

JUDGMENT OF THE COURT (Second Chamber)

4 March 2010 (\*)

(Failure of a Member State to fulfil obligations Directive 92/43/EEC Article 6(2) and (3) Incorrect transposition Special areas of conservation Significant effect of a project on the environment 'Non-disturbing' nature of certain activities Assessment of the effects on the environment)

In Case C-241/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 2 June 2008,

**European Commission**, represented by D. Recchia and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**French Republic**, represented by G. de Bergues and A.-L. During, acting as Agents, defendant,

THE COURT (Second Chamber),

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

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2009,

gives the following

**Judgment**

1. By its application, the Commission of the European Communities requests the Court to declare that, by failing to adopt all the laws and regulations necessary to transpose correctly Article 6(2) and (3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive'), the French Republic has failed to fulfil its obligations under that directive.

**Legal context**

*Community legislation*

2. Article 2(3) of the Habitats Directive provides that measures taken pursuant to that directive are to take account of economic, social and cultural requirements and regional and local characteristics.
3. Article 6(2) to (4) of the Habitats Directive provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of

species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

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

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

...!

#### *National legislation*

4. Article L. 414-1(V) of the Code de l'environnement (Environmental Code) provides:

'Natura 2000 sites shall be the subject of measures intended to conserve or restore, in a state favourable to their long-term maintenance, the natural habitats and populations of species of wild fauna and flora which have justified the designation of those sites. Natura 2000 sites shall also be subject to appropriate preventive measures to avoid deterioration of those natural habitats and disturbances likely significantly to affect those species.

Those measures shall be defined in consultation with, inter alia, the local authorities and groupings concerned, and with the representatives of the owners, operators and users of the lands and spaces within the site.

They shall take account of economic, social, cultural and defence requirements and of regional and local characteristics. They shall be adapted to the specific dangers which threaten those natural habitats and those species. They shall not result in human activities being prohibited, where those activities do not have a significant effect on the maintenance or restoration of those natural habitats and those species at a favourable conservation status. Fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force shall not constitute activities causing disturbance or having such an effect.

- The measures shall be taken in the context of the contracts or agreements provided for in Article L. 414'3 or in implementation of legislative and regulatory provisions, in particular those concerning national parks, natural marine parks, nature reserves, biotopes or listed sites.'
5. The first subparagraph of Article L. 414-2(I) of the Code de l'environnement provides that, for each Natura 2000 site, a statement of objectives is to establish the management policies, the measures provided for in Article L. 414-1, the means of implementing them and the accompanying financial provisions.
  6. Article L. 414-3(I) of the code states:

'To implement the statement of objectives, the owners of rights in rem and personal rights over the lands within the site and professionals and users of the marine spaces within the site may conclude contracts with the administrative authority, called 'Natura 2000 contracts'. ...

A Natura 2000 contract shall contain a series of commitments consistent with the policies and measures established in the statement of objectives, concerning the conservation and, if necessary, the restoration of the natural habitats and species which justified the creation of the Natura 2000 site. ...

...'
  7. Article L. 414'4(I) of the code states:

'Programmes and projects for works and developments which are subject to administrative authorisation or approval, the completion of which is likely significantly to affect a Natura 2000 site, shall be subject to an assessment of their implications in view of the site's conservation objectives. For any of those programmes which are provided for in legislative or regulatory provisions and are not subject to an impact study, the assessment shall be carried out in accordance with the procedure laid down in Article L. 122'4 et seq. of this code.

The works and developments provided for in Natura 2000 contracts shall be exempt from the assessment procedure referred to in the foregoing paragraph.'
  8. Pursuant to point 1 of Article R. 414'21(III) of the Code de l'environnement, the person making the application must indicate the reasons for which there are no other satisfactory solutions for the completion of the plan or project, where that plan or project may have significant injurious effects on the conservation status of natural habitats and of species.

#### **Pre-litigation procedure**

9. On 18 October 2005, the Commission sent a letter of formal notice to the French Republic in which the Commission expressed its doubts as to whether the French legislation complied with Article 6(2) and (3) of the Habitats Directive.
10. As the Commission found the French Republic's reply of 7 February 2006 unconvincing, it sent a reasoned opinion to the French Republic on 15 December 2006, calling on it to take the measures necessary to comply with that opinion within a period of two months

of receipt. The French authorities replied to that reasoned opinion by letter of 28 February 2007.

