

**IN THE COURT OF JUSTICE OF THE EUROPEAN UNION**

**CASE C-521/12**

**BRIELS E.A.**

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**WRITTEN OBSERVATIONS OF THE UNITED KINGDOM**

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The United Kingdom is represented by Sophie Brighthouse of the Cabinet Office European Law Division, Treasury Solicitor's Department, acting as agent, and by Emma Dixon, Barrister.

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## INTRODUCTION

1. Pursuant to the second paragraph of Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, the United Kingdom submits the following observations on the questions referred by the Raad van State (Nederland) ('the Referring Court') for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ('TFEU').
2. The Referring Court's questions arise in the context of a challenge to the making of a motorway order concerning the widening of a road, the Rijksweg A2. One of the grounds relied upon in that challenge concerns the effects of the road-widening on a Natura 2000 site (Order for Reference, §2) which is a special area of conservation for (inter alia) the natural habitat type molinia meadows (H6410) (Order for Reference §3). The motorway order includes provision for creating new molinia meadows within the Natura 2000 site, such that the consequences of the road-widening for the existing meadows will be more than offset (Order for Reference, §7). The Minister making the order concluded, without being contradicted, that this provision would create, within the site, a bigger area of molinia meadows, of higher quality than the present one (Order for Reference, §13).
3. The Referring Court seeks guidance on the application of Article 6(3) and 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') in circumstances where (i) a site is protected under the Directive because it hosts a particular protected natural habitat type; (ii) a plan or project not directly connected with or necessary to the management of the protected site, but likely to have a significant effect thereon, will involve the creation of an equally large, or larger, area of that protected natural habitat type within the site.
4. The United Kingdom submits (in summary) as follows:
  - a. In considering, pursuant to Article 6(3), whether a plan or project will 'not adversely affect the integrity of the site concerned', the competent national authorities may, compatibly with the provisions of the Habitats Directive, take into consideration the fact that the plan or project in question involves the proposed creation, within the site, of a new area (of equal or greater size) of the protected natural habitat type in question.

- b. The provision of such an additional area of habitat will not, however, necessarily lead to the conclusion that the plan or project will not adversely affect the integrity of the site concerned within the meaning of Article 6(3). Whether this is so will depend on the circumstances in the case and, in particular, on whether any reasonable scientific doubt remains as to the absence of adverse effects on the integrity of the site.

### **SUBMISSIONS OF THE UNITED KINGDOM**

#### *(a) The aim and purpose of the relevant provisions of the Habitats Directive*

5. The main aim of the Habitats Directive, as set out in its 3<sup>rd</sup> recital, is to promote 'the maintenance of biodiversity' by requiring the setting-up, under the 'Natura 2000' title, of a coherent European ecological network of special areas of conservation ('SACs') and special protection areas ('SPAs'). It is thus an essential objective of the Directive that natural habitats of Community interest be maintained at and, where appropriate, restored to a favourable conservation status.
6. At the heart of the Directive is the aim that the Member States take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types<sup>1</sup>.
7. Article 6 falls to be construed against the background of that essential objective. It sets out a series of procedures to be followed in the case of plans or projects which are not directly connected with or necessary to the management of the site (Article 6(3) and (4)). Without those provisions, the notions of maintenance and restoration on which the Habitats Directive is based "would risk being of no practical effect".<sup>2</sup>
8. Collectively, paragraphs (2), (3) and (4) of Article 6, which are to be construed as a whole<sup>3</sup>, seek to pre-empt<sup>4</sup> damage being done to the constitutive characteristics of the site: that is, to the ecological characteristics by reference to which the site is accorded protection under the Habitats Directive.

<sup>1</sup> See Case C-258/11 *Sweetman v An Bord Pleanála* ('*Sweetman*') (judgment of 11 April 2013) at [38].

<sup>2</sup> *Sweetman*, Opinion of Advocate General Sharpston at [41].

<sup>3</sup> *Ibid* at [43].

<sup>4</sup> *Ibid*, at [43].

