

Madam President, Members of the Court, Advocate General,

1. I will make some brief introductory remarks before turning to the issues raised in the Court's request.
2. An essential objective of the Habitats Directive is that natural habitats be maintained at (or restored to) a favourable conservation status where, in particular, their natural range and the areas they cover are stable or increasing. The Directive's third recital recognises that achieving this aim may require the maintenance or encouragement of human activities. Article 6 set out a framework within which conservation interests may be balanced against potentially damaging non-conservation interests in a proportionate manner.
3. Article 6(3) requires an appropriate assessment of the implications for the site of any plan or project which is not directly connected with ^{its} ~~the~~ management ~~of the site~~ but likely to have a significant effect on it. The question when carrying out such an assessment is, as the Advocate General noted in *Sweetman*, 'what will happen to the site if this plan or project goes ahead'? That question needs to be answered in a way which is both practical and comprehensive.
4. A plan or project assessed under Article 6(3) may include a range of measures for reducing, minimising, avoiding or cancelling its adverse effects on the protected characteristics of the site. These measures may ^{either} be part of the original design of a development or may be required by the competent authorities as a condition of approval.

5. Prior to carrying out the appropriate assessment, the effects of a plan or project on the site may be unclear. Such effects may turn out to be adverse, neutral, or even beneficial.
6. Even a proposed mitigation measure included as part of a plan or project may in fact have unintended negative effects on the site. This is a key reason for assessing *all* aspects of a proposed plan or project, not just those which are obviously adverse: the Court has repeatedly emphasised that it is necessary for the damage to a site to be precisely identified.
7. I now turn to the issues set out in the Court's request.
8. The starting point here is the Directive itself. I note at the outset that the term "mitigation" is not found anywhere in the Directive. *as have other parties*
9. Article 6(3) in fact refers to neither "mitigation" nor "compensation". Rather, it straightforwardly requires assessment of the "implications for the site" of a plan or project, in view of the site's conservation objectives. The assessment is, as the Advocate General noted in Case C-441/03 *Commission v Netherlands*, conceived very broadly indeed: all aspects which can affect the conservation objectives of a site must be identified.
10. Article 6(4) ^{then} allows a plan or project to proceed despite a negative assessment of the implications for the site, but in strictly limited circumstances. In such cases, it explicitly requires Member States to take the necessary "compensatory measures" to ensure the overall coherence of the Natura 2000 network ~~is protected~~. *despite negative residual effects*
as a whole

11. The Commission recognises in its guidance *Managing Natura 2000* (paragraph 4.5.2) that it is necessary, when carrying out an appropriate assessment under Article 6(3), to take into consideration what ^{we can call} ~~it~~ terms “mitigation measures” - that is, measures which form an integral part of the specifications of a plan or project, and are aimed at minimising or even cancelling its negative impact, either during ^{construction} or after ~~its~~ completion ^{of the project}.

12. The Commission’s Methodological Guidance (pages 30-31) ^{in the English version} sets out that “mitigation measures” are to be taken into account in determining (pursuant to Article 6(3)) whether the plan or project has adverse effects on the site. ^{Can go on to say that} If residual adverse effects remain despite the application of mitigation measures, the project may not proceed under Article 6(3).

13. Similarly, the Commission’s Guidance document on Article 6(4), referred to in the Court’s request, states (page 6) that an assessment under Article 6(3) should provide for: ~~4~~ ¹ quote:

“the incorporation of the most effective mitigation measures into the plan or project concerned, in order to avoid, reduce or even cancel the negative impacts on the site”.

^{We note that}
14. There is no suggestion in the Guidance that the creation of additional habitat at the site may not form part of such measures. Moreover, ^{we say} there is no good reason for treating habitat creation any differently from other types of measure intended to avoid or cancel adverse impacts on the site.

15. Indeed, to exclude on-site habitat creation from consideration under Article 6(3) could have the perverse effect of preventing a plan or project from proceeding under that provision despite the fact that it has a net beneficial effect. *Submit that concept of net effect is key here*

16. The United Kingdom submits that there are four key distinctions between the measures which may be taken into account under Article 6(3) and those required to be taken under Article 6(4).

17. The first relates to the type of measure concerned: Article 6(3) allows the taking into account of *any* measure forming part of the plan or project and designed to reduce, minimise, avoid or cancel the negative impacts of a plan or project on the integrity of the site. By contrast, Article 6(4) is restricted to 'compensatory' measures.

18. The second distinction is as to the relationship of the measure to the plan or project. A measure aimed at minimising or cancelling adverse impacts must *form part of* the plan or project under consideration in order to be taken into account under Article 6(3). By contrast, as the Commission *Managing Natura 2000* guidance makes clear (paragraph 5.4.1), measures taken under Article 6(4) are *independent* of the plan or project.

