JUDGMENT OF THE COURT (Second Chamber)
7 November 2018 (*)
(Reference for a preliminary ruling — Directive 92/43/EEC — Conservation of natural habitats and of wild fauna and flora — Special areas of conservation — Article 6 — Appropriate assessment of the implications of a plan or project for a site — National programmatic approach to tackling nitrogen deposition — Concepts of 'project' and 'appropriate assessment' — Overall assessment prior to individual authorisations for farms which cause nitrogen deposition)

In Joined Cases C-293/17 and C-294/17,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decisions of 17 May 2017, received at the Court on 22 May 2017, in the proceedings

Coöperatie Mobilisation for the Environment UA,
Vereniging Leefmilieu

v

College van gedeputeerde staten van Limburg,
College van gedeputeerde staten van Gelderland,
intervener:
G. H. Wildenbeest,
Maatschap Smeets,
Maatschap Lintzen-Crooijmans,
W. A. H. Corstjens (C-293/17),

and

Stichting Werkgroep Behoud de Peel

v

College van gedeputeerde staten van Noord-Brabant,
intervener:
Maatschap Gebr. Lammers,
Landbouwbedrijf Swinkels,
Pluimveehouderij Van Diepen VOF,
Vermeerderingsbedrijf Engelen,
Varkenshouderij Limburglaan BV,
Madou Agro Varkens CV (C-294/17),

THE COURT (Second Chamber),

composed of A. Prechal, President of the Third Chamber, acting as President of the Second Chamber, C. Toader (Rapporteur), and A. Rosas, Judges,
Advocate General: J. Kokott,
Registrar: C. Strömholm, Administrator,
having regard to the written procedure and further to the hearing on 3 May 2018,
after considering the observations submitted on behalf of:
Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu, by V. Wösten and A. van den Burg, adviseurs,
Stichting Werkgroep Behoud de Peel, by A. K. M. van Hoof, adviseur,
College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland and College van gedeputeerde staten van Noord-Brabant, by H. J. M. Besselink, advocaat,
the Netherlands Government, by M. K. Bulterman, C. S. Schillemans and P. P. Huurnink, acting as Agents,
the Danish Government, by J. Nymann-Lindegren, M. S. Wolff and P. Z. L. Ngo, acting as Agents,
the European Commission, by E. Manhaeve, C. Hermes and C. Zadra, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,
gives the following

Judgment

These requests for a preliminary ruling concern the interpretation of Article 6 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 requests have been made in proceedings between Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu, on the one hand, and College van gedeputeerde staten van Limburg (Provincial Government of Limburg, Netherlands) and College van gedeputeerde staten van Gelderland (Provincial Government of Gelderland, Netherlands) on the other (Case C-293/17), and Stichting Werkgroep Behoud de Peel, on the one

hand, and College van gedeputeerde staten van Noord-Brabant (Provincial Government of Noord-Brabant, Netherlands) on the other (Case C-294/17) concerning authorisation schemes for agricultural activities which cause nitrogen deposition on 'Natura 2000' European ecological network sites.

Legal context

EU law

The 10th recital of the Habitats Directive states as follows:

'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'.

Article 1 of the Habitats Directive provides:

'For the purpose of this Directive:

…

conservation status of a natural habitat means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservative status of a natural habitat will be taken as "favourable" when:

its natural range and areas it covers within that range are stable or increasing, and

the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, …

special area of conservation means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;

…'

Under Article 2 of that directive:

'1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

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

Article 3(1) of the Habitats Directive is worded as follows:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

…'

Article 6 of that directive provides as follows:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

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

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

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

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

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) preceded Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1, 'the EIA Directive').

Article 1(2)(a) of the EIA Directive, which reproduces the wording of Article 1(2) of Directive 85/337, defines the concept of 'project' as 'the execution of construction works or of other installations or schemes' or as 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

Netherlands law

The Natuurbeschermingswet 1998 (Law on Nature Conservation 1998, Stb. 1998, No 403, 'the Nbw 1998'), in force until 1 January 2017, provides, in Article 1 thereof:

'For the purposes of this Law and the provisions adopted pursuant to this Law:

…

m: "existing practice" means a practice of which the competent authority was aware or could reasonably have been aware on 31 March 2010'.

Article 19d(1) and (3) of the Nbw 1998 is worded as follows:

'1. It is prohibited to carry out projects or perform other operations without the authorisation of the Provincial Government or in contravention of the conditions or restrictions attached to that authorisation …, projects or other operations which, having regard to the goal of conservation, … are likely to have a deteriorative effect on the quality of natural habitats and the habitats of species for which the site has been designated or cause a significant disturbance to them.

…

3. The prohibition referred to in paragraph 1 shall not apply to an existing practice, except where that practice is a project which is not directly connected with or necessary to the management of a Natura 2000 site but is likely, either individually or in combination with other plans or projects, to have a significant effect on the Natura 2000 site concerned.'

Article 19f(1) of the Nbw 1998 provides:

'For projects in respect of which the Provincial Government must adopt a decision on a request for authorisation within the meaning of Article 19d(1) and which are not directly connected with or necessary to the management of a Natura 2000 site but are likely, individually or in combination with other projects or plans, to have a significant effect thereon, the applicant must, before the provincial authorities adopt their decision, carry out an appropriate assessment of the effects on that site, taking account of the objective of conservation … of that site.'

Article 19g(1) of the Nbw 1998 provides:

'Where Article 19f(1) requires an appropriate assessment, an authorisation within the meaning of Article 19d(1) may not be granted unless the Provincial Government is satisfied, on the basis of the appropriate assessment, that the natural features of the site will not be affected.'

Article 19kg(1), (2) and (5) of the Nbw 1998 provides:

'1. [The competent ministers] … shall establish a programme for the Natura 2000 sites which they designate in view of reducing nitrogen deposition in those sites and achieving the conservation objectives of the nitrogen-sensitive habitats located in those sites within a foreseeable period.

2. The aim of the programme is to reduce, ambitiously and realistically, nitrogen deposition from sources located in the Netherlands.

…

5. The programme shall be established at least once during the period of six years and shall be valid for six years.'

Article 19kh(1), (7) and (9) of the Nbw 1998 provides:

'1. Any programme within the meaning of Article 19kg must in any event describe or mention, for the Natura 2000 sites concerned:

the nitrogen deposition volume at the beginning of the validity period of the programme …

the expected autonomous changes likely to cause nitrogen deposition on account of the factors referred to in point (a) and the effects of those changes on the volume of nitrogen deposition in the sites concerned;

the measures taken or to be taken which are intended to contribute to reducing nitrogen deposition or which contribute in another way to achieving a good conservation status for nitrogen-sensitive habitats and the expected effects which those measures are to have on the nitrogen deposition volume or on the achievement of a favourable conservation status in the sites concerned;

the objectives in terms of nitrogen deposition volume …

he type and frequency of reports to be established …

the measures taken or to be taken in view of achieving the conservation objectives of nitrogen-sensitive habitats located in the Natura 2000 sites included in the programme;

the results of an assessment, for each Natura 2000 site registered in the programme, of the proportion in which the measures referred to in points (c) and (g), taking account of the anticipated general change in nitrogen deposition, in particular the total deposition volume, within the meaning of paragraphs 7 and 9, and the room for development:

contribute to the achievement of the conservation objectives of nitrogen-sensitive habitats in the site concerned;

prevent any deterioration in the quality of the natural habitats and habitats of species located in the site concerned.

prevent the appearance of factors disturbing the species for which the site has been designated in so far as, having regard to the conservation objectives of the site in question, those factors are likely to have a significant effect and

do not compromise the achievement of the conservation objectives of the site concerned which are not linked to nitrogen-sensitive habitats.

