



COUR EUROPÉENNE DES DROITS DE L'HOMME  
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 13645/05  
by COOPERATIEVE PRODUCENTENORGANISATIE VAN DE  
NEDERLANDSE KOKKELVISSERIJ U.A.  
against the Netherlands

The European Court of Human Rights (Third Section), sitting on  
20 January 2009 as a Chamber composed of:

Josep Casadevall, *President*,

Corneliu Bîrsan,

Boštjan M. Zupančič,

Egbert Myjer,

Ineta Ziemele,

Luis López Guerra,

Ann Power, *judges*,

and Stanley Naismith, *Deputy Section Registrar*,

Having regard to the above application lodged on 8 April 2005,

Having deliberated, decides as follows:

THE FACTS

The applicant, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A.*, is an association based in Kapelle, Netherlands. The applicant association was represented before the Court by Mr G. van der Wal, a lawyer practising in Brussels (Belgium) and The Hague (Netherlands).

## A. The circumstances of the case

The facts of the case, as submitted by the applicant association and as apparent to the Court from information available from public sources, may be summarised as follows.

### 1. Factual background

The applicant association is comprised of individuals and enterprises engaged in mechanical cockle fishing in waters including, until the events complained of, the Wadden Sea.

The Wadden Sea is a tidal wetlands area in open connection with the North Sea. The western part belongs to the internal waters of the Netherlands. It offers feeding and breeding grounds to a variety of wildlife including a number of species of molluscs and sea birds. With the exception of passages left open for shipping and military training grounds, it is subject to environmental protection regimes under domestic law.

In the part of the Wadden Sea under the sovereignty of the Netherlands, the regime was defined at the relevant time by decrees issued under the Nature Conservation Act (*Natuurbeschermingswet*) of 1967. Article 16 of that Act made activities including the catching and killing of animals in protected areas subject to the grant of a licence by the Minister of Agriculture, Nature Conservation and Fisheries (*Minister van Landbouw, Natuurbeheer en Visserij*).

The cockle (*cerastoderma edule* or *cardium edule*) is an edible bivalve mollusc found in tidal flats and the seabed in shallow coastal waters. Its natural predators in the Wadden Sea include several bird species, particularly eider ducks (*somateria mollissima*) and oystercatchers (*haematopus ostralegus*).

Cockles are fished commercially, by both manual and mechanical means: the mechanical techniques used are dredging and suction.

### 2. Administrative proceedings

On 1 July 1999 the Deputy Minister (*Staatssecretaris*) of Agriculture, Nature Conservation and Fisheries (“the Deputy Minister”) granted a licence to the applicant association entitling its members collectively to a total catch of up to 10,000 tons of cockle meat from the Wadden Sea over a period of approximately three and a half months in the following autumn.

On 11 August 1999 the Wadden Sea Society (*Landelijke Vereniging tot Behoud van de Waddenzee*, also called *Waddenvereniging*), a non-governmental organisation whose stated aim was to protect the Wadden Sea environment, lodged an objection (*bezwaar*) in its own name and on behalf of another non-governmental organisation, the Netherlands Society for the Protection of Birds (*Nederlandse Vereniging tot Bescherming van Vogels*, also called *Vogelbescherming Nederland*). They stated, in so far as relevant

to the case before the Court, that mechanical cockle fishing caused long-term and possibly irreversible damage to ecologically vulnerable areas and that the quota set was too high in relation to the feeding needs of seabirds including oystercatchers.

On 23 December 1999 the Deputy Minister gave a decision dismissing the objection as unfounded since much of the Wadden Sea was closed to mechanical cockle fishing; at all events, in the absence of empirical evidence, it was not established that the effects of such fishing were irreversible. The estimated quantities of cockles in 1999 were such that there was no need to reserve them all for seabirds that year, the less so since they could feed on protected mussel banks as well.

The Wadden Sea Society appealed against this decision to the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*).