11. On 2 June 2008, the Commission brought the present action.

**The action**

*Article 6(2) of the Habitats Directive*

Admissibility

12. It must be noted that, while Law No 2006'1772 of 30 December 2006 on water and aquatic areas (JORF, 31 December 2006, p. 20285) amended the national provisions at issue, the amendments, as the Commission has pointed out without being contradicted by the French Republic, make no substantial change to those provisions and have no effect on the Commission's complaints set out in the letter of formal notice and in the reasoned opinion.
13. It follows that the complaints alleging that the third and fourth sentences of the third subparagraph of Article L. 414'1(V) of the Code de l'environnement do not comply with the Habitats Directive are admissible.

The first complaint: application of the 'significant effect' criterion indifferently to the deterioration of habitats and the disturbance of species.

Arguments of the parties

14. The Commission claims that, by providing that human activities are prohibited in Natura 2000 sites only if they significantly affect the maintenance or restoration of natural habitats and species at a favourable conservation status, the third sentence of the third subparagraph of Article L. 414'1(V) of the Code de l'environnement applies the 'significant effect' criterion indifferently both to the deterioration of habitats and the disturbance of species, and is therefore imprecise and less strict than Article 6(2) of the Habitats Directive. Article 6(2) requires the Member States to take appropriate steps to avoid, in the special areas of conservation, first, the deterioration of natural habitats and the habitats of species and, second, the disturbance of species in so far as such disturbance could be significant in relation to the objectives of that directive. In other words, disturbances of species, which occur most often over a short period of time, may be tolerated up to a certain level, in contrast to the deterioration of habitats, which can be defined as a physical degradation affecting those habitats and which is systematically prohibited because placing a habitat in danger is more serious than disturbing a species.
15. Even though the Commission recognises that the first subparagraph of Article L. 414'1(V) of the Code de l'environnement distinguishes, in accordance with Article 6(2) of the Habitats Directive, between the need to avoid the deterioration of habitats and the need to avoid disturbance of species with the 'significant effect' criterion only being laid down in respect of disturbance of species, it nevertheless criticises the French legislation at issue for not making that distinction when, in the third subparagraph of Article L. 414'1(V) of the Code de l'environnement, it specifically regulates human activities, which cannot be prohibited by the competent authorities where they do not have a significant effect.
16. The French Republic contends that, under the first subparagraph of Article L. 414'1(V) of

the Code de l'environnement, the deterioration of habitats must in all cases be avoided, in accordance with the requirements of Article 6(2) of the Habitats Directive. However, the third subparagraph of Article L. 414'1(V) of that code means that an outright prohibition need not be imposed on human activities which do not have a significant effect on the conservation of habitats. Such activities may, under the first subparagraph of Article L. 414'1(V) of that code, be the subject of specific measures to prevent the deterioration of habitats and disturbance of species.

17. According to the French Republic, by reconciling the requirement of conservation of habitats and species with the maintenance of human activities which respect that requirement, the third subparagraph of Article L. 414'1(V) of the Code de l'environnement is consistent with the objectives pursued by the Habitats Directive, and with Article 2(3) of that directive, which provides that measures taken are to take account of economic, social and cultural requirements and regional and local characteristics. The Commission's position, by contrast, is not consistent with the requirements of the Habitats Directive.