…

7. The prohibition which Article 19d(1) imposes in respect of Natura 2000 sites shall not be applicable to a project or other operation which meets each of the following conditions:

the project or operation:

causes, in the nitrogen-sensitive habitats located in the Natura 2000 site concerned, nitrogen deposition which, individually or, where the project or activity concerns an establishment within the meaning of Article 1.1(3) of the Wet milieubeheer [Law on Environmental Policy], in combination with other projects or activities concerning the same establishment, does not exceed, during the validity period of the programme, a value set by means of a general administrative measure, or

is not likely to lead, for the Natura 2000 site concerned, to consequences other than nitrogen deposition which, having regard to the conservation objectives, are likely to have a deteriorative effect on the quality of the natural habitats and habitats of species located in a Natura 2000 site or to cause a significant disturbance to the species for which the site has been designated.

…

9. When it adopts a decision for the purposes of Article 19km(1), the competent authority shall not take account of nitrogen deposition which the project or other operation may cause in the nitrogen-sensitive habitats located in a Natura 2000 site, where that nitrogen deposition does not exceed the value referred to in paragraph 7(a), or where the project or the operation are carried out at a distance exceeding the distance set in accordance with paragraph 7(a).'

Article 19km(1) of the Nbw 1998 provides:

'The administrative body with the power to adopt the decision may allocate … room for development to a Natura 2000 site included in the programme:

…

in an authorisation within the meaning of Article 19d(1);

…'

Article 2 of the besluit grenswaarden programmatische aanpak stikstof (Decree on limit values for the programmatic approach to tackling nitrogen deposition, Stb. 2015, No 227) provides:

'1. The value referred to in Article 19kh(7)(a), point 1° of the [Nbw 1998] is 1 mol per hectare per year.

…

3. By way of derogation from paragraph 1, the value referred to in Article 19kh(7)(a), point 1° of the [Nbw 1998] is, for a project or other operation which is not a project or other operation within the meaning of Article 19kn(1) of that law, 0.05 mol per hectare per year, so long as it is apparent from the calculation model … that, for a hectare of a nitrogen-sensitive habitat located in the Natura 2000 site concerned, 5% or less than 5% of the room for deposition for limit values is available.'

Article 2(1) of the regeling programmatische aanpak stikstof (Regulation on the programmatic approach to tackling nitrogen deposition, Stcrt. 2015, No 16320, 'the PAS Regulation') provides:

'In order to establish whether a project or other operation within the meaning of Article 19d(1) of the [Nbw 1998] is, due to the nitrogen deposition which it causes, likely to have a significant deteriorative effect on or cause a significant disturbance to a nitrogen-sensitive habitat located in a Natura 2000 site, the nitrogen deposition shall be calculated by means of the Aerius Calculator software.

…'

Article 5(1) of the PAS Regulation is worded as follows:

'The competent authority shall establish the room for development to be allocated in the authorisation decision by using the Aerius Calculator software.'

According to Article 7(1) of the PAS Regulation, the Aerius Register software is a data registration instrument concerning the increase, decrease and reserves factored into the room for development and the projects or other operations subject to the duty to report.

Article 8(1) of the PAS Regulation provides:

'Whosoever intends to carry out a project or perform another operation to which Article 19kh(7)(a), point 1°, of the Nbw 1998 applies shall declare it at least four weeks but at most two years before the beginning of that project or operation, where each of the following conditions is met:

The project or other operation concerns the edification, alteration or expansion of an establishment within the meaning of Article 1.1(3) of the Law on Environmental Policy, an establishment intended for agriculture, …

the project or other operation causes nitrogen deposition in a nitrogen-sensitive habitat located in a Natura 2000 site which exceeds 0.05 mol per hectare per year.

The Wet natuurbescherming (Law on Nature Conservation, Stb. 2016, No 34, 'the Wnb'), in force since 1 January 2017, provides, in Article 2.4 thereof:

'1. Where the management of a Natura 2000 site so requires in view of conservation objectives, the Provincial Government shall require any person who, in its Province, carries out or proposes to carry out an operation [within the meaning of Article 19d(1) of the Nbw 1998]:

to provide all information regarding that activity;

to take all necessary preventive or restoration measures;

to carry out that activity in accordance with the provisions laid down in the abovementioned measures, or

to refrain from carrying out or to cease that activity.

2. Where the protection of a Natura 2000 site necessitates the immediate execution of a decision as referred to in paragraph 1, the Provincial Government may give notification of its decision orally to the person who carries out or proposes to carry out the activity in question. The Provincial Government shall document the decision in writing as soon as possible and send or deliver it to the interested parties.

…

4. It is prohibited to act in contravention of an obligation under paragraphs 1 or 3.'

Under Article 2.7(2) of the Wnb:

'Without the authorisation of the Provincial Government, it is prohibited to carry out projects or perform other operations which, having regard to the conservation objectives set for a Natura 2000 site, are likely to have a deteriorative effect on the quality of natural habitats or the habitats of species in that site or cause a significant disturbance to the species for which that site has been designated.'

Article 2.9(3) and (4) of the Wnb provides:

'3. The prohibition referred to in Article 2.7(2) shall not apply to projects and other operations falling within the categories of projects or other operations designated by the provincial councils by way of regulation, where the rules set by way of regulation or pursuant to a regulation are respected for the project or operation in question.

…

4. The following may only be designated in accordance with paragraph 3:

categories of projects within the meaning of Article 2.7(3)(a), in respect of which it may be ruled out at the outset, on the basis of objective data, that, individually or in combination with other plans or projects, they will adversely affect the natural features of a Natura 2000 site;

categories of other operations within the meaning of Article 2.7(3)(b), in respect of which account is taken at the outset of the consequences which, having regard to the conservation objectives set for a Natura 2000 site, they are likely to have for the site concerned.'

Article 3.7.8.1 of the Environmental Decree of the Provincial Government of Gelderland and Article 3.2.1 of the Environmental Decree of the Provincial Government of Limburg, which entered into force on 3 February 2017 and 26 April 2017 respectively, both provide that the prohibition in Article 2.7(2) of the Wnb is not applicable to projects of 'grazing of cattle' and 'the application of fertilisers on the surface of land or below its surface'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Considerations common to Cases C-293/17 and C-294/17

The cases in the main proceedings concern authorisation schemes for agricultural activities which cause nitrogen deposition in sites protected by the Habitats Directive.

The referring court notes that, out of 162 Natura 2000 sites in the Netherlands, 118 face a problem of excessive nitrogen deposition, for which the principal national source of emissions is agriculture.

