¹¹ — See p. 442 et seq. of the annexes to the defence.

the capercaillie species, which is one of the natural assets which justified the classification of the 'Alto Sil' SPA, and in the absence of alternative solutions, namely for imperative reasons of overriding public interest and only after having notified the Commission of the necessary compensatory measures to ensure that the coherence of the Natura 2000 network is protected, and

interest which the proposed 'Alto Sil' site had at national level, the Kingdom of Spain has failed to fulfil its obligations in relation to that site, pursuant to the interpretation of the Court of Justice in Case C-117/03 *Dragaggi* [2005] ECR I-167 and Case C-244/05 *Bund Naturschutz in Bayern* [2006] ECR I-8445; and

- by having failed to adopt the necessary measures to prevent the deterioration of the habitats of that species, and to prevent the disturbance of that species, which was the reason for the designation of that area as an SPA, caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Ampliación de Feixolín' and 'Nueva Julia' mines,

- (d) from December 2004,

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' SPA under Article 6(2), (3) and (4) in conjunction with Article 7 of the Habitats Directive;

- (c) from January 1998, by failing in relation to the mining operations at the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines to adopt the necessary measures to safeguard the ecological

- by permitting opencast mining (in the case of the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines) likely to have a significant impact on the natural assets which determined the designation of the 'Alto Sil' area as an SCI but failing to make an appropriate assessment of the possible impact of those mines, and in any event failing to comply with the conditions under which the execution of those projects would be permitted, in spite of the risk which they represented to the natural assets which justified the designation of the 'Alto Sil' and in the absence of alternative solutions, namely solely for imperative reasons of overriding public interest and only after having notified the Commission

of the necessary compensatory measures to ensure that the coherence of the Natura 2000 network is protected,

31. The parties have presented their observations exclusively in writing.

- and by having omitted in relation to the above opencast mining to adopt the necessary measures to prevent the deterioration of natural habitats and the habitats of species, and the disturbances of species caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Nueva Julia' and 'Ampliación de Feixolín' mines,

IV — Legal assessment

32. In a departure from the structure of the application, I shall examine the pleas in law relating to the Habitats Directive first, before then turning to consider the application of the EIA Directive.

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' SCI under Article 6(2), (3) and (4) of the Habitats Directive;

A — Authorisation of the 'Nueva Julia' and 'Ladrones' projects in relation to the 'Alto Sil' bird protection area

2. order the Kingdom of Spain to pay the costs.

33. Under the first limb of the second plea in law, the Commission takes the view that, by authorising the 'Nueva Julia' and 'Ladrones' projects in 2003, Spain infringed Article 6(3) and (4) of the Habitats Directive in relation to the 'Alto Sil' SPA.

30. The Kingdom of Spain contends that the Court should:

- (a) dismiss the action and

34. By the time the applications for authorisation of those projects were made in 2001,¹² Spain had already designated the SPA as a bird protection area, with the result that,

- (b) order the applicant institution to pay the costs.

¹² — See p. 72 of the annexes to the defence for the purposes of the 'Nueva Julia' project and p. 98 of those annexes for the purposes of the 'Ladrones' project.

pursuant to Article 7 of the Habitats Directive, the authorisation procedures were subject to Article 6(2) to (4) of the Directive.

corresponding derogations from the scope of the assessment requirement in the first sentence of Article 6(3) of the Habitats Directive do not apply.

35. In accordance with the first sentence of Article 6(3) of the Habitats Directive, 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, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The second sentence provides that, 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 are to agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned.

36. Subject to certain conditions, Article 6(4) of the Habitats Directive allows projects to be implemented in spite of a negative outcome following the procedure laid down in paragraph 3.

1. The need for an assessment of the projects

37. The opencast mining projects are neither connected with nor necessary to the management of the 'Alto Sil' SPA. Consequently, the

38. An assessment was therefore necessary if the individual projects were likely to have a significant effect on the site, either individually or in combination with other plans or projects. This is already the case where there is a probability or a risk that plans or projects will have significant effects on the site concerned.¹³

39. As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project must be assessed with reference to the site's conservation objectives.¹⁴

40. In the light, in particular, of the precautionary principle, such an assessment must be carried out if there is doubt as to the absence of significant effects. That principle is one of the foundations of the high level of protection pursued by EU policy on the environment, in accordance with the first subparagraph of Article 191(2) TFEU. The Habitats Directive

13 — Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 43, and Case C-179/06 *Commission v Italy* ('Altamura') [2007] ECR I-8131, paragraph 34.

14 — See *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 13, paragraph 46 et seq., and *Altamura*, cited in footnote 13, paragraph 35.

must be interpreted by reference to that principle.¹⁵

41. Since, in an action for failure to fulfil obligations, the Commission is required to prove the existence of the alleged infringement, it is for the Commission to furnish sufficient proof that, in the light of the characteristics and the specific environmental conditions of the site affected by a plan or project, that plan or project is likely to have a significant effect on that site, in the light of the conservation objectives fixed for the site.¹⁶

42. The Commission's objections relate to conservation of the Cantabrian capercaillie. This subspecies of capercaillie is considered to be endangered in Spain. It is common ground that it is covered by the conservation objectives of the 'Alto Sil' bird protection area.

43. It must therefore be examined whether the two opencast mining projects are likely to have a significant effect on the conservation of the Cantabrian capercaillie within the 'Alto Sil' bird protection area.

44. The 'Ladrones' project is located within the protection area. The land surfaces directly affected can therefore no longer make any contribution to the conservation of the capercaillie, at least not until they are re-naturalised. Even after the mining operations have ceased, it will be a long time before the land surfaces return to a comparable level of ecological functionality, if indeed it ever can.

45. Other parts of the site may also be adversely affected by noise, vibrations and other consequences of the project's implementation. According to a study submitted by Spain, the noise from an opencast mine can have effects up to four kilometres away, and its vibrations are said to be felt at a distance of up to 300 metres.¹⁷ These potential effects are particularly significant because the 'Ladrones' project is directly adjacent to an area 'critical' to the conservation of the capercaillie, which presumably means one of its preferred habitats.¹⁸

46. Although 'Nueva Julia' is located outside the SPA, it does border directly on it. Disturbance to parts of the site, in particular from noise and vibrations, is therefore possible. This is particularly true of the aforementioned critical area, which is only a kilometre,

15 — *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 13, paragraph 44, and Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, paragraph 254.

16 — *Altamura*, cited in footnote 13, paragraph 37 et seq. and the case-law cited there.

17 — Informe relativo a la queja 2001/4914, Annex 9 to the application, p. 221 et seq.

18 — AS-03, see Plano I, p. 48 of the annexes to the application.

if that, from the perimeter of the ‘Nueva Julia’ mine.

stated that opencast mining projects represent a substantial threat to the site.