#### Findings of the Court

18. Article 6(2) of the Habitats Directive establishes a general obligation to take appropriate protective steps to avoid the deterioration of habitats and the disturbance of species, in so far as such disturbance could be significant in relation to the objectives of that directive.
19. It should be pointed out, in that regard, that the first subparagraph of Article L. 414'1(V) of the Code de l'environnement provides that Natura 2000 sites are to be the subject of appropriate preventive measures to avoid the deterioration of natural habitats and disturbances likely significantly to affect the populations of species of wild fauna and flora which justified the designation of the sites.
20. As regards human activities, the third subparagraph of Article L. 414'1(V) of the Code de l'environnement states that such measures are not to result in human activities being prohibited, where those activities do not have a significant effect on the maintenance or restoration of natural habitats and species at a favourable conservation status.
21. In that regard, the third subparagraph of Article L. 414-1(V) of the Code de l'environnement must be read in conjunction with the first subparagraph of that provision and in the light thereof.
22. For the purposes of determining whether the complaint raised by the Commission is well founded, it should be borne in mind that, according to settled case-law, it is incumbent upon the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court all the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (see, inter alia, Case C-293/07 *Commission v Greece* [2008] ECR I-182\*, paragraph 32 and the case-law cited).
23. In the present case, however, the Commission merely alleges, in essence, that, in order to ensure a correct transposition of Article 6(2) of the Habitats Directive, the third subparagraph of Article L. 414'1(V) of the Code de l'environnement must prohibit all deteriorations, even if they do not have a significant effect. By isolating that provision in that way, and not taking sufficient account of its immediate legislative context, the Commission has, inter alia, failed to show that the appropriate measures adopted pursuant

to the first subparagraph of Article L. 414'1(V) of that code do not, in fact, allow the deterioration of habitats within the meaning of Article 6(2) of the Habitats Directive to be avoided.

24. In those circumstances, it has not been established that Article L. 414'1(V) of the Code de l'environnement, considered in its entirety, does not constitute a correct transposition of Article 6(2) of the Habitats Directive, as alleged in the first complaint.
25. Consequently, the first complaint must be rejected.

The second complaint: the general assertion that certain activities do not cause disturbance

Arguments of the parties

26. The Commission claims that the fourth sentence of the third subparagraph of Article L. 414'1(V) of the Code de l'environnement, which provides that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force shall not constitute activities causing disturbance or activities having such an effect, does not ensure a clear, precise and complete transposition of Article 6(2) of the Habitats Directive. Compliance with rules without any assurance that those rules take account of the requirements specific to a particular site cannot, a priori, lead to the general assertion that those activities cause no disturbance.
27. The Commission takes the view, in particular, that the statement of objectives, on which the regulatory power is based, is not such as to take account of the requirements specific to a particular site, inasmuch as that document, established on a contractual basis, is not intended to regulate activities such as hunting or fishing and has no binding force, as it has no accompanying sanction.
28. The French Republic contends that it correctly transposed Article 6(2) of the Habitats Directive by laying down the principle that, in so far as aquatic and hunting-related activities are carried out in accordance with the laws and regulations in force, they are not causing disturbance, and that, therefore, they are presumed to comply with the conservation objectives pursued in the context of the Natura 2000 European Ecological Network.
29. While recognising that the statement of objectives does not contain directly applicable regulatory measures, the French Republic submits that the necessary regulatory measures, specific to the site concerned, are approved subsequently by decision of the competent authorities, supplementing the existing general rules. It states, moreover, that the general rules on fishing and hunting-related activities can relate to areas which are delimited and demarcated according to ecological criteria and give rise to the setting of quotas.

Findings of the Court

30. It should be recalled, first, that, in accordance with the Court's case-law, Article 6(2) and (3) of the Habitats Directive seek to ensure the same level of protection (see, to that effect, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 36 and Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, paragraph 263).