(b) *The provisions of the Habitats Directive*

9. By Article 2(2), measures taken pursuant to the Habitats Directive are required to be designed to 'maintain or restore, at favourable conservation status' (inter alia) natural habitats.
10. By Article 1(e), the conservation status of a natural habitat is taken to be favourable when (inter alia) –
 

"its natural range and areas it covers within that range are stable or increasing".
11. Article 6(2) establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the Directive's objectives<sup>5</sup>. Article 6(3) is intended to ensure the same level of protection of natural habitats (and habitats of species)<sup>6</sup>.
12. Article 6(3) itself sets out the obligation to carry out, for any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon<sup>7</sup>, an—
 

"appropriate assessment of its implications for the site in view of the site's conservation objectives" (emphasis added).
13. Such a plan or project may only be authorised if the competent national authorities ascertain that it "will not adversely affect the integrity of the site concerned"<sup>8</sup> (and, if appropriate, after having obtained the opinion of the general public).
14. The requirement that the integrity of the site not be adversely affected<sup>9</sup> means that—
 

"the site needs to be preserved at a favourable conservation status"<sup>10</sup>.

<sup>5</sup> *Sweetman*, judgment at [33]; Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, judgment at [49].

<sup>6</sup> *Sweetman*, judgment at [32]: the provisions of Article 6 of the Habitats Directive are to be construed as a coherent whole. (See also the Advocate General's Opinion in *Sweetman* at [43]).

<sup>7</sup> That is, where it cannot be excluded on the basis of objective information that it will have such a significant effect: *Waddenzee* [2004] I-7405, at [45].

<sup>8</sup> Emphasis added.

<sup>9</sup> Article 6(3), second sentence.

<sup>10</sup> *Sweetman*, judgment at [39].

In the case of a natural habitat, the conservation status is 'favourable' (by Article 1(e), above) when, in particular, its natural range *and the areas it covers* within that range are stable or increasing.<sup>11</sup>

15. A plan or project will adversely affect the integrity of the site if it is liable to prevent the lasting preservation at favourable conservation status of the habitat by reference to which the site is designated. There would be such an effect where, for example, the plan or project will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site.<sup>12</sup>
16. For example, in the *Sweetman* case, the Court was concerned with a priority natural habitat type, limestone pavement, which once destroyed could not be replaced<sup>13</sup>. The court held that the lasting and irreparable loss of the whole or part of that habitat at the site would amount to an adverse effect on the integrity of the site for the purposes of Article 6(3)<sup>14</sup>.
17. It is important to note that in carrying out an appropriate assessment, the decision-maker is to establish, first, whether there is an effect on the integrity of the site and, secondly (if so) whether that effect is adverse. In any given case, the appropriate assessment under Article 6(3) may determine that the effect of the plan or project on the site's protected characteristics will be neutral, or even beneficial. If, however, the effect is negative, the plan or project cannot proceed under Article 6(3)<sup>15</sup>.

*(c) The Court's case-law as to the relevance of measures to avoid or reduce harm*

18. It is clear from the Court's case-law that in carrying out an appropriate assessment under Article 6(3), the decision-maker is required to take into account all aspects of a plan or project which can (individually or in combination with other plans or projects) affect the site's conservation objectives<sup>16</sup>. A thorough assessment is required<sup>17</sup>; it must be based on 'complete, precise and definitive' findings and it must not contain lacunae<sup>18</sup>.

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<sup>11</sup> *Ibid*, at [37].

<sup>12</sup> *Ibid*, at [39]; [46]; [48].

<sup>13</sup> *Ibid*, at [45].

<sup>14</sup> *Ibid*, at [46].

<sup>15</sup> *Sweetman*, Advocate General's opinion, at [57].

<sup>16</sup> *Waddenzee*, above, judgment at [54].

<sup>17</sup> *Sweetman*, above, Advocate General's opinion at [49].

<sup>18</sup> *Sweetman*, above, judgment at [44].

The appropriate assessment is 'not merely a formal procedural act'; rather, its aim is to establish whether a plan or project is compatible with the specified conservation objectives for the particular site. Accordingly, all the aspects of a plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of a site must be identified in the light of the best scientific knowledge in the field<sup>19</sup>.