47. Furthermore, it must be borne in mind that the first sentence of Article 6(3) of the Habitats Directive covers not only the effects which individual plans or projects may have when viewed in isolation, but also expressly includes the combined effects of a number of plans and projects. Such combined effects are possible in this case not least because it concerns the implementation or at least the planning of a number of opencast mining projects in close proximity to each other. Other effects resulting, for example, from the residential communities and transport links in the area in question may add to the mix. These effects may not only create a disturbance to the species in the so-called critical areas but may also cause the various occurrences of the species to be separated from each other, making interaction between the respective populations more difficult or impossible.¹⁹

2. Assessment of the implications for the conservation objectives of the ‘Alto Sil’ SPA

49. The implications of the two projects for the protection area should therefore have been assessed.

50. That assessment must be organised in such a manner that the competent authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse authorisation.²⁰

48. Both opencast mining projects are therefore likely to have a significant effect on the conservation of the Cantabrian capercaillie in the ‘Alto Sil’ bird protection area. This assessment is confirmed by the fact that, in the standard data form for the site, Spain itself

51. With regard to the factors on the basis of which the competent authorities may gain the necessary level of certainty, the Court has stated that no reasonable scientific doubt may

19 — See the Informe sobre la incidencia de las actividades mineras sobre el urogallo cantábrico in Laciana, Annex 19 to the application, p. 650 et seq.

20 — *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 13, paragraphs 56 and 57; Case C-239/04 *Commission v Portugal* (‘Castro Verde’) [2006] ECR I-10183, paragraph 20; and Case C-304/05 *Commission v Italy* (‘Santa Caterina’) [2007] ECR I-7495, paragraph 58.

remain,²¹ those authorities having to rely on the best scientific knowledge in the field.²²

52. Neither the arguments advanced by Spain nor the documents before the Court give any indication that such an assessment was carried out in relation to the conservation of the capercaillie.

53. The documents before the Court that relate to the authorisation of the 'Nueva Julia' opencast mine do not even mention the capercaillie.

54. Spain points out that the decision authorising the 'Ladrones' opencast mine states that any effects which that project may have on the capercaillie have been studied and found to be satisfactory.²³ This, however, is merely an assertion on the part of the authorising authority and, as such, is not capable of proving that an appropriate assessment of the project's implications was carried out. Spain has not produced any documentation to substantiate that assertion.

55. Although Spain points out that none of the capercaillie's mating grounds have been affected, this does not mean that the capercaillie remains unaffected at all stages of its development. In particular, it is not inconceivable that its use of the aforementioned critical area will be impaired within the impact range of the two opencast mines.

56. Finally, Spain relies on the aforementioned 2005 study, which examines the possible effects of the 'Fonfría' project, including the cumulative effects of that project combined with other opencast mining projects. For the purposes of this case, however, there is no need to consider whether that study carries out an adequate assessment of the implications of the 'Nueva Julia' and 'Ladrones' projects for the protection of the capercaillie within the 'Alto Sil' bird protection area. After all, pursuant to Article 6(3) of the Habitats Directive, the implications of a project must be assessed before it is authorised.²⁴ The authorisations in this case were granted in 2003.

57. As the Commission rightly points out, that study also states that the previously conducted assessments of the implications for the site did not properly examine the effects that the projects would have.²⁵

21 — *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 13, paragraphs 59 and 67; *Castro Verde*, cited in footnote 20, paragraph 24; and *Commission v Ireland*, cited in footnote 15, paragraph 258.

22 — *Santa Caterina*, cited in footnote 20, paragraph 59.

23 — Footnote 4 to paragraph 20 of the rejoinder, which refers to the decision authorising the project of 24 November 2003, p. 105 et seq. of the annexes to the defence.

24 — *Santa Caterina*, cited in footnote 20, paragraph 72.

25 — Page 240 of the annexes to the application.

58. Since the ‘Nueva Julia’ and ‘Ladrones’ projects were therefore not appropriately assessed, their authorisation necessarily infringes Article 6(3) and (4) of the Habitats Directive. For, pursuant to Article 6(3) of the Habitats Directive, authorisation would have required that the competent authorities could be certain that the projects would not have adverse effects on the integrity of the site concerned.²⁶ However, such certainty was impossible without any assessment of the implications for the site.

that the overall coherence of Natura 2000 is protected.²⁷

60. Spain highlights the importance of mining for the local economy and takes the view that the effects on the conservation of the capercaillie are minimal. However, without an assessment of the implications for the site in question, those considerations are irrelevant.

59. For the same reasons, the conditions governing authorisation under Article 6(4) of the Habitats Directive were not satisfied. That provision states that, 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

61. After all, Article 6(4) of the Habitats Directive can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of the Directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4). Without that knowledge, no condition for 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.²⁸

26 — *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 13, paragraphs 56 and 57; *Castro Verde*, cited in footnote 20, paragraph 20; and *Santa Caterina*, cited in footnote 20, paragraph 58.

27 — *Santa Caterina*, cited in footnote 20, paragraph 81.

28 — *Santa Caterina*, cited in footnote 20, paragraph 83.

62. Consequently, by authorising opencast mining at the 'Nueva Julia' and 'Ladrones' mines without assessing the possible effects of those projects in an appropriate manner, Spain infringed Article 6(3) and (4) of the Habitats Directive.

B — The adverse effects on the 'Alto Sil' bird protection area

63. By the second limb of the second plea in law, the Commission claims that Spain infringed Article 6(2) of the Habitats Directive because the necessary steps were not taken to avert any adverse effects on the 'Alto Sil' SPA resulting from the operation of the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Feixolín' extension and 'Nueva Julia' opencast mines.

64. Under Article 6(2) of the Habitats Directive, Member States are to take appropriate steps to avoid, in the protection areas falling under that provision, 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 the Directive.

1. The application of Article 6(2) of the Habitats Directive

65. It must be examined first of all whether Article 6(2) of the Habitats Directive is applicable to the effects of the projects in question. After all, that provision does not apply to all cases of deterioration or disturbance of protection areas. Indeed, the Court has held that the fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2).²⁹

66. Accordingly, Article 6(2) of the Habitats Directive applies to the steps already taken to extend the 'Feixolín' mine. Those steps were taken without authorisation, with the result that Article 6(3) and (4) could not yet apply.

67. Furthermore, it follows from the outcome of the foregoing examination of the case in accordance with Article 6(3) and (4) that Article 6(2) also applies to the effects of the 'Nueva Julia' project. Where authorisation

²⁹ — *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 13, paragraph 35.

for a plan or project has been granted without complying with Article 6(3) of the Directive, a breach of Article 6(2) in relation to an SPA may be found where deterioration of a habitat or disturbance of the species for which the area in question was designated has been established.³⁰

assessment of the implications of the project for the site concerned.³¹ After all, it would not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time-consuming by the specific requirements imposed by the Directive, and for situations already established to be affected by it.³²

68. The application of Article 6(2) of the Habitats Directive to the effects of the ‘Feixolín’, ‘Salguero-Prégame-Valdesegadas’ and ‘Fonfría’ opencast mines, however, might be precluded by the fact that they were authorised before the site’s protection under the Habitats Directive became effective.

69. The Court has already held that, where a project was authorised before the expiry of the time-limit for transposing the Habitats Directive or where the authorisation procedure was initiated prior to the date of accession of the Member State concerned to the European Union, it is not subject to the requirements of Article 6(3) of the Habitats Directive relating to the procedure for prior

70. However, that case-law relates only to matters of procedural law. The Court has, on the other hand, repeatedly held that the substantive requirements governing the protection of sites, laid down in Article 6(2) of the Habitats Directive, are not excluded by existing authorisations. That provision thus makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to the Directive, where a plan or project authorised in accordance with Article 6(3) subsequently proves likely to give rise to deterioration or significant disturbance, even where the competent national authorities cannot be held responsible for any error.³³ In addition, Article 6(2) may also require that a

30 — *Santa Caterina*, cited in footnote 20, paragraph 94, and, by way of illustration, my Opinion of 19 April 2007 in that case, point 62; see also *Commission v Ireland*, cited in footnote 15, paragraph 263, and my Opinion of 14 September 2006 in that case, point 173.