31. Second, it should be noted that, as regards Article 6(3) of the Habitats Directive, the Court has already held that the option of exempting generally certain activities, in accordance with the rules in force, from the need for an assessment of the implications for the site concerned does not comply with that provision. Such an exemption is not such as to guarantee that those activities do not adversely affect the integrity of the protected site (see, to that effect, Case C-98/03 *Commission v Germany* [\[2006\] ECR I-53](#), paragraphs 43 and 44).
32. Accordingly, taking into account the similar levels of protection required by Article 6(2) and 6(3) of the Habitats Directive, the fourth sentence of the third subparagraph of Article L. 414 1(V) of the Code de l'environnement by providing generally that, certain activities such as fishing or hunting do not cause disturbance, can be regarded as consistent with Article 6(2) of that directive only if it is ensured that those activities cause no disturbance likely significantly to affect the objectives of the directive.
33. The French Republic submits in that regard that a statement of objectives is drawn up for each site and serves as the basis for the adoption of targeted measures taking account of the ecological requirements specific to the site concerned. It adds that where the activities in question are carried out in accordance with the general rules applicable to those activities, that allows account to be taken of areas which are delimited and demarcated according to ecological criteria and allows for quotas to be set.
34. It is therefore necessary to examine whether such measures or rules guarantee, in fact, that the activities in question do not cause any disturbance likely to have a significant effect.
35. As regards the statement of objectives, the French Republic indicates that it does not contain directly applicable regulatory measures and that it is a diagnostic tool which allows, on the basis of available scientific knowledge, measures to be proposed to the competent authorities which will enable the conservation objectives set by the Habitats Directive to be met. It adds that, currently, only half the sites concerned have a statement of objectives.
36. It follows that the statement of objectives cannot systematically guarantee in all cases that the activities in question will not cause disturbances likely significantly to affect those conservation objectives.
37. Such a conclusion applies all the more as regards targeted measures which take account of the ecological requirements specific to a particular site, since the adoption of those measures is based on the statement of objectives.
38. In relation to the general rules applicable to the activities in question, it must be held that, while those rules can admittedly reduce the risk of significant disturbance, they can however remove that risk altogether only if they provide for mandatory compliance with Article 6(2) of the Habitats Directive. The French Republic does not claim that that is the situation in this case.
39. It follows from the foregoing that by providing generally that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an effect, the French Republic has failed to fulfil its obligations under Article 6(2) of the Habitats Directive.

*Article 6(3) of the Habitats Directive*

First complaint: the exemption of works or developments under Natura 2000 contracts from the procedure of assessment of their implications for the site

Arguments of the parties

40. The Commission criticises the second subparagraph of Article L. 414'4(1) of the Code de l'environnement for not constituting a correct transposition of Article 6(3) of the Habitats Directive in that it systematically exempts works or developments provided for in the Natura 2000 contracts from the procedure of assessment of their implications for the site referred to in Article 6(3).
41. Under French law, Natura 2000 contracts are concluded 'to implement the statement of objectives' which contains, inter alia, one or more specifications applicable to Natura 2000 contracts, establishing good practice to be followed when executing contractual measures and defining the objective pursued and the species and habitats concerned. Although those contracts must comply with the statement of objectives, there is no indication, according to the Commission, that they are comprised exclusively of measures directly connected with or necessary for the management of the site.
42. The French Republic accepts that works and developments provided for in Natura 2000 contracts are exempt from the assessment of implications procedure and considers that Article 6(3) of the Habitats Directive does not require that those works and developments be subject to that assessment procedure since, in its view, they do not adversely affect the site in a significant way.
43. Natura 2000 contracts are concluded, in accordance with Article L. 414'3 of the Code de l'environnement, to implement the statements of objectives and it is impossible for them to contravene the conservation objectives of habitats and species or to involve actions which are unnecessary for maintaining the conservation status of the site.

Findings of the Court

44. It should be borne in mind that, under 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 must be subject to appropriate assessment of its implications for the site in view of that site's conservation objectives.
45. In that regard, it is not in dispute that works or developments provided for in Natura 2000 contracts can be categorised as plans or projects within the meaning of Article 6(3) of the Habitats Directive.
46. It is therefore necessary to examine whether the works or developments provided for in Natura 2000 contracts are directly connected with or necessary for the management of the site, so that their authorisation is not subject to the obligation to carry out the assessment of implications referred to in Article 6(3) of the Habitats Directive.
47. In accordance with Article L. 414'3(I) of the Code de l'environnement a Natura 2000 contract is concluded 'to implement the statement of objectives', and comprises 'a series of commitments consistent with the policies and measures established in the statement of objectives concerning the conservation and, if necessary, the restoration of the natural habitats and species which justified the creation of the Natura 2000 site'.