The referring court observes that this excessive nitrogen deposition poses a problem for achieving the conservation objectives of nitrogen-sensitive natural resources in Natura 2000 sites. In particular, significant deposition leads to the formation of a nitrogen cover, as a result of which, in many regions, the so-called 'critical' deposition values for the habitat types designated have been substantially exceeded. Exceeding the critical deposition value means that the risk of the quality of habitat types being negatively affected by the acidifying and eutrophying effects of nitrogen deposition cannot be ruled out in advance.

The referring court states that a programmatic approach has been drawn up by the Kingdom of the Netherlands in order to tackle the problem of excessive nitrogen deposition in natural sites. The *Programma Aanpak Stikstof 2015-2021* (programmatic approach to tackling nitrogen deposition 2015-2021, 'the PAS'), which entered into force on 1 July 2015, is the product of that effort.

The aim of the PAS is twofold. It is intended, first, to conserve and, where necessary, restore the Natura 2000 sites listed by it in order to achieve a favourable conservation status at national level and, secondly, to enable the maintenance or development of economic activities that are sources of nitrogen deposition in those sites. The PAS is also based upon the premiss that nitrogen deposition will be reduced and half of that reduction will offer 'room for deposition' for new economic activities.

The method underlying the PAS is based on ascertaining critical deposition values for each Natura 2000 site and for the habitat types identified. Those critical deposition values constitute limits above which there is a risk of the quality of the habitat being significantly affected by the polluting and acidifying effects of nitrogen deposition.

Each Natura 2000 site included in the PAS is subject to a distinct analysis. Carried out at hectare level, those analyses constitute, together with the general part of the appropriate assessment under the PAS at site level, the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive. Since its entry into force, the PAS and the appropriate assessment upon which it is based, as well as its associated regulation, may be used to grant authorisations for activities which cause nitrogen deposition.

The referring court explains that the PAS also includes site-specific restoration measures, such as hydrological measures and supplementary measures to the benefit of vegetation, as well as source-directed measures, such as those covering stables, low-emission fertilisation methods, feed measures and management measures. Those measures make it possible to envisage an improvement in natural resistance and an additional reduction in nitrogen deposition compared with the reduction already achieved by means of external measures adopted outside of the PAS and enabling autonomous reduction.

The referring court further states that, for authorisation procedures, the regulation accompanying the PAS draws a distinction between three categories of projects. First, the need to obtain authorisation does not apply where it is a project or another act which causes nitrogen deposition of less than 0.05 mol N/ha/yr. Secondly, projects and other acts causing nitrogen deposition of more than 0.05 mol N/ha/yr but less than 1 mol N/ha/yr are also permitted without prior authorisation, but they must necessarily be notified. Thirdly, projects and other acts causing nitrogen deposition exceeding the threshold of 1 mol N/ha/yr are entirely subject to the permit requirement.

In the latter instance, the assessing authority must examine whether the activity for which such a request has been made would cause an increase in nitrogen deposition. In that regard, the decisive factor is whether the situation created by the new project or new activity causes an increase in deposition compared with the situation prior to the issuing of a permit or compared with the highest level of deposition actually caused in the period between 1 January 2012 and 31 December 2014. If the planned project or operation does not cause an increase in nitrogen deposition, the authority may issue authorisation under the Nbw 1998 by reference to the appropriate assessment upon which the PAS is based. In that case, the deposition caused by the planned project or operation

forms part of the deposition analysed in that appropriate assessment. If that project or operation causes an increase in nitrogen deposition, the competent authority may issue authorisation if room for development is available for that purpose.

An impact assessment of those measures has shown that nitrogen deposition will decrease by about 13.4 kilotonnes per year from now until 2020, as compared to the situation if a programme like the PAS had not been implemented. In order to allow a safety margin, only 6.4 kilotonnes per year are taken into consideration in the PAS. With regard to the room for development, a maximum of 60% may be allocated during the first three years of the PAS and 40% may be allocated during the second half of its duration.

The referring court further explains that, in view of ascertaining the nitrogen deposition situation, monitoring its development and ascertaining the permit allocation situation, the competent authorities have developed instruments including the Aerius software, which is available online on the website www.aerius.nl.

Among the six modules of that software, Aerius Calculator enables a partially autonomous decision process. To do so, it works out the contribution to nitrogen deposition based on the emission sources which a user introduces or imports into the system and is used to determine whether a project or activity is likely to cause, through nitrogen deposition, a significant deterioration or disturbance of a nitrogen-sensitive habitat located in a Natura 2000 site. It also permanently registers the room for deposition and room for development available for each site covered by the PAS.

Finally, if the need is demonstrated by the monitoring programme, source-directed measures and restoration measures may be replaced or added to the PAS and the room for development to be allocated may be adjusted.

Case C-294/17

On 14 December 2015, the Provincial Government of Noord-Brabant issued six permits creating or expanding farms which cause nitrogen deposition inter alia in the Natura 2000 sites Groote Peel and Deurnsche Peel & Mariapeel. Those sites were designated for the High Fens, which is a type of nitrogen-sensitive natural habitat. Those decisions authorise, with a single exception, an increase, in varying proportions, in nitrogen deposition on each of those farms.

The Provincial Government issued the authorisations pursuant, inter alia, to the PAS and the measures introduced to implement it from 1 July 2015 in the Nbw 1998, as well as the PAS Regulation.

With regard to one of the farms at issue, the Provincial Government granted authorisation because the project did not cause any increase in nitrogen deposition compared with the deposition actually caused before the adoption of the PAS. Deposition from existing activities was considered reasonable for the purposes of the PAS as part of the background deposition. The authorisation was granted with reference to the appropriate assessment for the site conducted for the purposes of the PAS.

As regards the other farms, the authorisations at issue concern activities which cause an increase in nitrogen deposition compared with the amount actually caused or authorised prior to the adoption of the PAS. In so far as those activities cause nitrogen deposition exceeding the threshold value or limit, of 0.05 mol N/ha/yr or 1 mol N/ha/yr, applicable to the Natura 2000 site concerned, room for development was allocated for the increase in nitrogen deposition. The Provincial Government issued the authorisations with reference to the appropriate assessment conducted for the purposes of the PAS.

Stichting Werkgroep Behoud de Peel brought an appeal against the six authorisations at issue because it considers that the Provincial Government of Noord-Brabant could not issue them under the national legislation, in so far as it is not a correct transposition of Article 6 of the Habitats Directive.

In that regard, the environmental conservation association claims, first of all, that a programme may not replace the individual assessment required by Article 6(3) of that directive for projects which may have a significant effect on Natura 2000 sites. It further claims that deposition below the threshold value or limit value set by the national legislation may have significant effects. It adds that the appropriate assessment on which the PAS is based fails to comply with that directive, Article 6(1) and (2) of which require the adoption of appropriate conservation measures. Moreover, it considers that the assessment includes source-directed measures and restoration measures which are compensatory in nature and, finally, deems it incompatible with Article 6 of the Habitats Directive that room for development may be allocated before the measures have had any positive effects.

The Provincial Government of Noord-Brabant takes the view that the PAS and its associated regulation ensure that Article 6 of the Habitats Directive was correctly transposed. In accordance with that article, the PAS included an assessment of potential nitrogen pollution having regard to the conservation objectives in all Natura 2000 sites with nitrogen-sensitive ecological features.