31 — Case C-209/04 *Commission v Austria* (*‘Lauteracher Ried’*) [2006] ECR I-2755, paragraphs 53 to 62, and Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 48.

32 — *Lauteracher Ried*, cited in footnote 31, paragraph 57, which contains references to the case-law on the EIA Directive.

33 — *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 13, paragraph 37.

subsequent review of an existing authorisation be carried out;³⁴ accordingly, the implementation of a project authorised prior to the expiry of the time-limit for transposing the Habitats Directive falls within the scope of that provision.³⁵

71. Consequently, Article 6(2) of the Habitats Directive requires Member States to take the necessary steps to avoid the deterioration and disturbance of protected areas also in relation to existing projects. The legitimate interests of the holders of authorisations must, where necessary, be satisfied by means of compensation.

72. The foregoing case-law is not at odds with the prohibition on the retroactive application of rules of law. On the contrary, a new rule of law applies, in principle, from its entry into force. While it does not apply to legal situations which have arisen and become definitive under the old law, it does apply to their future effects.³⁶ Thus, for example, new rules of law on the protection of patents may restrict the scope of the protection

afforded by existing patents.³⁷ The situation is similar in the case of existing authorisations for projects which may lead to the deterioration or significant disturbance of protected areas. Following a site's designation as an SPA, such projects may be implemented only in so far as they are compatible with the protection of that site.

73. Moreover, as far as the protection of the capercaillies is concerned, the legitimate expectation in the continued validity of the authorisations is excluded not least because it must be assumed that, prior to its designation as a bird protection area, the 'Alto Sil' site was already subject to the strict requirements governing the protection of *de facto* bird protection areas laid down in the first sentence of Article 4(4) of the Wild Birds Directive,³⁸ even though the Commission has not claimed that that provision was infringed. Spain should therefore, in principle, have stopped authorising projects which may lead to the deterioration or significant disturbance of that site³⁹ as soon as it acceded to the European Economic Community in 1986.⁴⁰

34 — Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, paragraph 58.

35 — *Stadt Papenburg*, cited in footnote 31, paragraph 49.

36 — Case C-428/08 *Monsanto Technology* [2010] ECR I-6765, paragraph 66, and Case C-266/09 *Stichting Natuur en Milieu* [2010] ECR I-13119, paragraph 32.

37 — *Monsanto Technology*, cited in footnote 36, paragraph 69.

38 — Case C-374/98 *Commission v France* ('Basses Corbières') [2000] ECR I-10799, paragraphs 47 and 57; Case C-388/05 *Commission v Italy* ('Valloni e steppe pedegarganiche') [2007] ECR I-7555, paragraph 18; and Case C-186/06 *Commission v Spain* ('Segarra-Garrigues Canal') [2007] ECR I-12093, paragraph 26.

39 — In this regard, the situation is comparable to that in *Commission v Italy* ('Valloni e steppe pedegarganiche'), cited in footnote 38.

40 — Case C-355/90 *Commission v Spain* ('Santoña marshes') [1993] ECR I-4221, paragraph 11.

74. The effects of projects which were authorised before ‘Alto Sil’ was designated as an SPA are therefore subject to Article 6(2) of the Habitats Directive.

is any disturbance of adjacent land surfaces as a result of noise and vibrations (see section b) below) and to the barrier effect of the projects (see section c) below).

2. The effects of the projects

(a) Land surface occupation

75. Article 6(2) of the Habitats Directive requires appropriate steps to be taken 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 the Directive.

76. Since it relates to an SPA under the Wild Birds Directive, this plea in law is directly concerned not with any deterioration of the natural habitats within that SPA but with the deterioration of the habitats of birds for which the SPA was designated – in this case, the capercaillie –, as well as any disturbance caused to those species.

77. In this case, any deterioration of habitats is likely to result primarily from the fact that the land surfaces are occupied by individual projects (see section a) below). Consideration must also be given, however, to whether there

78. All of the projects complained of by the Commission occupy land surfaces which cannot be used by the Cantabrian capercaillie, at least while the opencast mine is in operation and presumably also for a longer subsequent period of renaturalisation. Land surface occupation leads to the deterioration of an SPA within the meaning of Article 6(2) of the Habitats Directive where it adversely affects the protection of bird species for which the SPA was designated.⁴¹

79. The ‘Salguero-Prégame-Valdesegadas’ and ‘Nueva Julia’ projects, however, are located outside the ‘Alto Sil’ SAC. The occupation of land surfaces by those projects cannot therefore lead directly to the deterioration of the site.

⁴¹ — *Commission v Italy* (‘Valloni e steppe pedegarganiche’), cited in footnote 38, paragraphs 22 and 27.

80. The ‘Fonfría’ and ‘Feixolín’ opencast mines and the ‘Feixolín’ extension, on the other hand, occupy land surfaces within the SPA. The Commission submits that those projects have destroyed the habitat type suited to the capercaillie, that is to say habitat type 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*.

81. That said, the Commission has not adduced any evidence to support its submission in relation to either the ‘Feixolín’ mine or the ‘Feixolín’ extension. It is true that it has demonstrated, without contradiction, that the aforementioned habitat was still in existence immediately *outside* the perimeter of the ‘Feixolín’ mine in 2008. However, it cannot necessarily be assumed from this that occurrences of that habitat *inside* the perimeter of that project were destroyed after the year 2000. If that habitat ever existed in the project area, it could have been destroyed before the area’s designation as an SPA in 2000. Furthermore, according to the aforementioned 2005 study, the existing ‘Feixolín’ project has at least not affected that habitat type.⁴² It is true that, in relation to the ‘Feixolín’ extension, the study refers to the loss of 19.9 hectares of the aforementioned habitat type.⁴³ To date, however, that project has been implemented on only a third of the surface area scheduled to be mined.⁴⁴ It cannot therefore be ruled out that habitat type 9230 occurs only outside the land surface affected to date.

82. By contrast, the 2005 study submitted by Spain states that the ‘Fonfría’ mine has destroyed 17.92 hectares of habitat suited to the capercaillie, type 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*.⁴⁵ That project was authorised in July 1999 and, according to the documents before the Court, implemented from 2001 onwards,⁴⁶ that is to say not until after the site was designated as an SPA.

83. Qualitatively, that impairment of the SPA is more serious than the felling of some 2500 trees to make room for a ski run in an Italian SPA of similar size, which the Court considered to be an infringement of Article 6(2) of the Habitats Directive.⁴⁷ After all, an opencast mine which is in operation throughout the year represents a much greater obstacle to the use of a land surface by birds than a ski run used only in the winter.

84. Spain argues that the land surfaces concerned are of no significance to the protection of the capercaillie. Its only justification for that argument, however, is that those land surfaces contained no mating grounds. Mating is, however, only one stage in the lifecycle of the capercaillie. Thus, even the 2005 study submitted by Spain states that the clearance of vegetation is detrimental to the capercaillie.⁴⁸

42 — Page 235 of the annexes to the application.

43 — Page 235 of the annexes to the application.

44 — With regard to the extent of the work, see p. 442 of the annexes to the defence.