48. Under the first subparagraph of Article L. 414'2(I) of that code, the statement of objectives establishes, inter alia, the management policies and the conservation or restoration measures.
49. According to the French Republic, the systematic exemption of works and developments provided for in Natura 2000 contracts from the obligation, laid down in Article 6(3) of the Habitats Directive, to carry out an assessment of their implications for the site is justified by the notion that, in so far as those contracts are intended to achieve fixed conservation and restoration objectives for the site, they are directly connected with or necessary for the management of the site.
50. Such an approach presupposes therefore that the measures provided for in Natura 2000 contracts which seek to attain conservation and restoration objectives are also, under all circumstances, measures directly connected with or necessary for the management of the site.
51. However, it cannot be ruled out that, while they may have as their objective the conservation or restoration of a site, the works or developments provided for in those contracts may, nevertheless, not be directly connected with or necessary for the management of that site.
52. In that regard, the French Republic accepts, moreover, in the context of the complaint alleging a uniform application of the 'significant effect' criterion, that conservation measures for habitats may prove favourable for some habitats concerned but involve a deterioration in other types of habitats. It cites salt production as an example: the creation of basins called '♣illets' for the purposes of industrialised salt production leads to the deterioration of the habitat formed by lagoons, even if, otherwise, that activity may have beneficial effects for regenerating that environment owing to the retention of certain types of marsh.
53. It follows that determining the conservation and restoration objectives in the context of Natura 2000 may require, as the Advocate General pointed out in paragraph 71 of her Opinion, the reconciliation of various conflicting objectives.
54. In order to ensure fully the attainment of the conservation objectives referred to in the Habitats Directive, it is therefore necessary, in accordance with Article 6(3) of the Habitats Directive, that each plan or project, not directly connected with or necessary for the management of the site, which is likely significantly to affect the site be subject to an individual assessment of its implications for the site concerned in view of the site's conservation objectives.
55. It follows that the mere fact that the Natura 2000 contracts comply with the conservation objectives of sites cannot be regarded as sufficient, in the light of Article 6(3) of the Habitats Directive, to allow the works and developments provided for in those contracts to be systematically exempt from the assessment of their implications for the sites.
56. Accordingly, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, the French Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive.

The second complaint: the existence of activities not subject to authorisation

#### Arguments of the parties

57. The Commission claims that the first subparagraph of Article L. 414'4(I) of the Code de l'environnement does not comply with Article 6(3) of the Habitats Directive, in that only activities which require administrative authorisation or approval are subject to the procedure of assessment of their implications for the site laid down in Article 6(3). Programmes or projects subject to a declaratory scheme are excluded. Those programmes or projects have a significant effect on the site in view of the conservation objectives, which is the decisive criterion when applying Article 6(3) of the Habitats Directive.
58. The French Republic does not dispute the merits of that complaint and merely points to the legislative amendments which it has undertaken in order to comply with the Community rules, amendments which were introduced by Law No 2008'757 of 1 August 2008 concerning environmental liability and various provisions for adaptation to Community law in the environmental sector (JORF, 2 August 2008, p. 12361).

#### Findings of the Court

59. It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see judgment of 25 July 2008 in Case C-504/06 *Commission v Italy*, paragraph 24 and the case-law cited).
60. In the present case, the French Republic does not dispute that on 15 February 2007, at the end of the period laid down in the reasoned opinion, namely before Law No 2008'757 was adopted, the national provision at issue did not constitute a correct transposition of Article 6(3) of the Habitats Directive.
61. In those circumstances, without it being necessary to examine whether Law No 2008'757 complies with the Habitats Directive, it is sufficient to note that that law was adopted after the period laid down in the reasoned opinion had expired.
62. Accordingly, by systematically exempting works and development programmes and projects which are subject to a declaratory system from the procedure of assessment of their implications for the site, the French Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive.

#### The third complaint: failure to examine alternative solutions

#### Arguments of the parties

63. The Commission criticises point 1 of Article R. 414'21(III) of the Code de l'environnement for not requiring the person making the application, in the context of an appropriate assessment of the implications for the site laid down in Article 6(3) of the Habitats Directive, to provide a description of the various alternative solutions which can be envisaged for carrying out the plan or project. That assessment requires, first, that a description be made of the various alternative solutions examined and an analysis of their implications for the site be carried out and, second, that the public authorities, even in the absence of an adverse affect on the integrity of the site, study those alternative solutions before making a decision on the basis of Article 6(3) of the Habitats Directive.
64. The Commission considers that the mere obligation on the person making the application

to indicate the reasons for which there is no other satisfactory solution does not suffice to ensure an examination of alternative solutions in the context of assessment of the implications for the site. The French legislation does not therefore comply with the obligation, arising from Article 6(3) of the Habitats Directive, to make sure that there are no alternative solutions.