For all of those sites, the authors of the assessment at issue researched whether, from a scientific perspective, there was no reasonable doubt as to whether, notwithstanding the allocation of room for deposition and room for development to the projects and activities, and taking account of the source-directed measures and restoration measures in the PAS, the objectives of conserving nitrogen-sensitive ecological features would be achieved and that the conservation thereof would be ensured. The room for deposition and room for development allocated for all of the projects and activities made possible by the PAS were appropriately assessed. It follows from that assessment that the quality of the habitat types will not deteriorate and that the natural features of the Natura 2000 sites will not be adversely affected.

In any event, according to the Provincial Government of Noord-Brabant, there is nothing in the Court's case-law which permits the inference that the Habitats Directive does not permit a programmatic approach.

In those circumstances, the Raad van State (Council of State, Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

Does Article 6(2) and (3) of [the Habitats Directive] preclude legislation which exempts from the permit requirement projects and other operations causing nitrogen deposition which do not exceed a threshold value or a limit value, and are therefore permitted without individual approval, proceeding on the assumption that the effect

of all projects and other operations taken together which could make use of the legislation, have been appropriately assessed before the adoption of the legislation?

Does Article 6(2) and (3) of [the Habitats Directive] preclude an appropriate assessment for a programme in which a certain total amount of nitrogen deposition is assessed, being used as the basis for granting an authorisation (individual approval) for a project or other operation which causes nitrogen deposition which fits within the room for deposition assessed in the context of the programme?

May the appropriate assessment as referred to in Article 6(3) of [the Habitats Directive], which is made for a programme such as the [PAS], take into account the positive effects of conservation measures and appropriate steps for existing areas of habitat types and habitats, which are taken in connection with the obligations arising from Article 6(1) and (2) of that Directive?

If question 3 is answered in the affirmative: can the positive effects of conservation measures and appropriate steps be taken into account in an appropriate assessment if, at the time of the appropriate assessment, those measures have not yet been implemented and their positive effect has not yet been achieved?

Assuming that the appropriate assessment contains definitive findings on the effects of these measures based on the best available scientific knowledge in that regard, is it important that the implementation and the results of those measures be monitored and, if it transpires that the effects are less favourable than had been assumed in the appropriate assessment, that adjustments, if required, be made?

May the positive effects of the autonomous decrease of the nitrogen deposition which might become apparent during the period in which the [PAS] applies, be taken into account in the appropriate assessment as referred to in Article 6(3) of [the Habitats Directive]?

Assuming that the appropriate assessment contains definitive findings on the effects of those developments based on the best available scientific knowledge in that regard, is it important that the autonomous decrease in the nitrogen deposition be monitored and, if it transpires that the decrease is less favourable than had been assumed in the appropriate assessment, that adjustments, if required, be made?

May restoration measures taken in the context of the [PAS] and aimed at preventing a particular harmful ecological factor, such as nitrogen deposition, from having adverse effects for existing areas of habitat types or habitats, be considered protective measures as referred to in paragraph 28 of the judgment [of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330)], which may be taken into account in an appropriate assessment as referred to in Article 6(3) of [the Habitats Directive]?

If question 5 is answered in the affirmative: Can the positive effects of protective measures which may be taken into account in the appropriate assessment be taken into account if, at the time of the appropriate assessment, they have not yet been implemented and their positive effect has not yet been achieved?

Is it important in that respect, assuming that the appropriate assessment contains definitive findings on the effects of those measures based on the best scientific knowledge in that regard, that the implementation and the results of the measures be monitored, and if that indicates that the results are less favourable than assumed in the appropriate assessment, that adjustments take place if necessary?'

Case C-293/17

By decision of 23 June 2015, the Provincial Government of Gelderland rejected as unfounded the complaint brought by environmental conservation associations, namely Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu, against that government's decision not to penalise the activities of a livestock business causing nitrogen deposition on Natura 2000 sites. By three decisions of 14 July 2015, the Provincial Government of Limburg also rejected as unfounded similar complaints in respect of identical activities. The disputes before the referring court concern those four decisions.

As the exemption from the permit requirement for the grazing of cattle and the application of fertilisers on the surface of land and below its surface entered into force only after the adoption of those decisions, namely, first, under the Nbw 1998 and, after 1 January 2017, under the Wnb, the Provincial Governments have requested that account be taken of that legislation when the appeals are dealt with. According to the referring court, those appeals must in fact be examined on the basis of the Environmental Decree of the Provincial Government of Gelderland and the Environmental Decree of the Provincial Government of Limburg. It further states that the appropriate assessment on which the exemption laid down in those decrees is based is the assessment conducted for the purposes of the PAS in its entirety.

Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu claim before the referring court that the activities of agricultural undertakings are likely to have a deteriorative effect on the quality of the habitat and are, therefore, subject to the obligation to obtain a permit pursuant to Article 19d(1) of the Nbw 1998.

The Provincial Governments of Limburg and Gelderland contend that the grazing of cattle and application of fertilisers are admittedly 'other operations' within the meaning of Article 19d(1) of the Nbw 1998, but that no obligation to obtain a permit to carry out those activities stems from that provision because there is nothing to suggest that they will have effects on Natura 2000 sites.

Those governments observe that, according to the appropriate assessment conducted in view of adopting the PAS, it is ruled out that grazing and fertilising at the 2014 level could have significant effects, and that, on average, an increase in nitrogen deposition as a result of those activities may be ruled out after 2014.

More specifically, the Provincial Government of Limburg appears to rely on the consideration that both grazing and fertilising constitute 'existing practices' within the meaning of the Nbw 1998 and were therefore lawful before Article 6 of the Habitats Directive became applicable to the Natura 2000 sites concerned.

The referring court states that, other than the questions formulated in Case C-294/17, the request for a preliminary ruling in Case C-293/17 raises, first, the question whether the activity consisting in the grazing of cattle and application of fertilisers is to be classified as a project within the meaning of Article 6(3) of the Habitats Directive and whether it is compatible with Article 6(2) and (3) of that directive to grant an exemption allowing an undertaking to carry out such an activity without individual approval. Secondly, the referring court is uncertain

whether, where it is the only appropriate measure allowing intervention in respect of existing or future activities which are likely to have a deteriorative effect on or damage a natural site significantly, the power to impose the obligations laid down in Article 2.4 of the Wnb is sufficient to ensure compliance with Article 6(2) of the Habitats Directive.

In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

Can an activity which is not covered by the concept of 'project' as referred to in Article 1(2)(a) of [the EIA Directive] because it is not a physical intervention in the natural surroundings be a project as referred to in Article 6(3) of [the Habitats Directive] because the activity may have a significant effect on a Natura 2000 site?

If it is assumed that the application of fertilisers on the surface of land or below its surface is a project, and in the event that it was carried out lawfully before Article 6(3) of [the Habitats Directive] became applicable to a Natura 2000 site, and that it is still being carried out, must it then be assessed to be one and the same project, even if the fertilising did not always take place on the same tracts of land, in the same quantities and using the same techniques?

Is it relevant, for the purposes of the assessment of whether this constitutes one and the same project, that the nitrogen deposition caused by the application of fertilisers on the surface of land or below its surface did not increase after Article 6(3) of [the Habitats Directive] became applicable to the Natura 2000 site?