19. There is no authority, in either the Directive or the case-law of the Court, for excluding consideration of particular measures intended to avoid or reduce adverse effects on the integrity of the site when carrying out an appropriate assessment of a particular plan or project in order to ascertain whether it will adversely affect the integrity of the site concerned. In considering whether there is an adverse effect on the constitutive characteristics of a site<sup>20</sup> hosting a particular habitat type, measures which will reduce or eliminate the area of that habitat type which is lost, or even lead to a net gain in that habitat type, are plainly relevant.
20. The exercise of carrying out an appropriate assessment is a *practical* one requiring the decision-maker to undertake a thorough consideration of the effect on the constitutive characteristics of the site of the plan or project in question. If certain features which will avoid or reduce adverse effects on the integrity of the site have been incorporated into the plan or project, there is no sensible reason why those features should be ignored; indeed, to do so might actually be counter-productive<sup>21</sup>. The Habitats Directive is intended as an aid to effective environmental decision-making and an artificially narrow approach to the environmental effects of a plan or project is, therefore, to be avoided.
21. Thus, for example, if features of the plan or project are included which will prevent any reduction in (or will even increase) the overall area of a protected habitat at the site, those features must be taken into account at the stage of appropriate assessment under Article 6(3) in order to answer the question of whether there is an effect on the integrity of the site and, if so, whether that effect is adverse.

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<sup>19</sup> Case C-441/03, *Commission v Netherlands* [2005] ECR I-3043, Opinion of Advocate General Kokott, at [12].

<sup>20</sup> *Sweetman*, above, judgment at [39]

<sup>21</sup> See below.

22. Indeed, the relevance (for Article 6(3) purposes) of proposed measures for avoiding or minimising harm was specifically recognised by the Advocate General in *Waddenzee* (above) at [108]--

“[A conclusion that there will be no adverse effects] is tenable only where the deciding authorities at least are satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned. ...account must ... be taken here of the likelihood of harm occurring and the extent and nature of the anticipated harm. Measures to minimise and avoid harm can also be of relevance. Precisely where scientific uncertainty exists, it is possible to gain further knowledge of the adverse effects by means of associated scientific observation and to manage implementation of the plan or project accordingly.”

(Emphasis added.)

23. A parallel may be drawn with the duties<sup>22</sup> imposed by the Directive in the case of ‘candidate’ SACs (that is, sites which have been submitted to the European Commission but not yet adopted). Member States may not authorise interventions posing a risk of seriously compromising the ecological characteristics of such sites. In this context too, the Court has had regard to measures taken to reduce or avoid the harm caused by a plan or project. Thus, for example, in Case C-308/08, *Commission v Spain*<sup>23</sup>, which concerned a road upgrading project alleged to risk bringing about the extinction of the Iberian lynx, the Court considered the effect of a number of corrective measures [41] including the provision of wildlife crossings and bridges [31] and animal fencing [48] before concluding that the Commission had failed to establish a violation of the Directive [51]. The United Kingdom submits that the same approach applies when considering the impact of a project upon an established (rather than candidate) SAC.

(d) *Guidance from the European Commission*

24. The European Commission’s guidance<sup>24</sup> in relation to the Habitats Directive, reinforces a number of the points made above—
- a. It sets out that in applying the Article 6(3) test (no adverse effect on the integrity of the site), the focus is on the specific site, and that the ‘integrity of the site’ may be usefully defined as—

<sup>22</sup> See, inter alia, Case C-244/05, *Bund Naturschutz in Bayern eV v Freistaat Bayern* [2006] ECR I-8445 at [46].

<sup>23</sup> [2010] I-4281.

<sup>24</sup> Such guidance is not legally-binding: *Waddenzee*, above, AG’s opinion at [95].

“the coherence of the site’s ecological structure and function, across its whole area, or the habitats .. for which the site is ... classified”<sup>25</sup>.

(Emphasis added.)

Thus, it is the condition of the protected habitat across the site as a whole that is to be assessed under Article 6(3)<sup>26</sup>.