45 — Page 235 of the annexes to the application.

46 — See p. 497 of the annexes to the application.

47 — *Santa Caterina*, cited in footnote 20, paragraph 95.

48 — Page 232 of the annexes to the application.

85. Implementation of the ‘Fonfría’ project therefore led to the deterioration of the ‘Alto Sil’ SPA because habitat type 9230 – Galician-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*, which could have been used by the capercaillie, was destroyed over an area of 17.92 hectares.

to the map submitted by the Commission,⁴⁹ a number of areas critical to the capercaillie lie within the aforementioned distances from the opencast mines at issue.

(b) The effects on adjacent land surfaces

86. Article 6(2) of the Habitats Directive also requires that the disturbance of species for which the areas have been designated is to be avoided in so far as such disturbance could be significant in relation to the objectives of the Directive.

89. According to the 2005 study, however, disturbance of this kind is not to be regarded as significant in relation to the capercaillie, since numbers of that species have fallen all around the perimeter of its distribution area. This is also true of locations where there are no mining projects. Indeed, in some of those locations, the decline is much greater.⁵⁰ As Spain correctly points out, the other documents contained in the case-file also describe disturbance from opencast mining as not posing a threat to the capercaillie. The Commission has therefore failed to adduce the necessary proof that, in general, disturbance from noise and vibrations is likely to be significant.

87. The scope of that protection is very extensive, since proof of significant disturbance is not required, it being sufficient, according to the wording of that provision, for the disturbance to be potentially significant.

88. As I have already said, the documents before the Court show that noise can cause disturbance up to four kilometres away and vibrations up to 300 metres away. Furthermore, it is common ground between the parties that the capercaillie is very sensitive. According

90. The situation is somewhat different, however, in the case of critical area AS-09, the ‘Robledo El Chano’ mating ground, which

49 — Plano 1, p. 48 of the annexes to the application. Since the scale stated is incorrect, the distances were calculated using Google Maps distance calculator (<http://www.daftlogic.com/projects-google-maps-distance-calculator.htm>).

50 — Page 239 of the annexes to the application.

is directly adjacent to the 'Fonfría' opencast mine. It is true that, according to information provided by Spain, that mating ground was abandoned back in the late 1980s.⁵¹ However, according to a population survey of the Castilla y León region, submitted by Spain,⁵² it was still in use in 1999; not until an inspection conducted in 2003 was it found to be no longer occupied.

91. The aforementioned population survey is the only document in the case-file which can be said to be based on a specific observation of the capercaillie in that area. It therefore carries greater weight than the mere assertion, such as that contained in the 2005 study, that the mating ground was abandoned at an earlier date. Since the population survey was produced by the Spanish authorities and Spain neither disputes nor refutes it in any reasoned way, it constitutes sufficient proof that the capercaillie abandoned that mating ground at about the same time as the 'Fonfría' opencast mine came into operation.

92. Furthermore, the letter from two recognised experts who were also involved in drawing up the Spanish plan for the conservation of the Cantabrian capercaillie shows that it is at the very least true that the capercaillie abandon woodland located in very close

proximity to opencast mining projects.⁵³ It must therefore be assumed that, in this particular case, the 'Robledo El Chano' mating ground was abandoned as a result of the disturbance to the capercaillie caused by the operation of the 'Fonfría' opencast mine.

93. The operation of the 'Fonfría' opencast mine therefore caused significant disturbance to the capercaillie at the 'Robledo El Chano' mating ground.

(c) The barrier effect of opencast mining projects

94. Finally, the Commission complains that opencast mining projects are instrumental in isolating subpopulations of the capercaillie because they block corridors connecting them to other populations.

95. In this regard, the Commission relies on the aforementioned letter from two recognised experts.⁵⁴ These object to a number of opencast mining projects on the north bank of the Sil, including the 'Fonfría' and 'Feixolín' opencast mines and the 'Feixolín' extension.

51 — Page 227 of the annexes to the application.

52 — Situación del urogallo en Castilla y León, pp. 307 and 318 of the annexes to the defence.

53 — Page 651 of the annexes to the application.

54 — Page 650 et seq. of the annexes to the application.

In their view, those projects will combine to isolate the capercaillie populations found further to the south of the ‘Alto Sil’ SPA and may contribute to their disappearance.

is significant in so far as it contributes towards the isolation of subpopulations of the capercaillie.

96. The isolation of subpopulations of protected species is, in principle, to be regarded as adversely affecting the protected area concerned.⁵⁵

(d) Interim conclusion

97. The ‘Salguero-Prégame-Valdesegadas’ and ‘Nueva Julia’ opencast mines, however, are located away from the migratory corridors claimed to have been adversely affected in the aforementioned letter.⁵⁶ They do not therefore contribute towards the isolation of the subpopulations in question.

98. As far as the ‘Fonfría’ and ‘Feixolín’ mines and the ‘Feixolín’ extension are concerned, Spain disputes the submission made by the Commission in this regard, but fails to put forward any argument capable of refuting that criticism, which is based on scientific considerations. Moreover, the Spanish plan for the conservation of the capercaillie also recognises the isolation of subpopulations as constituting a threat to that species.

100. In summary, it must be concluded that the implementation of the ‘Fonfría’ project led to a deterioration of the ‘Alto Sil’ SPA, since habitat type 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*, which could have been used by the capercaillie, was destroyed over an area of 17.92 hectares. That opencast mining project also caused significant disturbance to the capercaillie at the ‘Robledo El Chano’ mating ground. And finally, the combined disturbance from the ‘Fonfría’ and ‘Feixolín’ opencast mines and the ‘Feixolín’ extension is significant in so far as it contributes towards the isolation of subpopulations of the capercaillie.

99. It must therefore be concluded that the disturbance from the ‘Fonfría’ and ‘Feixolín’ opencast mines and the ‘Feixolín’ extension

3. Spain’s liability

⁵⁵ — See to that effect Case C-308/08 *Commission v Spain* (‘Iberian lynx’) [2010] ECR I-4281, paragraph 25.

⁵⁶ — See the map on p. 653 of the annexes to the application and the plan of the various projects on p. 48.

101. The question is whether the aforementioned actual instances of deterioration and disturbance are in themselves capable of

establishing an infringement by Spain of Article 6(2) of the Habitats Directive.

102. A distinction must be drawn here between the authorised 'Fonfría' and 'Feixolín' projects, on the one hand, and the unauthorised 'Feixolín' extension, on the other hand.

103. By virtue of the consent it gives, a Member State is fully liable for the permitted effects of projects which it authorises. This is also the case where the conservation provisions subsequently become stricter. The competent authorities are informed and are able to take the necessary steps. Spain is therefore liable for the consequences of the 'Fonfría' and 'Feixolín' projects.

104. On the other hand, a Member State is not directly liable for the unauthorised conduct of private individuals and the effects of such conduct. That said, the obligation under Article 6(2) of the Habitats Directive to take steps to prevent the deterioration of protected sites includes the duty to prohibit harmful acts by private individuals or at least to bring such acts to an end as quickly as possible.

105. According to the documents before the Court, the competent authorities were aware that the 'Feixolín' extension was being

operated without authorisation from at least 2005.⁵⁷ However, Spain did not prohibit those works until 9 November 2009. Consequently, a situation incompatible with Article 6(2) of the Habitats Directive was tolerated for at least four years, even though it caused significant disturbance to the 'Alto Sil' SPA. Spain did not therefore take the necessary steps as soon as possible.