Does Article 6(3) of [the Habitats Directive] preclude legislation which provides that an activity which is inextricably linked to a project and which must therefore also be assessed to be a project, such as the grazing of cattle by a dairy farm, is exempted from the permit requirement, with the result that no individual authorisation is required for that activity, it being assumed that the effects of the activity which has been permitted without authorisation were appropriately assessed before that legislation was adopted?

Does Article 6(3) of [the Habitats Directive] preclude legislation which provides that a certain category of projects, such as the application of fertilisers on the surface of land or below its surface, is exempted from the permit requirement and is thus permitted without individual authorisation, it being assumed that the effects of the activity which has been permitted without authorisation were appropriately assessed before that legislation was adopted?

Does the appropriate assessment which formed the basis of the exemption from the permit requirement for the grazing of cattle and the application of fertilisers on the surface of land or below its surface, which was based on the actual and expected extent and intensity of those activities, and the outcome of which is that on average an increase in nitrogen deposition by those activities can be ruled out, meet the requirements which Article 6(3) of [the Habitats Directive] lays down in that regard?

Is it important in this regard that there is a connection between the exemption from the permit requirement and the [PAS] which is premised on a decrease in the total nitrogen deposition in respect of nitrogen-sensitive ecological features in the Natura 2000 sites, and that deposition development in the Natura 2000 sites is monitored annually in the context of the PAS, and that, if the decrease is less favourable than had been assumed in the appropriate assessment, any necessary adjustments are made?

May the appropriate assessment as referred to in Article 6(3) of [the Habitats Directive], which was made for a programme such as the PAS, take account of the positive effects of conservation measures and appropriate steps for existing areas of habitat types and habitats, which are taken in connection with the obligations arising from Article 6(1) and (2) of [that directive]?

If Question 5 is answered in the affirmative: Can the positive effects of conservation measures and appropriate steps be taken into account in an appropriate assessment for a programme if, at the time of the appropriate assessment, those measures have not yet been implemented and their positive effect has not yet been achieved?

Assuming that the appropriate assessment contains definitive findings on the effects of those measures based on the best available scientific knowledge in that regard, is it important that the implementation and the outcomes of those measures be monitored and, if it transpires that the effects are less favourable than had been assumed in the appropriate assessment, that adjustments, if required, be made?

May the positive effects of the autonomous decrease in the nitrogen deposition which might become apparent during the period in which the PAS applies be taken into account in the appropriate assessment as referred to in Article 6(3) of [the Habitats Directive]?

Assuming that the appropriate assessment contains definitive findings on the effects of those developments based on the best available scientific knowledge in that regard, is it important that the autonomous decrease in the nitrogen deposition be monitored and, if it transpires that the decrease is less favourable than had been assumed in the appropriate assessment, that adjustments, if required, be made?

May restoration measures taken in the context of a programme such as the PAS and aimed at preventing a particular harmful ecological factor, such as nitrogen deposition, from having adverse effects for existing areas of habitat types or habitats be regarded as protective measures as referred to in paragraph 28 of the judgment [of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330)], which may be taken into account in an appropriate assessment as referred to in Article 6(3) of [the Habitats Directive]?

If Question 7 is answered in the affirmative: Can the positive effects of protective measures which may be taken into account in the appropriate assessment be taken into account if, at the time of the appropriate assessment, they had not yet been implemented and their positive effect had not yet been achieved?

Is it important in that respect, assuming that the appropriate assessment contains definitive findings on the effects of those measures based on the best scientific knowledge in that regard, that the implementation and the results of the measures be monitored, and, if this indicates that the results are less favourable than assumed in the appropriate assessment, that adjustments take place if necessary?

Is the power to impose obligations referred to in Article 2.4 of the [Wnb], which the competent authority must apply if, having regard to the conservation objectives, a Natura 2000 site so requires, an adequate preventive

instrument in order to be able to implement Article 6(2) of [the Habitats Directive] in respect of the grazing of cattle and the application of fertilisers on the surface of land or below its surface?'

By decision of the President of the Court of 19 June 2017, first, Cases C-293/17 and C-294/17 were joined for the purposes of the written and oral procedure and the judgment and, secondly, the request for priority treatment made by the referring court for those cases was granted.

Consideration of the questions referred

The first question in Case C-293/17

By the first question in Case C-293/17, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that the grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, on the ground that they are likely to have significant consequences for those sites, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of the EIA Directive.

In the first place, it must be noted that, while the Habitats Directive does not define the concept of 'project', it is apparent from the Court's case-law that the definition of 'project' within the meaning of Article 1(2)(a) of the EIA Directive is relevant to defining the concept of project as provided for in the Habitats Directive (see, to that effect, judgment of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 38 and the case-law cited).

In the present case, the referring court is uncertain whether the grazing of cattle and the application of fertilisers on the surface of land or below its surface are to be included in the concept of 'project' within the meaning of Article 6(3) of the Habitats Directive, in so far as the Court has stated, in paragraph 24 of the judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154), that the renewal of an existing permit cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' within the meaning of the provisions preceding Article 1(2)(a) of the EIA Directive.

In that regard, it should be noted that, in that judgment, the Court, when it formulated the condition relating to the existence of works or interventions involving alterations to the physical aspect of the site, clarified the definition of the concept of 'project' within the meaning of Article 1(2) of Directive 85/337 and, in particular, the requirement for an 'intervention in the natural surroundings' contained therein.

It must be noted that the requirements relating to 'works' or 'interventions involving alterations to the physical aspect' or even an 'intervention in the natural surroundings' are not to be found in Article 6(3) of the Habitats Directive, that provision requiring an appropriate assessment, inter alia where a project is likely to have a 'significant' effect on a site.

Thus, Article 1(2)(a) of the EIA Directive defines the concept of 'project' for the proposes of that provision, attaching to it conditions that are not specified in the equivalent provision of the Habitats Directive.

In the same vein, it follows from the Court's case-law that, in so far as the definition of the concept of 'project' stemming from Directive 85/337 is more restrictive than that stemming from the Habitats Directive, if an activity is covered by Directive 85/337, it must, a fortiori, be covered the Habitats Directive (see, to that effect, judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraphs 26 and 27).

It follows that, if an activity is regarded as a 'project' within the meaning of the EIA Directive, it may constitute a 'project' within the meaning of the Habitats Directive. However, the mere fact that an activity may not be classified as a 'project' within the meaning of the EIA Directive does not suffice, in itself, to infer therefrom that the activity may not be covered by the concept of 'project' within the meaning of the Habitats Directive.

In the second place, in order to determine whether the grazing of cattle and the application of fertilisers on the surface of land or below its surface may be classified as a 'project' within the meaning of Article 6(3) of the Habitats Directive, it is important to examine whether such activities are likely to have a significant effect on a protected site.

The 10th recital of the Habitats Directive states that 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. That recital finds expression in Article 6(3) of the directive, which provides, inter alia, that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications for that site (judgment of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 28 and the case-law cited).

In the present case, it is apparent from the findings of the referring court, described in paragraph 27 of the present judgment, that a large number of Natura 2000 sites in the Netherlands face a problem of excessive nitrogen deposition, and that the principal national source of emissions is the agricultural sector.