Pausing here -

19. The third distinction relates to the damage sought to be addressed: a measure taken into account under Article 6(3) must seek to minimise or cancel adverse impacts to the integrity of the *particular site*. By contrast, Article 6(4) requires measures aimed at protecting the *overall* coherence of the Natura 2000 network to compensate for unavoidable adverse effects on the site.

must form 'part of' - for A(3) a remedial forms part if:

- 1. measure forms part of proposal and we are considering*
- 2. if agreement given - remedial measure will be required to be taken*
- 3. if not agreed - remedial measure, not required to be taken - not under A(3) if it were required in any.*

*see para 7(4)142
Clear NAs.*

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20. The fourth and final distinction ^{relates} ~~is~~ as to the point in the decision-making process at which the measures are considered: as the Netherlands point out in their Observations, under Article 6(3), measures are taken into account *prior to* a decision as to whether there are residual adverse effects on the integrity of the site. By contrast, Article 6(4) measures are only considered *after* a decision that there will be (unavoidable) residual adverse effects.

21. Applying this to the question now arising, the United Kingdom submits that on-site habitat creation may properly be taken into consideration under Article 6(3):

22. First, it is intended to *avoid or cancel* the negative impacts on the site concerned.

23. Secondly, it *forms part of* the plan or project rather than being independent of it.

24. Thirdly, it relates to the *particular site* affected by the plan or project rather than to the Natura 2000 network more generally.

25. Fourthly, it may be taken into account by the decision-maker *prior to* determining whether there are any adverse effects on the integrity of the site.

26. There are a number of ways in which habitat loss associated with a plan or project may be reduced or eliminated. These include changing or reducing the development 'footprint'; transferring an area of protected habitat (eg grassland) from one part of the site to another; or creating a new area of habitat on the site. In each case,

the question to be considered under Article 6(3) is whether, overall, there is an adverse impact on the protected habitat at the site and in particular, whether there is a net loss of area. There is no justification for excluding any particular type of measure from consideration altogether. *in carrying out this exercise*

27. Importantly, the fact that on-site habitat creation may be taken into account ~~when assessing a plan or project~~ under Article 6(3) does *not* mean that the plan or project will necessarily be allowed to proceed under that provision. This will only be the case if the decision-maker is able to exclude the possibility of an adverse effect on the integrity of the site in all the circumstances; and this will depend upon (among other things) the nature of the habitat which is adversely affected and the effectiveness of the measures taken to provide the replacement habitat.

if the applicant were a farmer & meadows will need years, perhaps it can't be excluded
28. For example, providing replacement habitat may be easier to achieve for a dynamic habitat (such as intertidal mud flats) than for a static rocky habitat ~~like~~ *- it was impossible to replace* the limestone pavement in *Sweetman*.

29. In paragraphs 43-44 of its Observations, the Commission submits at that the terms 'plan' and 'project' must be interpreted narrowly so as to exclude a habitat creation measure.

30. ~~The United Kingdom~~ *We* contends that ~~to adopt a narrow interpretation of 'plan or project'~~ would contradict the established case-law of the Court, and would be wrong in principle.

31. It is clear from the Court's case-law since *Waddenzee* that the terms 'plan' and 'project' should be interpreted broadly, not restrictively.

Recognised in

~~Indeed, the need for a broad interpretation is specifically recognised in *Managing Natura 2000*, at paragraph 4.3.~~

32. The process of appropriate assessment is an essentially *practical* one. It should not artificially exclude particular aspects of a plan or project. Indeed, in some cases this will be impossible because the habitat creation measures are an inherent part of the design of the plan or project. *so they can't be excluded*

33. For example, in a recent case in the UK, a scheme was proposed to increase the size of a reservoir at a Natura 2000 site. The design of the enlarged reservoir would provide significantly more feeding habitat for the birds by reference to which the site was designated. This was to be achieved, in particular, by removing the concrete edge of the existing reservoir and re-profiling the banks to provide large new areas of natural shoreline and shallow water. In assessing the likely effects on the site of the redevelopment scheme, it would be both impractical and counterproductive to ignore these large new feeding areas – since the result of doing so would be to prevent the project from going ahead under Article 6(3) despite its ^{*overall*} beneficial impact on birds and their habitat. ~~We can provide further examples if that would be helpful.~~

** cautiously*

34. Moreover, there is a danger that in taking a narrow approach to the scope of a particular 'plan or project', elements may be excluded from assessment which would be found, upon examination, to have a negative ^{*effect*} ~~impact~~ on the integrity of the site. For example, the proposed provision of a compensatory feeding habitat as part of a coastal development might be found to have an

overall negative effect on the existing protected species and habitats there. *It's important to assess it.*

35. It would be contradictory and incoherent to take a broad approach to those elements of a plan or project which appear likely to have negative environmental effects, while taking a narrow approach to those aspects thought likely to have beneficial effects. This is especially so given that, until a detailed assessment is carried out, it may be unclear into which category a particular measure falls.

36. In conclusion: To require a decision-maker to ignore particular biodiversity benefits when assessing a plan or project under Article 6(3) is inappropriate and potentially counterproductive. By taking into account all aspects of a plan or project at the earliest possible stage, decision-makers can ensure high-quality environmental decision-making, and a proportionate approach.

~~37. For all these reasons, as well as those set out in its written Observations, the United Kingdom submits that the creation, as part of a plan or project at a particular site, of additional habitat at that site may properly be taken into account in determining, pursuant to Article 6(3), whether there is an adverse effect on the integrity of the site.~~

[ends]