4. The justification for the adverse effects on the capercaillie

106. The deterioration and disturbance may, however, be justified.

107. Here too, a distinction must be drawn between the authorised 'Fonfría' and 'Feixolín' projects, on the one hand, and the unauthorised 'Feixolín' extension, on the other hand.

108. Article 6(2) of the Habitats Directive – like Article 4(4) of the Wild Birds Directive in relation to the protection of *de facto* bird protection areas – does not provide for a ground of justification based on overriding interests. After all, the protection of sites under the

⁵⁷ — The 2005 study (p. 235 of the annexes to the application) lists the project as an 'explotación activa' (active operation).

Habitats Directive is based on the idea that the deterioration or significant disturbance of protected areas must always be authorised (and, where so authorised, justified) in accordance with Article 6(3) and (4). Moreover, where such authorisation is based on an appropriate assessment of the implications for the site in question, there is in principle no scope for the application of Article 6(2).⁵⁸

109. The ‘Feixolín’ extension would have required authorisation in accordance with the procedure laid down in Article 6(3) and (4) of the Habitats Directive. Under that procedure, notwithstanding any adverse effects on the ‘Alto Sil’ SPA, it would have been possible, subject to certain conditions, to put forward grounds of justification for that extension. However, since that procedure was not applied, any justification for that project must be rejected.

110. By contrast, Article 6(3) and (4) of the Habitats Directive were not even yet applicable to the ‘Fonfría’ and ‘Feixolín’ projects. It would, however, be unreasonable to deny projects which, for reasons of time, are not subject to the prior assessment under Article 6(3) and (4) the possibility of being authorised by way of derogation, as provided

for in Article 6(4). Those projects would be more severely restricted than later projects, to which the provisions of Article 6(2) to (4) apply in their entirety.

111. In the case of *existing projects*, therefore, the deterioration or significant disturbance of protected areas must be permitted even under Article 6(2) of the Habitats Directive where the material conditions laid down in Article 6(4) are present, that is to say imperative reasons of overriding public interest, including those of a social or economic nature, the absence of an alternative solution and compensatory measures to ensure that the overall coherence of Natura 2000 is protected.

112. It is true that a formal assessment of the implications for the site in question, in accordance with Article 6(3) of the Habitats Directive, is not required. The discretion thus enjoyed by the Member States in the acceptance of a ground of justification is none the less subject to limits. They must carefully and impartially examine all the relevant elements of the individual case and, in so doing, ensure that those elements are capable of supporting the conclusions drawn from them.⁵⁹ Consequently, the weighing up process, the examination of alternatives and the compensatory measures must be preceded by an

⁵⁸ — *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 13, paragraph 35.

⁵⁹ — On the subject of the power to review the discretion available to the Commission, see Case C-326/05 *P Industrias Químicas del Vallés v Commission* [2007] ECR I-6557, paragraph 77, and Case C-405/07 *P Netherlands v Commission* [2008] ECR I-8301, paragraph 55, together with the case-law cited in each.

appropriate assessment of the effects requiring justification.⁶⁰

113. In this case, Spain relies on the objective of reducing dependence on external sources of energy (security of supply) and on the importance of mining to the local economy. Moreover, the principle of legal certainty requires that account be taken of the interest in maintaining authorisations which have become final.⁶¹

114. These interests must be balanced against the adverse effects caused to the 'Alto Sil' SPA.

115. The direct loss of habitat suited to the capercaillie is relatively minimal compared with the overall incidence of that habitat type within the SPA. According to the standard data form, there are some 2600 hectares of habitat type 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica* in the SPA; indeed, according to credible information provided by Spain, there are likely to be 4000 hectares. The losses caused by the 'Fonfría' opencast mine therefore account for less than 1 %.

116. There is no doubt that the loss of a mating ground and the risk that the southern

subpopulations will be isolated are much more serious. Nevertheless, it is not inconceivable that the interest in implementing opencast mining projects may outweigh the detrimental effects on the capercaillie.

117. Nor are there any obvious alternatives that would be less harmful to the SPA. Coal can be mined at the advantageous costs made possible by opencast mining only in places where it is deposited in conditions that lend themselves to this form of extraction. Most of the other planned mining projects are also situated within the SPA and their effects are therefore likely to be just as significant.

118. Spain also relies on various measures, in particular in the fields of hunting, silviculture, reforestation, firefighting and the protection of endangered species,⁶² which, taken together, will also be of benefit to the capercaillie in the 'Alto Sil' SPA. One of their effects may be to offset the direct destruction of the capercaillie's habitat.

119. This case, however, does not call for a definitive ruling on the balancing of interests, the examination of alternatives or the adoption of compensatory measures.

⁶⁰ — See point 61 above and the judgment cited there.

⁶¹ — See Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 46, and Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 24.

⁶² — See p. 271 et seq. of the annexes to the defence.

120. After all, there has not been an adequate assessment of the adverse effects of the projects in question on the ‘Alto Sil’ SPA. The competent authorities have to date clearly not yet recognised that the loss of the ‘Robledo El Chano’ mating ground is most probably due to the ‘Fonfria’ opencast mine, and do not give any consideration to the possibility that subpopulations will be isolated. As a result, there is no adequate basis on which the competent authorities can balance the interests involved and the compensatory measures do not address those two points either.

121. The adverse effects on the ‘Alto Sil’ SPA are therefore not justified.

5. Interim conclusion on the second limb of the second plea in law

122. It must therefore be concluded that, by failing to take the necessary steps to ensure that the operation of the ‘Feixolín’ and ‘Fonfria’ opencast mines and the ‘Feixolín’ extension does not have any unjustified adverse effects on the ‘Alto Sil’ SPA, Spain has infringed Article 6(2) of the Habitats Directive.

C — The provisional protection of the ‘Alto Sil’ proposed site of Community interest (SCI)

123. By the third plea in law, the Commission claims that, from January 1998, Spain failed to take the necessary steps to safeguard the national ecological interest of the ‘Alto Sil’ proposed site in relation to coalmining at the ‘Feixolín’, ‘Salguero-Prégame-Valdesegadas’, ‘Fonfria’ and ‘Nueva Julia’ mines.

124. Under the Habitats Directive, Member States must take appropriate protective measures to preserve the characteristics of sites which host natural habitat types and/or priority species and which have been identified by Member States with a view to their inclusion on the Community list. Member States cannot therefore authorise intervention where there is a risk that the ecological characteristics of those sites will be seriously compromised as a result. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics.⁶³

⁶³ — *Bund Naturschutz in Bayern and Others*, cited in footnote 10, paragraphs 44 and 46; *Stadt Papenburg*, cited in footnote 31, paragraph 49; and *Iberian lynx*, cited in footnote 55, paragraph 21.

125. The previously established adverse effects on the capercaillie are, in themselves, irrelevant to this plea in law, since the protection of that species is guaranteed by the 'Alto Sil' SPA.