In that context, as the Advocate General noted in points 117 and 126 of her Opinion, it is important to examine whether activities such as the application of fertilisers on the surface of land or below its surface and the grazing of cattle are compatible with the conservation objectives of the protected sites in the provinces of Gelderland and Limburg or whether they may have a significant effect on those sites.

Moreover, as the Advocate General noted, in essence, in paragraph 118 of her Opinion, it cannot be ruled out that the grazing of cattle and the application of fertilisers on the surface of land or below its surface are covered, in any event, by the concept of 'project' within the meaning of Article 1(2)(a) of the EIA Directive.

As regards the application of fertilisers, such an activity may alter the properties of the soil by enriching it with nutrients and thus constitute an intervention involving alterations to the physical aspect of the site within the meaning of Article 1(2)(a) of the EIA Directive and, with regard to the grazing of cattle, establishing grazing land could constitute 'the execution of construction works or of other installations or schemes' within the meaning of

that provision, in particular if such execution involves, in the circumstances of the present case, an unavoidable or planned development of such grazing land, which it is for the referring court to verify.

In the light of the foregoing, the answer to the first question in Case C-293/17 is that Article 6(3) of the Habitats Directive must be interpreted as meaning that the grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of the EIA Directive.

The second question in Case C-293/17

By the second question in Case C-293/17, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that a recurring activity, such as the application of fertilisers on the surface of land or below its surface, authorised under national law before the entry into force of that directive, may be regarded as one and the same project for the purposes of that provision, with the result that that activity does not fall within the scope of that provision.

In order to answer the referring court's questions, it should be recalled that, under the first sentence of Article 6(3) of the Habitats Directive, no project likely to have a significant effect on the site concerned can be authorised without a prior assessment of its implications for that site.

In so far as the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of Article 6(3) of the Habitats Directive, it is necessary to examine the bearing on the applicability of that provision of the fact that that recurring activity was authorised under national law before the entry into force of that directive.

In that regard, the Court has previously held that such a fact does not in itself constitute an obstacle to considering such an activity, at the time of each subsequent intervention, as a distinct project within the meaning of that directive, at the risk of automatically excluding that activity from any prior assessment of its implications for the site concerned within the meaning of Article 6(3) (see, to that effect, judgment of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraphs 41 and 42).

However, if, having regard in particular to their regularity or nature or the conditions under which they are carried out, certain activities must be regarded as constituting a single operation, those activities can be considered to be one and the same project within the meaning of Article 6(3) of the Habitats Directive (see, to that effect, judgment of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 47).

In the present case, as the Advocate General noted in points 132 to 134 of her Opinion, the regular fertilising of agricultural land generally has a single common purpose, namely crop cultivation on a farm, and may constitute a single operation, characterised, in the pursuit of that common purpose, by the continuity of that activity in the same locations and under the same conditions.

In those circumstances, such a single operation, authorised and regularly practised before Article 6(3) of the Habitats Directive became applicable to the site at issue, may constitute one and the same project for the purposes of that provision, exempted from a new authorisation procedure.

The referring court is uncertain, however, as to the bearing on the applicability of Article 6(3) of the Habitats Directive and, accordingly, the requirement of an 'appropriate assessment' within the meaning of that provision, of the fact that, first, fertilising takes place on different plots of land, in variable quantities and following various techniques, which themselves evolve over time as a result of technical and regulatory changes, and, secondly, nitrogen deposition caused by the application of fertilisers has not, overall, increased after the entry into force of that provision.

In that regard, it should be noted that Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 118 and the case-law cited). Thus, according to the Court's settled case-law, recalled in paragraph 68 of the present judgment, the decisive criterion for establishing whether a new project requires an appropriate assessment of its implications to be carried out is whether there is a possibility that that project will have a significant effect on a protected site.

Consequently, where there is no continuity and, inter alia, the location and the conditions in which it carried out are not the same, the recurring activity of applying fertilisers on the surface of land or below its surface cannot be classified as one and the same project for the purposes of Article 6(3) of the Habitats Directive. It might be a case of new projects requiring an appropriate assessment within the meaning of that provision, the decision as to the obligation to conduct such an assessment depending, in each case, on the criterion relating to the risk of a significant adverse effect on the protected site on account of the changes thus brought about by such an activity.

Therefore, the fact that nitrogen deposition caused by the application of fertilisers on the surface of land or below its surface has not, as a whole, increased since the entry into force of Article 6(3) of the Habitats Directive is irrelevant to the question whether a new project requires an appropriate assessment to be carried out, in so far as that fact does not make it possible to rule out the risk that nitrogen deposition on the protected sites concerned has increased and that it now affects one of those sites significantly.

It must also be added that, even if a project was authorised before the system of protection laid down by the Habitats Directive became applicable to the site in question and, accordingly, such a project was not subject to the requirements relating to the procedure for prior assessment according to Article 6(3) of that directive, its implementation nevertheless falls within the scope of Article 6(2) of that directive. More specifically, an activity complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives. The very existence of a probability or risk that an activity on a protected site might cause significant disturbances is capable

of constituting an infringement of that provision (see, to that effect, judgment of 14 January 2016, *Grüne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraphs 33, 41 and 42 and the case-law cited).

In the light of the foregoing, the answer to the second question in Case C-293/17 is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a recurring activity, such as the application of fertilisers on the surface of land or below its surface, authorised under national law before the entry into force of that directive, may be regarded as one and the same project for the purposes of that provision, exempted from a new authorisation procedure, in so far as it constitutes a single operation characterised by a common purpose, continuity and, inter alia, the location and the conditions in which it is carried out being the same. If a single project was authorised before the system of protection laid down by that provision became applicable to the site in question, the carrying out of that project may nevertheless fall within the scope of Article 6(2) of that directive.

The second question in Case C-294/17

As a preliminary point, it should be recalled that, while Article 6(2) and Article 6(3) are designed to ensure the same level of protection (judgment of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 24 and the case-law cited), the subject matter of those two provisions is different, in that the first is intended to introduce preventive measures whereas the second establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 108 and the case-law cited).

In the present case, the referring court's uncertainty concerns the authorisation issued to the farms for which nitrogen deposition in protected sites is assessed by reference to the appropriate assessment of the implications of a programme, such as the PAS, conducted in advance when that programme was adopted.

The uncertainty of the referring court thus concerns Article 6(3) of the Habitats Directive.

By the second question in Case C-294/17, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection.

As recalled in paragraph 87 of the present judgment, Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site.

The first stage of the assessment procedure, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 44 and the case-law cited).

Having regard to the precautionary principle, where a plan or project not directly connected with or necessary to the management of a site may undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 112 and the case-law cited).

As the Advocate General noted in point 40 of her Opinion, the first sentence of Article 6(3) of the Habitats Directive generally requires the individual assessment of plans and projects.

Nonetheless, the appropriate assessment of the implications of the plan or project for the site concerned implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified (judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 40 and the case-law cited).

In that regard, as the Advocate General noted in points 42 to 44 of her Opinion, an overall evaluation of the implications carried out in advance, such as that conducted when the PAS was adopted, makes it possible to examine the cumulative effects of different sources of nitrogen deposition on the sites concerned.