- b. The Commission guidance particularly recognises that in determining whether there will be adverse effects on the integrity of the site as defined by its conservation objectives, it may be relevant to consider the *net* effects on the site, giving the example of a conservation objective for a marine site of ensuring that there is ‘no net loss of area’ (emphasis added)<sup>27</sup> of the highly sensitive communities within the site. Similarly, in the case of a site with a protected natural habitat, it may be relevant to consider, for example, the extent to which there is a permanent and irreparable net loss of area of the protected habitat within a site (where the conservation of that habitat was the objective justifying the site’s designation)<sup>28</sup>.
- c. Similarly, the guidance recognises that it is legitimate, in carrying out an appropriate assessment, to consider the effect of mitigation measures and whether there are any residual adverse effects on the integrity of the site after their application<sup>29</sup>.

(e) *Analysis*

25. It is necessary briefly to consider the terminology used when discussing, under the Habitats Directive, measures to reduce environmental harm. Such measures may be described in a variety of ways, including as ‘mitigation’ or ‘compensation’.
26. It is important to distinguish between (i) the requirements of Article 6(3), which requires an appropriate assessment of all relevant aspects of a plan or project; and (ii) the requirements of Article 6(4), which requires compensatory

<sup>25</sup> European Commission, *Managing Natura 2000 Sites* (‘MN2000’), §4.6.3, The concept of the ‘integrity of the site’.

<sup>26</sup> See the Methodological guidance (below, n27) at §3.4.1, referring to “damage to the site”.

<sup>27</sup> European Commission, *Methodological guidance on the provisions of Article 6(3) and 6(4) of the Habitats Directive 92/43/EEC* (‘Methodological guidance’), §3.2.4 and Box 9.

<sup>28</sup> See *Sweetman*, above, judgment at [46].

<sup>29</sup> See eg the following references: Methodological guidance, §3.2.6 p31; Commission *Guidance document on Article 6(4) of the Habitats Directive* (2007/2012) at §1.3 (second subparagraph) p5.



measures following a determination under Article 6(3) that a plan or project may have an adverse effect on the integrity of the site.

27. Article 6(3) of the Directive refers neither to 'mitigation' nor to 'compensation', but merely requires an 'appropriate assessment' of (all aspects of) a plan or project. The United Kingdom submits that in carrying out such an assessment, the decision-maker must have regard to *all* aspects of a plan or project, including all proposed measures to avoid or reduce harm to the integrity of the site, whether such measures are properly described as 'avoidance', 'mitigation', 'offsetting' or 'compensation'.
28. The ultimate question in every case will be whether the net effects of the plan or project result in an adverse effect on the site's integrity. For example, in the case of a priority natural habitat type whose conservation is the objective justifying the designation of a site, the lasting and irreparable loss of the whole or a significant part of that habitat type will amount to an adverse effect on the integrity of the site<sup>30</sup>. By contrast, if the effect of the plan or project will be a net *increase* in that habitat type at the protected site, there is no such adverse effect.
29. Article 6(4) of the Directive refers to 'compensatory measures' (but not to mitigation, offsetting or avoidance). The compensatory measures referred to in Article 6(4) are measures aimed at offsetting the residual negative impacts of the plan or project on the protected characteristics of the *site* so that the overall coherence of the Natura 2000 *Network* is maintained<sup>31</sup>.
30. In order to determine the nature of any compensatory measures ensuring maintenance of the whole network under Article 6(4), the damage to the particular site must first be precisely identified<sup>32</sup>. That entails considering the effect of the proposed plan or project on the site as a whole, including all proposed measures to reduce or avoid harm to the protected characteristics

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<sup>31</sup> Article 6(3) and Article 6(4) are to be 'separated rigorously', Article 6(4) only being applicable when *after* the Article 6(3) assessment, adverse implications for the integrity of the site cannot be ruled out: see eg *Commission v Netherlands* (above), Advocate General's Opinion at [16].

<sup>31</sup> Article 6(3) and Article 6(4) are to be 'separated rigorously', Article 6(4) only being applicable when *after* the Article 6(3) assessment, adverse implications for the integrity of the site cannot be ruled out: see eg *Commission v Netherlands* (above), Advocate General's Opinion at [16].

<sup>32</sup> See (among many other authorities) Case C-304/05, *Commission v Italy* [2007] ECR I-7519 at [83].

of the site. This may, in an appropriate case, include measures which are compensatory in nature.