65. The French Republic contends that the disputed provision represents a correct transposition of Article 6(3) of the Habitats Directive. Furthermore, the French legislation actually results in the person making the application studying, describing and mapping alternative solutions and explaining the advantages and drawbacks of each solution in view of the site's conservation objectives.
66. The French Republic states that, in any event, in order to remove all doubt in that regard, the decrees implementing Law No 2008'757 expressly lay down the obligation on the person making the application to describe the alternative solutions.

#### Findings of the Court

67. By this complaint, the Commission claims that the appropriate assessment which must be carried out pursuant to Article 6(3) of the Habitats Directive must also include an examination of alternative solutions.
68. It must be held, in that regard, that that complaint arises from an incorrect interpretation of Article 6(3) of the Habitats Directive both in relation to the concept of appropriate assessment and in relation to the stage in the procedure at which the examination of alternative solutions must be carried out.
69. First, according to settled case-law, the appropriate assessment of the implications for the site which must be carried out pursuant to Article 6(3) implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 54, and *Commission v Ireland*, paragraph 243). Such an assessment does not therefore involve an examination of the alternatives to a plan or project.
70. Second, it must be pointed out that the obligation to examine alternative solutions to a plan or project does not come within the scope of Article 6(3) of the Habitats Directive, but within the scope of Article 6(4) (see, to that effect, Case C-441/03 *Commission v Netherlands* [2005] ECR I-3043, paragraph 27 et seq.).
71. In accordance with Article 6(4) of the Habitats Directive, the examination referred to in that provision, which concerns, in particular, the absence of alternative solutions, can only be undertaken where the assessment required under Article 6(3) of Directive 92/43 is negative and where the plan or project must nevertheless be carried out for imperative reasons of overriding public interest (see, to that effect, *Commission v Netherlands*, paragraphs 26 and 27).
72. Thus, following the assessment of the implications undertaken pursuant to Article 6(3) of the Habitats Directive and in the event of a negative assessment, the competent authorities have the choice of either refusing authorisation for the plan or project or of granting authorisation under Article 6(4) of that directive, provided that the conditions laid down in that provision are satisfied (see Case C-239/04 *Commission v Portugal*

[2006] ECR I-10183, paragraph 25 and, to that effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 60).

73. In those circumstances, the examination of alternative solutions, which is a requirement set out in Article 6(4) of the Habitats Directive, cannot constitute a factor which the competent national authorities are obliged to take into account when they undertake the appropriate assessment laid down in Article 6(3) of that directive (see, to that effect, *Commission v Netherlands*, paragraph 28).
74. It follows that the Commission is not justified in claiming that point 1 of Article R. 414'21(III) of the Code de l'environnement does not comply with Article 6(3) of the Habitats Directive in that regard.
75. Accordingly, this complaint cannot be upheld.
76. In the light of the foregoing considerations, it must be held that,
- first, by providing generally that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an effect, and
  - second, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, and
  - by systematically exempting works and development programmes and projects which are subject to a declaratory system from that procedure, the French Republic has failed to fulfil its obligations under Article 6(2) and Article 6(3) respectively of the Habitats Directive.

### **Costs**

77. 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. Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs, *inter alia*, where each party succeeds on some and fails on other heads.
78. In the present case, it must be taken into account that some of the Commission's complaints have not been upheld.
79. Accordingly, the French Republic should be ordered to pay two thirds of the costs and the Commission to pay the other third.

On those grounds, the Court (Second Chamber) hereby

#### **1. Declares that,**

**first, by providing generally that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an effect, and**

**second, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of**

**assessment of their implications for the site, and  
by systematically exempting works and development programmes and  
projects which are subject to a declaratory system from that  
procedure,**

**the French Republic has failed to fulfil its obligations under Article 6(2) and Article  
6(3) respectively of Council Directive 92/43/EEC of 21 May 1992 on the conservation  
of natural habitats and of wild fauna and flora;**

**2. Dismisses the action as to the remainder;**

**3. Orders the French Republic to pay two thirds of the costs and the European  
Commission to pay the other third.**

[Signatures]

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\* Language of the case: French.