The fact that an assessment at such a level of generality makes it possible to examine better the cumulative effects of various projects does not mean, however, that national legislation such as that at issue in the main proceedings necessarily meets all the requirements stemming from Article 6(3) of the Habitats Directive.

The assessment carried out under the first sentence of Article 6(3) of the Habitats Directive cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects proposed on the protected site concerned (judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 39 and the case-law cited).

Furthermore, the second stage of the assessment procedure, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the appropriate assessment of the implications of the plan or project for the site concerned, allows such a plan or project to be authorised only if it will not adversely affect the integrity of the site concerned (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 115 and the case-law cited).

Article 6(3) of the Habitats Directive thus integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects envisaged. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 118 and the case-law cited).

In order to ensure that all the requirements thus recalled are fulfilled, it is for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive accompanying a programmatic approach and the various arrangements for implementing it, including inter alia the use of software such as that at issue in the main proceedings intended to contribute to the authorisation process. The competent national authorities may be entitled to authorise such an individual project on the basis of such an assessment only if the national court is satisfied that that assessment carried out in advance meets those requirements in respect of each specific individual project.

In this regard, it should be noted that under Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is considered to be 'favourable' when, inter alia, its natural range and the areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.

In circumstances such as those at issue in the main proceedings, where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited.

In the light of the foregoing, the answer to the second question in Case C-294/17 is that Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That is so, however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain.

The first question in Case C-294/17

By the first question in Case C-294/17, the referring court asks, in essence, whether Article 6(2) and (3) of the Habitats Directive must be interpreted as precluding national programmatic legislation, such as that at issue in the main proceedings, exempting certain projects which do not exceed a certain threshold value or a certain limit value in terms of nitrogen deposition from the requirement for individual approval, since the cumulative effects of all the plans or projects likely to create such deposition were subject in advance to an 'appropriate assessment' within the meaning of Article 6(3) of that directive.

For the same reasons as those set out in paragraphs 87 to 89 of the present judgment, that question will be answered solely in the light of Article 6(3) of the Habitats Directive.

In the case in the main proceedings, the need to obtain authorisation does not apply, first, where a project causes nitrogen deposition of less than 0.05 mol N/ha/yr. Secondly, projects causing nitrogen deposition of more than 0.05 mol N/ha/yr but less than 1 mol N/ha/yr are also permitted without prior authorisation, but must necessarily be notified.

In the present case, even though, in those two situations, the projects proposed would be exempted from authorisation, the authorisation scheme for them is based on the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, carried out when the PAS was adopted, in which the effects of plans or projects of that scale were examined.

The Court has held that, where a Member State introduces an authorisation scheme, under which there is no provision for a risk assessment depending inter alia on the characteristics and specific environmental conditions of the site concerned, that Member State must show that the provisions which it has adopted enable it to be excluded, on the basis of objective information, that any plan or project subject to that authorisation scheme will have a significant effect on a Natura 2000 site, whether individually or in combination with other plans or projects. It can be inferred from Article 6(3) of the Habitats Directive that competent national authorities may refrain from carrying out an impact assessment of any plan or project which is not directly connected with, or necessary to, the management of a Natura 2000 site only where it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on that site, whether individually or in combination with other plans or projects (see, to that effect, judgment of 26 May 2011, *Commission* v *Belgium*, C-538/09, EU:C:2011:349, paragraphs 52 and 53 and the case-law cited).

As stated in paragraph 101 of the present judgment, it is for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive accompanying a programmatic approach such as that at issue in the main proceedings, and exemptions from authorisation such as those at issue in the main proceedings may be accepted only if the national court is satisfied that that assessment carried out in advance meets the requirements of that provision.

In particular, it must be ascertained that, even below the threshold values or limit values at issue in the main proceedings, there is no risk of significant effects being produced which may adversely affect the integrity of the sites concerned.

In the light of the foregoing, the answer to the first question in Case C-294/17 is that Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation, such as that at issue in the main proceedings, exempting certain projects which do not exceed a certain threshold value or a certain limit value in terms of nitrogen deposition from the requirement for individual approval, if the national court is satisfied that the 'appropriate assessment' within the meaning of that provision, carried out in advance, meets the criterion that there is no reasonable scientific doubt as to the lack of adverse effects of those plans or projects on the integrity of the sites concerned.

The third and fourth questions in Case C-293/17

By the third and fourth questions in Case C-293/17, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as not precluding national legislation, such as that at issue in the main

proceedings, which allows a certain category of projects, in the present case the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement and, accordingly, to an individualised appropriate assessment of its implications for the sites concerned, since that legislation is itself based on an 'appropriate assessment' within the meaning of that provision.

According to the Court's case-law, the condition governing the need to undertake an assessment of the implications of a plan or a project on a particular site, in accordance with which such an assessment must be carried out where there are doubts as to the existence of significant effects, does not permit that assessment to be avoided, in respect of certain categories of plans or projects, on the basis of criteria which do not adequately ensure that those projects are not likely to have a significant effect on the protected sites. The option of generally exempting certain activities, in accordance with the rules in force, from the need for an assessment of their implications for the site concerned is not such as to guarantee that those activities do not adversely affect the integrity of the protected site. Thus, Article 6(3) of the Habitats Directive does not authorise a Member State to enact national legislation which allows the environmental impact assessment obligation for certain types of plans or projects to benefit from a general waiver (see, to that effect, judgment of 26 May 2011, *Commission* v *Belgium*, C-538/09, EU:C:2011:349, paragraphs 41 to 43 and the case-law cited).

It follows that, as the Advocate General noted in point 144 of her Opinion, should the grazing of cattle and the application of fertilisers on the surface of land or below its surface constitute 'projects' within the meaning of Article 6(3) of the Habitats Directive, dispensing with the appropriate assessment of the implications of those projects for the site concerned may be compatible with the requirements stemming from that provision only if it is ensured that those activities cause no disturbance likely significantly to affect the objectives of that directive (see, to that effect, judgment of 4 March 2010, *Commission* v *France*, C-241/08, EU:C:2010:114, paragraph 32).

In the present case, the referring court states that the authors of the appropriate assessment at issue in the main proceedings based it, inter alia, on the expected extent and intensity of the agricultural activities concerned and concluded that, for the level at which they were carried out at the time of that assessment, it could be ruled out that such activities would have significant consequences, and that, on average, an increase in nitrogen deposition caused by those activities could be ruled out. It likewise notes that the categorical exemptions at issue in the main proceedings mean that the activities concerned may be carried out regardless of the location and regardless of the nitrogen deposition that they cause.

In accordance with the Court's case-law recalled in paragraph 98 of the present judgment, the assessment carried out under the first sentence of Article 6(3) of the Habitats Directive cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects proposed on the protected site concerned.

In those circumstances, as the Advocate General also noted, in essence, in points 146, 147 and 150 of her Opinion, it does not appear possible for the adverse effects of the projects at issue in the main proceedings on the integrity of the sites concerned to be removed beyond all reasonable scientific doubt, which it is for the referring court to ascertain.