31. Thus, measures which are compensatory in nature may properly be considered in two cases:

(a) Under Article 6(3), where they form part of the plan or project and aim to minimise or cancel the negative impacts of a plan or project on the protected characteristics of the site, or even to provide a net positive impact on those characteristics<sup>33</sup>. This would be the case whether the measures are properly described as 'mitigation', 'offsetting', 'avoidance', or 'compensation'.

(b) Under Article 6(4), where they are independent of the plan or project, but intended to offset its negative effects to maintain the ecological coherence of the Natura 2000 Network as a whole. These might include, for example, measures taking place at some distance from the original site. Such measures are only considered following a conclusion that the plan or project may have an adverse effect on the integrity of the site.

(f) *The legal consequences of considering offsetting measures under Article 6(3)*

32. The Referring Court has posed the question<sup>34</sup> of whether the creation of an area of habitat of the type protected at the site which is of equal size to that adversely affected by the plan or project in question leads to the conclusion that the integrity of the site is not adversely affected for the purposes of Article 6(3) of the Habitats Directive.

33. A straightforward 'yes' or 'no' answer cannot be given to this question. Rather, it would depend on all the circumstances of the case including the nature of the adverse effects and, in particular—

a. The nature of the habitat adversely affected by the plan or project. In some cases, it may not be possible to offset the predicted adverse effect at all (for example, where an irreplaceable priority habitat will be permanently lost, as in the case of the karstic limestone pavement in the *Sweetman* case). In other cases, it may be difficult to replicate the full

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<sup>33</sup> Eg by providing a significantly larger area of protected habitat at the site than the area likely to suffer significant adverse effects when the plan or project is implemented.

<sup>34</sup> First question referred for a preliminary ruling.

ecological characteristics of the existing habitat at the site<sup>35</sup>. In further cases, the habitat may be fully replaceable (as may be the case with the molinia meadows habitat in the present case) and/or the effect may be temporary, so that it is possible to conclude there is no adverse effect on the integrity of the site (and in particular, no lasting adverse effect on the favourable conservation status of the protected habitat at the site, the area of which will be “stable or increasing”<sup>36</sup>).

- b. The likely effectiveness of the measures taken to provide the replacement habitat: such measures may range from those which are well-established and uncontroversial (so that there remains no scientific doubt that they will succeed) to those which are experimental, controversial or uncertain. In the former case, it may be possible for the decision-maker to reach the view, on the basis of objective information, that there will be no adverse effect on the integrity of the site; in the latter, such a view may not be sustainable. It should be noted that the Commission’s guidance specifically recognises that the ‘degree of confidence in [the] likely success’ of mitigation measures to be a relevant factor to be considered by decision-makers in carrying out an appropriate assessment under Article 6(3)<sup>37</sup>.

34. Thus, while the provision of replacement on-site habitat is a matter which may properly be taken into account in carrying out an appropriate assessment under Article 6(3), the question of whether such provision means that the decision-maker is able to exclude the possibility of an adverse effect on the integrity of the site is fact-specific, and no general answer can be given.
35. Where the competent national authorities conclude that, notwithstanding the proposed creation of additional habitat, the risk of a permanent<sup>38</sup> and irreparable adverse effect on the integrity of the site remains, the plan or project may only proceed on the conditions set down in Article 6(4).

*(g) Policy and practical considerations*

<sup>35</sup> In such cases, the decision-maker would need to reach a judgment about whether scientific doubt remained about the adverse impacts on the site as a whole.

<sup>36</sup> Article 1(1)(e).

<sup>37</sup> Methodological guidance, Figure 3 and §3.2.6, p31.

<sup>38</sup> A plan will not have an adverse effect on the integrity of the site where it involves some strictly temporary loss of amenity which is capable of being fully undone: see the Advocate General’s opinion in *Sweetman* (above) at [59].