126. However, my examination of the adverse effects on the SPA established that the 'Fonfría' opencast mine led to the destruction of habitat type 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*, which could have been used by the capercaillie, over an area of 17.92 hectares.⁶⁴

127. Furthermore, according to the 2005 study submitted by Spain,⁶⁵ the 'Fonfría' project also led to the loss of other land surfaces that had hosted protected habitat types:

- 79.31 hectares of habitat type 4030 – European dry heaths (0.36 % of its occurrence on the site);
- 16.88 hectares of habitat type 4090 – Endemic oro-Mediterranean heaths with gorse (0.64 % of its occurrence on the site);
- 6.76 hectares of habitat type 6160 – Siliceous oro-Iberian *Festuca indigesta* grasslands (1.5 % of its occurrence on the site);

— 76.05 hectares of habitat type 6510 – Lowland hay meadows (*Alopecurus pratensis*, *Sansguisorba officinalis*) (its overall occurrence on the site is not known); and

— 5.63 hectares of the habitat type 8230 – Siliceous rock with pioneer vegetation of the *Sedo-Scleranthion* or of the *Sedo albi-Veronicion dillenii* (0.1 % of its occurrence on the site).

128. With the exception of habitat type 6510, which is not mentioned in the site notification, the above habitat types form part of the ecological characteristics of the 'Alto Sil' proposed site. However, they cannot be said to be 'seriously' compromised since the land surfaces in question account for only a minimal proportion of those habitat types within the proposed site⁶⁶ and, moreover, do not have priority status. This is particularly true where the loss is offset elsewhere.⁶⁷

129. The potential adverse effects on the brown bear, a priority species under Annex II to the Habitats Directive, are more important.

130. In the Commission's submission, open-cast mining prevents that species from using the land surfaces directly occupied and drives it out of the surrounding area. On the basis of

⁶⁴ — See above, point 85.

⁶⁵ — Page 235 of the annexes to the application.

⁶⁶ — See above, point 114.

⁶⁷ — See above, point 118.

an expert's report, the Commission assumes that the species moves between 3.5 and 5 kilometres away. An examination of the various opencast mining projects and other sources of disturbance taken together shows that those areas of disturbance block one of the brown bear's key migratory paths, the Leitariegos corridor.⁶⁸ The 'Feixolín' and 'Fonfría' mines are clearly located directly within that corridor.⁶⁹

131. It is true that, in this connection, the Commission refers to the need for a connection between the brown bear's western distribution core area in the Cantabrian mountains, of which the 'Alto Sil' SPA forms part, and its eastern distribution core area some 50 to 100 kilometres away. However, the Leitariegos corridor does not appear to be directly connected with that issue. On the contrary, the Leitariegos corridor relates primarily to the north-south connection between various subpopulations within the western distribution core area.⁷⁰

132. That blockade has indeed had an adverse effect on the conservation of the brown bear, but it can hardly be regarded as having seriously compromised the ecological characteristics of the 'Alto Sil' proposed site during the six years of its provisional protection

between 1998 and 2004. It also seems unlikely that it will lead to the disappearance of the brown bear. After all, Spain has submitted, without contradiction, that the population of the western distribution core area in the Cantabrian mountains rose significantly between 1994 and 2007.

133. It cannot therefore be concluded that the various opencast mining projects constitute an infringement of the requirements relating to the provisional protection of the 'Alto Sil' proposed site.

D — The authorisation of projects in relation to the 'Alto Sil' SCI

134. By the first limb of the fourth plea in law, the Commission submits that, by authorising opencast mining projects – namely the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines – but failing to make an assessment of the possible effects of that mining, and in any event failing to comply with the conditions under which those projects might be implemented in spite of any adverse effects, Spain has infringed Article 6(3) and (4) of the Habitats Directive.

135. Whereas the 'Alto Sil' site, as an SPA under the Wild Birds Directive, had been

68 — Pages 672 and 675 of the annexes to the application. Palomero et al., 'Cantabrian Bear Trends', *Ursos*, 18 (2), p. 145 et seq. (155 [p. 742 of the annexes to the application]), also refer to mining activities as a source of disturbance and an obstacle to the movement of brown bears.

69 — Internal opinion of the conservation authority for the Castilla y León region of 13 November 1998, p. 114.

70 — This is also clear from the documents relating to the LIFE project entitled 'Corredores de comunicación para la conservación del oso pardo cantábrico', p. 718 of the annexes to the application.

subject to those provisions since its designation in 2000, they did not begin to apply to the site in its capacity as an SCI under the Habitats Directive until 2004. The protective measures prescribed in Article 6(3) and (4) of the Habitats Directive must be adopted only in respect of sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, have been included on the list of sites selected as sites of Community importance drawn up by the Commission.⁷¹ This took place in 2004.

136. By their very nature, the requirements laid down in Article 6(3) and (4) of the Habitats Directive may be applied only to decisions authorising projects which were made after those provisions entered into force.⁷²

137. The Commission does adduce evidence to show that the 'Alto Sil' SCI was adversely affected, but does not refer to any project authorised since 2004.

138. It is true that, in their pleadings, the parties discuss an authorisation for the 'Feixolín' extension to which the Commission does

not object in the context of the present plea in law. However, even if the Commission did object to the procedure for the authorisation of the aforementioned extension, that authorisation would have no bearing on the present proceedings. After all, it was not given until June 2009, that is to say after the expiry of the deadline of 1 February 2009 laid down in the reasoned opinion.

139. In addition, the rejoinder contains evidence of the adoption in 2008 of a decision relating to the 'Fonfría' project⁷³ which might have been subject to Article 6(3) and (4) of the Habitats Directive. However, that decision was not made part of the subject-matter of these proceedings.

140. In the absence of an authorisation granted after 2004, Article 6(3) and (4) cannot have been infringed in relation to the 'Alto Sil' SCI, as alleged. The first limb of the fourth plea in law is therefore unfounded.

E — *Adverse effect on the 'Alto Sil' SCI*

141. Finally, by the second limb of the fourth plea in law, the Commission complains that

⁷¹ — See *Dragaggi and Others*, cited in footnote 10, paragraph 25, and *Bund Naturschutz in Bayern and Others*, cited in footnote 10, paragraph 36.

⁷² — See *Stadt Papenburg*, cited in footnote 31, paragraph 48, on the subject of existing projects authorised before the expiry of the time-limit for transposing the Habitats Directive, and the Opinion of Advocate General Sharpston in Case C-388/05 *Commission v Italy* ('*Valloni e steppe pedegarganiche*') [2007] ECR I-7555, point 51.

⁷³ — See paragraph 7 of the rejoinder and Annex D-1, p. 19 et seq.

Spain has failed to take the steps required under Article 6(2) of the Habitats Directive in relation to the ‘Feixolín’, ‘Salguero-Prégame-Valdesegadas’, ‘Fonfría’ and ‘Nueva Julia’ opencast mines and the ‘Feixolín’ extension.

1. The destruction of land surfaces that host protected habitat types

142. It is true that we have just established that the aforementioned projects were not subject to the requirements laid down in Article 6(3) and(4) of the Habitats Directive with respect to the prior assessment of the implications of those projects for the ‘Alto Sil’ SCI.⁷⁴ However, this does not mean that Article 6(2) is not applicable to effects which arise after the SCI has been included on the Community list.⁷⁵

144. In principle, the aforementioned direct losses of land surfaces that host protected habitat types⁷⁶ on the site of the ‘Fonfría’ opencast mine constitute deterioration of the ‘Alto Sil’ SCI. However, the Commission has not demonstrated to what extent those losses occurred only after 2004. On the contrary, it does not seem unlikely that the trees were felled when mining commenced in 2001. Although losses arising before the SCI’s inclusion on the Community list fall within the scope of the provisional protection afforded to the SCI,⁷⁷ Spain was not required to prevent them in accordance with Article 6(2).