An average value is not, in principle, capable of ensuring that there are no significant effects on any single protected site as a result of fertilising or grazing, as such effects seem to depend, inter alia, on the extent and, as the case may be, the intensiveness of those activities, the proximity which may exist between the place in which those activities are carried out and the protected site concerned, and specific conditions, for example owing to the interaction of other sources of nitrogen, potentially characterising that site.

In the light of the foregoing, the answer to the third and fourth questions is that Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation, such as that at issue in the main proceedings, which allows a certain category of projects, in the present case the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement and, accordingly, to an individualised appropriate assessment of its implications for the sites concerned, unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites, which it is for the referring court to ascertain.

The fifth to seventh questions in Case C-293/17 and the third to fifth questions in Case C-294/17

By the fifth to seventh questions in Case C-293/17 and the third to fifth questions in Case C-294/17, the referring court asks, in essence, whether, and under which conditions, an 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive may take into account the existence of 'conservation measures' within the meaning of paragraph 1 of that article, 'preventive measures' within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or 'autonomous' measures, in so far as those measures are not part of that programme.

In particular, the referring court is uncertain whether such types of measures may be taken into account in an 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive only if they have already been adopted and have yielded results.

In that regard, it should be noted that it would be contrary to the effectiveness of Article 6(1) and (2) of the Habitats Directive for the effects of necessary measures under those provisions to be invoked in order to grant, under paragraph 3 of that article, the authorisation of a plan or project which has implications for the site concerned before they are actually implemented (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 213).

Nor can the positive effects of the necessary measures under paragraphs 1 and 2 of Article 6 of the Habitats Directive be invoked in order to grant, under paragraph 3 of that article, authorisation to projects which have an adverse effect on protected sites.

Furthermore, it must be added that, as follows from the judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583), the case-law relating to Article 6 of the Habitats Directive requires a distinction to be drawn between protective measures forming part of the plan or project at issue and intended to avoid or reduce any direct adverse effects caused by it, in order to ensure that that plan or project does not adversely affect the integrity of the sites concerned, which are covered by Article 6(3), and measures which, in accordance with Article 6(4), are aimed at compensating for the negative effects of the plan or project on that site and cannot be taken into account in the assessment of the implications of that plan or project on that site (see, to that effect, judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 47 and the case-law cited).

Moreover, according to the Court's case-law, it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive (see, to that effect, judgments of 26 April 2017, *Commission* v *Germany*, C-142/16, EU:C:2017:301, paragraph 38, and of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 51).

In the present case, the referring court notes, first, that the approach to the nitrogen problem adopted by the authors of the PAS is intended to reduce nitrogen deposition in Natura 2000 sites by means of measures in sites already affected which will take effect in the long term, it being understood that some of those measures may be taken only in the future and that others still must be regularly renewed.

Thus, as the Advocate General noted in point 92 of her Opinion, for some of them, those measures have not yet been taken or have not yet yielded any results, so that their effects are still uncertain.

Secondly, the referring court states that the PAS provides for annual monitoring of both deposition development and the implementation progress and results of measures, and also adjustment where their result is less favourable than the estimate used as a basis by the authors of the appropriate assessment.

The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such 'measures' if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty.

It must be added that the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive must include not only the anticipated positive effects of those 'measures' but also the certain or potential adverse effects which may result from them (see, to that effect, judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 53).

In the light of the foregoing, the answer to the fifth to seventh questions in Case C-293/17 and the third to fifth questions in Case C-294/17 is that Article 6(3) of the Habitats Directive must be interpreted as meaning that an 'appropriate assessment' within the meaning of that provision may not take into account the existence of 'conservation measures' within the meaning of paragraph 1 of that article, 'preventive measures' within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or 'autonomous' measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment.

The eighth question in Case C-293/17

By the eighth question in Case C-293/17, the referring court asks, in essence, whether Article 6(2) of the Habitats Directive must be interpreted as meaning that measures introduced by national legislation, such as that at issue in the main proceedings, including procedures for the surveillance and monitoring of farms whose activities cause nitrogen deposition and the possibility of imposing penalties, up to and including the closure of those farms, are sufficient for the purposes of complying with that provision.

In that regard, the Court has previously held that national legislation including procedures for intervention by the competent authorities that were merely reactive and not also preventive disregarded the scope of the obligations stemming from Article 6(2) of the Habitats Directive (see, to that effect, judgment of 13 December 2007, *Commission* v *Ireland*, C-418/04, EU:C:2007:780, paragraphs 207 and 208).

In the present case, the legislation at issue in the main proceedings allows the authorities, having regard to conservation objectives, first, to impose measures both preventive and corrective. Secondly, that legislation also includes a power of coercion, also including the possibility of adopting urgent measures.

Consequently, such legislation, in so far as it makes it possible to prevent the occurrence of a certain number of risks linked to the activities at issue, constitutes an appropriate step within the meaning of Article 6(2) of the Habitats Directive.

In the light of the foregoing, the answer to the eighth question in Case C-293/17 is that Article 6(2) of the Habitats Directive must be interpreted as meaning that measures introduced by national legislation, such as that at issue in the main proceedings, including procedures for the surveillance and monitoring of farms whose activities cause nitrogen deposition and the possibility of imposing penalties, up to and including the closure of those farms, are sufficient for the purposes of complying with that provision.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that the grazing of cattle and the application of

fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

Article 6(3) of Directive 92/43 must be interpreted as meaning that a recurring activity, such as the application of fertilisers on the surface of land or below its surface, authorised under national law before the entry into force of that directive, may be regarded as one and the same project for the purposes of that provision, exempted from a new authorisation procedure, in so far as it constitutes a single operation characterised by a common purpose, continuity and, inter alia, the location and the conditions in which it is carried out being the same. If a single project was authorised before the system of protection laid down by that provision became applicable to the site in question, the carrying out of that project may nevertheless fall within the scope of Article 6(2) of that directive.

Article 6(3) of Directive 92/43 must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That is so, however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain.

Article 6(3) of Directive 92/43 must be interpreted as not precluding national programmatic legislation, such as that at issue in the main proceedings, exempting certain projects which do not exceed a certain threshold value or a certain limit value in terms of nitrogen deposition from the requirement for individual approval, if the national court is satisfied that the 'appropriate assessment' within the meaning of that provision, carried out in advance, meets the criterion that there is no reasonable scientific doubt as to the lack of adverse effects of those plans or projects on the integrity of the sites concerned.

Article 6(3) of Directive 92/43 must be interpreted as precluding national programmatic legislation, such as that at issue in the main proceedings, which allows a certain category of projects, in the present case the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement and, accordingly, to an individualised appropriate assessment of its implications for the sites concerned, unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites, which it is for the referring court to ascertain.

Article 6(3) of Directive 92/43 must be interpreted as meaning that an 'appropriate assessment' within the meaning of that provision may not take into account the existence of 'conservation measures' within the meaning of paragraph 1 of that article, 'preventive measures' within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or 'autonomous' measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment.

Article 6(2) of Directive 92/43 must be interpreted as meaning that measures introduced by national legislation, such as that at issue in the main proceedings, including procedures for the surveillance and monitoring of farms whose activities cause nitrogen deposition and the possibility of imposing penalties, up to and including the closure of those farms, are sufficient for the purposes of complying with that provision.

[Signatures]

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* Language of the case: Dutch.