36. The position set out above is also supported by policy and practical considerations related to the application of the Directive in accordance with its overall aim of protecting and enhancing biodiversity, including protected habitats:
- a. In some cases where additional habitat is created, the overall impact on the protected habitat at the site of the plan or project may actually be beneficial, as the Advocate General noted in *Sweetman*<sup>39</sup>. An approach to Article 6(3) which prohibited the decision-maker from taking into account the creation of additional habitat could, perversely, lead to a situation where a plan or project having net *beneficial* effects on the protected habitat might be prevented from proceeding (since the additional requirements of Article 6(4) would not necessarily be satisfied).
  - b. It is vital that measures designed to avoid or reduce adverse impacts on the integrity of a site should be taken into account at an early stage in the decision-making process, to enable good-quality environmental decision-making<sup>40</sup>. To exclude from consideration measures which will mitigate adverse effects on protected habitats, or even improve the overall condition of protected habitats at the site, would be arbitrarily to fragment what is intended to be a holistic decision-making process.
  - c. In order to determine whether there is an adverse effect on the integrity of the site, and in particular in considering whether the natural habitat at the site will be preserved in a lasting manner<sup>41</sup>, with the area of such habitat being stable or increasing<sup>42</sup>, it would be artificial to ignore key aspects of a plan or project merely because they had offsetting characteristics. The Habitats Directive (and the relevant case law of the Court) requires determination of the effects of the plan or project taken as a whole, not just certain aspects thereof.
  - d. That position is in accordance with the purpose of Article 6(3), which is to identify plans or projects having a particular degree of adverse environmental effects in order to ensure the protection of the integrity of each Natura 2000 site. This assessment can only properly be made by

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<sup>39</sup> Opinion at [57].

<sup>40</sup> See eg the second recital to the EIA Directive (2011/92/EU).

<sup>41</sup> *Sweetman*, above, judgment at [39].

<sup>42</sup> Article 1(1)(e); and see *Sweetman*.

evaluating the net effects<sup>43</sup> of a plan or project on the site and its protected characteristics. In the case of a protected habitat the key question will be whether the area of habitat at the site is stable or increasing. In carrying out the assessment, it is necessary to take fully into account measures which will prevent, avoid or counteract adverse effects on the protected habitat at the site.

- e. This approach is, moreover, in accordance with the principle of proportionality, which is a general principle of EU law and applicable in this field<sup>44</sup>. To require a decision-maker to ignore the benefits for biodiversity of a plan or project when carrying out an appropriate assessment under Article 6(3) is not necessary in order to ensure the aims of the Directive or the specific protection afforded by Article 6(3) and, moreover, will be counterproductive for the reasons discussed above<sup>45</sup>. Offsetting measures may enable a plan or project not to have an adverse effect on the integrity of the site and, in some cases, may lead to an improvement in the favourable conservation status of the protected habitat (or species) – as for example where the overall area of a protected habitat within the site will certainly increase as a result of the implementation of a plan or project. To prevent a decision-maker having regard to those offsetting measures may prevent a plan or project from going ahead despite its net benefits for the protected habitat at the site.

#### **THE UNITED KINGDOM'S PROPOSED ANSWERS TO THE QUESTIONS REFERRED**

37. For the reasons set out above, the United Kingdom proposes that the questions referred should be answered as follows:

- (1) As to the first question referred, in circumstances where a project adversely affects an existing area of a protected natural habitat within a site but where, within the framework of the project, a new area of that natural habitat type of equal or similar size is created within the site—

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<sup>43</sup> That net effects are relevant is also recognised by the Commission's guidance: see above, paragraph 24(b).

<sup>44</sup> Case C-2/10 *Azienda Agro-Zootecnica Franchini v Regione Puglia* [2011] I-6561, at [73], [75].

<sup>45</sup> At paragraph 36(a).

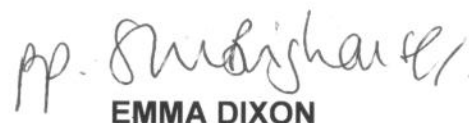
- (a) In considering, pursuant to Article 6(3), whether the project will 'not adversely affect the integrity of the site concerned', the competent national authorities may take into consideration the creation of the new area of habitat; but
- (b) The provision of the new habitat will not necessarily lead to the conclusion that the project will not adversely affect the integrity of the site. The question in every case will be whether any reasonable scientific doubt remains as to the absence of adverse effects on the integrity of the site as a whole. Whether or not this is so will depend on all the circumstances of the case including the nature of the adverse impacts and the nature and effectiveness of the measures to provide the new habitat.

(2) It is not necessary to answer the second question referred in the light of the answer to (1).



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