143. Article 6(2) of the Habitats Directive provides that Member States are to 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 the Directive.

145. The documents before the Court do, however, support the conclusion that the unauthorised works at the ‘Feixolín’ extension led to the loss of land surfaces hosting protected habitat types after the SCI’s inclusion on the Community list. According to those documents, the 93.9-hectare surface area envisaged in the original application for authorisation⁷⁸ included 77.77 hectares of

⁷⁴ — See above, point 134 et seq.

⁷⁵ — See above, point 68 et seq.

⁷⁶ — See above, point 126 et seq.

⁷⁷ — See above, point 127 et seq.

⁷⁸ — Page 212 of the annexes to the application.

protected habitat types.⁷⁹ The unauthorised works affected 35.24 hectares.⁸⁰ Even assuming that the unauthorised operation had encompassed all the land surfaces that do not host protected habitat types, it would still have led to the loss of over 19 hectares of protected habitat types. A report submitted by the Spanish Government on the condition of the land surfaces concerned confirms that assessment, since it states the vegetation at least sustained damage.⁸¹

146. As has already been established in connection with the adverse effects on the 'Alto Sil' SPA, Spain is liable for any effects brought about by that project⁸² and no ground of justification is available.⁸³

147. Spain has therefore infringed Article 6(2) of the Habitats Directive by failing to take the necessary steps to ensure that the 'Feixolín' opencast mine extension does not lead to the destruction within the 'Alto Sil' SCI of habitat types referred to in Annex I to the Directive.

2. The disturbance of adjacent land surfaces and the barrier effect

148. The disturbance of the brown bear on land surfaces surrounding the opencast mines and the blockade of the Leitariegos corridor, an important migratory route for the brown bear, which has already been established in relation to the period prior to 2004,⁸⁴ continued even after the site's inclusion on the Community list.

149. Although those effects could not previously be regarded as 'seriously compromising' the site within the meaning of the case-law concerning the provisional protection of proposed sites, they are nevertheless significant from the point of view of the objectives pursued by the Habitats Directive. After all, not only does the brown bear lose substantial areas of land which it could use but also, and most importantly, subpopulations of that species are separated from each other. Such separation becomes more significant the longer it lasts.

150. While it is true that the 2005 study does not regard those adverse effects as significant,⁸⁵ it does at the same time describe the possibility of the corridor being blocked

79 — Page 235 of the annexes to the application: 45.64 hectares of habitat type 4030 – European dry heaths, 6.52 hectares of habitat type 8220 – Siliceous rocky slopes with chasmo-phytic vegetation, and 19.09 hectares of habitat type 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*.

80 — Page 442 of the annexes to the defence.

81 — See p. 40 of the annexes to the rejoinder.

82 — See above, point 104 et seq.

83 — See above, point 109.

84 — See above, point 129 et seq.

85 — Page 237 of the annexes to the application.

as one of the greatest threats to the brown bear's recovery.⁸⁶ The assessment of the effects as not being significant therefore contradicts the report's own findings.

therefore, it forms an appropriate basis for justifying the adverse effects on the brown bear.

151. Consequently, at the very least the noise and vibrations from the 'Feixolín' and 'Fonfría' opencast mines and the 'Feixolín' extension, as well as the blockade of the Leitariegos corridor brought about by those mines, constitute a disturbance of the 'Alto Sil' SCI which is significant from the point of view of conservation of the brown bear.

154. Consequently, the Spanish authorities cannot, in principle, be criticised for assuming that the continued operation of the mines was supported by imperative reasons of overriding public interest – namely security of energy supply, jobs and the final nature of authorisations – and for ruling out alternatives.

152. Since the 'Feixolín' and 'Fonfría' opencast mines were authorised before the site's inclusion on the Community list, the disturbance caused by them could in principle be justified. The principles already defined in connection with the capercaillie in the 'Alto Sil' SPA will apply.⁸⁷

155. The aforementioned study even includes proposals for measures which appear to be capable of protecting the overall coherence of Natura 2000. They seek in particular to ensure that the brown bear continues to use the Leitariegos corridor.⁸⁹ The Commission does not call into question the suitability of those measures.

153. However, not least by carrying out the 2005 study, the competent authorities examined the adverse effects on the brown bear in the 'Alto Sil' SCI⁸⁸ much more rigorously than the adverse effects on the capercaillie in the SPA of the same name. Moreover, the Commission does not call into question the substance of that examination. In essence,

156. Here too, however, there is no need for definitive ruling on whether a ground of justification does in fact exist. After all, as Spain itself submits, the compensatory measures referred to are at present only proposals which have not yet been implemented.⁹⁰ Accordingly, the measures necessary to guarantee the coherence of Natura 2000 have yet to be adopted.

⁸⁶ — Page 256 of the annexes to the application.

⁸⁷ — See above, point 106 et seq.

⁸⁸ — See pp. 239 and 255 et seq. of the annexes to the application.

⁸⁹ — Page 255 et seq. of the annexes to the application.

⁹⁰ — See paragraph 28 of the rejoinder.

157. It cannot therefore be concluded that the failure to adopt measures to protect the 'Alto Sil' SCI from the adverse effects caused by the 'Feixolín' and 'Fonfría' opencast mines and the 'Feixolín' extension was justified.

the first place, and then to consider the content of that assessment.

3. Interim conclusion on the second limb of the fourth plea in law

1. The need for an environmental impact assessment

158. Consequently, Spain has infringed Article 6(2) of the Habitats Directive because it failed to take the necessary steps to prevent the operation of the 'Feixolín' and 'Fonfría' opencast mines and the 'Feixolín' extension from having unjustified adverse effects on the 'Alto Sil' SCI.

160. Pursuant to Article 4(1) of the EIA Directive, projects of the classes listed in Annex I must be made subject to an assessment of their impact on the environment. As amended by Directive 97/11, the EIA Directive included opencast mines where the surface of the site exceeds 25 hectares as projects under point 19 of Annex I.

161. It is thus beyond dispute that an environmental impact assessment was essential for the 'Nueva Julia' and 'Ladrones' opencast mines, as they are opencast mines where the surface of the site exceeds 25 hectares within the meaning of Annex I to the EIA Directive.

F — *The EIA Directive*

159. Finally, it is appropriate to consider the first plea in law, by which the Commission challenges the application of Articles 2, 3 and 5(1) and (3) of the EIA Directive for the purposes of authorising the 'Fonfría', 'Nueva Julia' and 'Ladrones' projects. It is necessary first to examine whether those projects required an assessment under the Directive in

162. The documents before the Court⁹¹ show that the application for authorisation of the 'Fonfría' opencast mine, on the other hand, was submitted on 11 March 1998. Pursuant to Article 3(2) of Directive 97/11, requests for development consent submitted before 14 March 1999 are to be subject not to the

⁹¹ — Page 38 of the annexes to the defence.

version of the EIA Directive as amended by Directive 97/11, as the Commission claims, but to the original version of that directive. An infringement of the EIA Directive as amended by Directive 97/11 is therefore precluded.

was necessary has not been discussed in the present proceedings.

163. The question is whether, contrary to its wording and the grounds relied on in support of it, the Commission's plea in law is to be understood as meaning that it includes an infringement of the original version of the EIA Directive. This might be so if the two versions of the Directive did not differ significantly in their application to the present case.

166. Accordingly, the application must be dismissed in relation to this matter.

167. Below I shall discuss the question whether the shortcomings alleged by the Commission in connection with the environmental impact assessment also exist in relation to the 'Fonfría' opencast mine, just in case the Court none the less wishes to address this matter, for example because Spain appears to have transposed the original version of the EIA Directive as meaning that an assessment is mandatory for such projects.⁹²

164. They do, however, differ significantly.

165. First and foremost, it did not become compulsory for opencast mines where the surface of the site exceeds 25 hectares to be made subject to an assessment, in accordance with Article 4(1) of and point 19 of Annex I to the EIA Directive, until after that directive was amended by Directive 97/11. Under the original version of the EIA Directive, on the other hand, the extraction of coal and lignite by opencast mining was subject to Article 4(2) and point 2(e) of Annex II. Under those provisions, mining projects of this kind required an assessment only where the Member States considered that the characteristics of the project made this necessary. The question whether an assessment

2. The environmental impact examined

168. With respect to the content of each of the assessments, the Commission complains that the projects' indirect or cumulative effects on the two species concerned, the capercaillie and the brown bear, were not adequately examined.

⁹² — According to the environmental impact declaration, p. 72 of the annexes to the application, the project had to be subjected to an assessment on account of Spain's transposition of the original version of the EIA Directive.

169. Under Article 2(1) of the EIA Directive, projects likely to have significant effects on the environment are to be made subject to an assessment with regard to their effects. Article 3 describes the content of that assessment and Article 5 defines the information that is to be provided.

170. Spain takes the view that the assessment of indirect and cumulative effects is not mandatory, but merely desirable. That view is substantiated by reference to the wording of the footnote to point 4 of Annex IV to the EIA Directive.

171. In accordance with that footnote, the description of the effects of a project *should* cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.

172. That footnote to point 4 of Annex IV to the EIA Directive must be interpreted in conjunction with Article 5(1) of the Directive, which refers to Annex IV. Article 5(1) allows the Member States some discretion in implementing the Community provision at national level. Under that article, they are to adopt the necessary measures to ensure that the developer supplies the required information where they consider, first, that the information is relevant to a given stage of the consent

procedure and to the specific characteristics of a particular project or type of project and, second, that a developer may reasonably be required to compile this information.⁹³

173. The use of 'should' (in German: 'sollte', in French: 'devrait') in the footnote to point 4 of Annex IV to the EIA Directive is a further expression of that discretion which the Member States enjoy in relation to the requirements governing the description of the environmental impact of a project. That discretion is, however, open to judicial review.⁹⁴

174. The criteria for exercising that discretion are laid down primarily in Article 2(1) and Article 3 of the EIA Directive.

175. Article 2(1) of the EIA Directive provides that the environmental effects of a project are to be examined where they are likely to be significant. The scope of that examination must not therefore be restricted to certain formalities, but must at least extend to the effects that are likely to be significant.

176. This is confirmed by Article 3 of the EIA Directive, which defines in abstract terms what an environmental impact assessment

93 — Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 36.

94 — *Linster*, cited in footnote 93, paragraph 37.

must include. Pursuant to that provision, the assessment is to identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect effects of a project on human beings, fauna and flora, soil, water, air, climate and the landscape, material assets and the cultural heritage, and the interaction between those factors. Consequently, indirect effects always form part of the assessment and account must be taken of the circumstances of each individual case.⁹⁵

177. In addition, Article 3 of the EIA Directive may require the competent authorities to gather additional information, where necessary, in order to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the various factors and the interaction between those factors.⁹⁶

178. Furthermore, the circumstances of the individual case may dictate that cumulative effects, too, are relevant to a complete assessment. This is apparent in particular from the fact that such effects must be taken into account for the purposes of deciding whether an environmental impact assessment is necessary.⁹⁷

179. Indirect or cumulative effects must therefore be taken into account where they may be significant in the light of the circumstances of the individual case.

180. It is clear from my comments on the application of the Habitats Directive that the indirect and cumulative effects of the various opencast mining projects in and around the ‘Alto Sil’ site on the capercaillie and the brown bear *are* particularly significant. The assessment of the ‘Fonfría’, ‘Nueva Julia’ and ‘Ladrones’ projects should therefore have included such effects.

181. The environmental impact study on the ‘Fonfría’ opencast mine does refer to the brown bear, in so far as it states that its habitat lies to the north and is therefore unaffected,⁹⁸ and the capercaillie, which is said to use the land surfaces some distance to the west of the project.⁹⁹ However, that information is clearly insufficient. No mention is made, for example, either of the effects on the migratory patterns of the two species or of the ‘Robledo El Chano’ mating ground.

95 — Case C-50/09 *Commission v Ireland* [2011] ECR I-873, paragraph 37.

96 — *Commission v Ireland*, cited in footnote 95, paragraph 40.

97 — Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraph 76.

98 — Page 95 of the annexes to the application.

99 — Page 96 of the annexes to the application.

182. The documents relating to the authorisation of the 'Nueva Julia' opencast mine¹⁰⁰ do not even refer to the two species.

185. Admittedly, the 2005 study is considerably more extensive, particularly in relation to the brown bear. It cannot, however, remedy the shortcomings of the environmental impact assessments. After all, as the Commission rightly points out, those assessments must be carried out before each of the projects is authorised, in accordance with Article 2(1) of the EIA Directive.

183. It is the documents relating to the authorisation of the 'Ladrones' opencast mine which go into greatest detail. On the subject of the brown bear, they state that land surfaces of lesser importance have been lost and that no connections between subpopulations have been blocked.¹⁰¹ The examination of the effects on the capercaillie, on the other hand, is still too superficial. The decision authorising the project states that any effects which that project might have on the capercaillie have been investigated and found to be satisfactory.¹⁰² However, a sweeping statement such as this is not capable of proving that the assessments necessary were in fact carried out.

186. Since I have examined the application of the EIA Directive to the 'Fonfría' project only in the alternative, it must be concluded that, by authorising the 'Nueva Julia' and 'Ladrones' projects, Spain has infringed Articles 2, 3 and 5(1) and (3) of the EIA Directive.

V — Costs

184. It must therefore be concluded that the assessment of the environmental impact of the 'Fonfría', 'Nueva Julia' and 'Ladrones' projects was defective in terms of its content.

187. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since both parties have been successful only in part, they should each bear their own costs.

100 — Page 72 et seq. of the annexes to the defence.

101 — Page 106 of the annexes to the defence.

102 — Page 105 et seq. of the annexes to the defence.

VI — Conclusion

188. I therefore propose that the Court should rule as follows:

- ‘(1) By authorising the “Nueva Julia” and “Ladrones” projects, the Kingdom of Spain has infringed Articles 2, 3 and 5(1) and (3) of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC, and Article 6(3) and (4) of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

- (2) By failing to take the necessary steps to ensure that the operation of the “Feixolín” and “Fonfria” opencast mines and the “Feixolín” extension do not have adverse effects on the “Alto Sil” special protection area and site of Community importance, Spain has infringed Article 6(2) of Directive 92/43.

- (3) The remainder of the application shall be dismissed.

- (4) Spain and the European Commission shall each bear their own costs.’