On 7 July 2000 the Deputy Minister granted a licence to the applicant association entitling its members collectively to a total catch of up to 9,775 tons of cockle meat from the Wadden Sea over a period of approximately three and a half months in the autumn of that year.

On 30 July 2000 the Wadden Sea Society lodged an objection, again acting in its own name and on behalf of the Netherlands Society for the Protection of Birds. They largely restated the grounds of their objection of 11 August 1999. A serious reduction in the numbers of eider ducks and oystercatchers had been noted in recent years, presumably as a result of the partial destruction of their feeding grounds. In addition, the Minister's decision was incompatible with Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive" – see below) which required a stricter review of the likely environmental effects than the applicable domestic legislation.

On 19 February 2001 the Deputy Minister dismissed the objection as unfounded. He dismissed the argument that the environmental impact review was incompatible with the Habitats Directive, since in his view the review under the applicable domestic legislation was equivalent in scope and was based on the latest available scientific information. Grounds for serious concern about irreversible environmental harm had not been established, nor had the reality of any threat to the feeding base of eider ducks and oystercatchers.

The Wadden Sea Society lodged an appeal against this dismissal also.

### *3. Proceedings in the Administrative Jurisdiction Division of the Council of State*

The Administrative Jurisdiction Division joined the cases and held a hearing on 20 November 2001. The applicant association appeared as an interested party.

On 27 March 2002 the Administrative Jurisdiction Division gave its decision.

It rejected the arguments of the appellant non-governmental organisations in so far as they called into question the Deputy Minister's assessment of the likelihood of harm to the Wadden Sea environment and wildlife. It accepted, however, that questions arose with regard to the interpretation and application of the Nature Conservation Act in the light of binding substantive standards of European Community law, in particular the Habitats Directive. The need therefore arose to seek a preliminary ruling of the Court of Justice of the European Communities (ECJ) under Article 234 of the Treaty establishing the European Community ("the EC Treaty" – see below).

The questions submitted to the ECJ were the following:

“1. (a) Are the words ‘plan or project’ in 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 to be interpreted as also covering an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period, with a fresh assessment being carried out on each occasion as to whether, and if so in which sections of the area, the activity may be carried on?

(b) If the answer to Question 1(a) is in the negative, must the relevant activity be regarded as a ‘plan or project’ if the intensity of this activity has increased over the years or an increase in it is made possible by the authorisations?

2. (a) If it follows from the answer to Question 1 that there is a ‘plan or project’ within the meaning of Article 6(3) of the Habitats Directive, is Article 6(3) of the Habitats Directive to be regarded as a special application of the rules in Article 6(2) or as a provision with a separate, independent purpose in the sense that, for example:

(i) Article 6(2) relates to existing use and Article 6(3) to new plans or projects, or

(ii) Article 6(2) relates to management measures and Article 6(3) to other decisions,  
or

(iii) Article 6(3) relates to plans or projects and Article 6(2) to other activities?

(b) If Article 6(3) of the Habitats Directive is to be regarded as a special application of the rules in Article 6(2), can the two subparagraphs be applicable cumulatively?

3. (a) Is Article 6(3) of the Habitats Directive to be interpreted as meaning that there is a ‘plan or project’ once a particular activity is likely to have an effect on the site concerned (and an ‘appropriate assessment’ must then be carried out to ascertain whether or not the effect is ‘significant’) or does this provision mean that an ‘appropriate assessment’ has to be carried out only where there is a (sufficient) likelihood that a ‘plan or project’ will have a significant effect?

(b) On the basis of which criteria must it be determined whether or not a plan or project within the meaning of Article 6(3) of the Habitats Directive not directly connected with or necessary to the management of the site is likely to have a significant effect thereon, either individually or in combination with other plans or projects?

4. (a) When Article 6(3) of the Habitats Directive is applied, on the basis of which criteria must it be determined whether or not there are ‘appropriate steps’ within the

meaning of Article 6(2) or an ‘appropriate assessment’, within the meaning of Article 6(3), in connection with the certainty required before agreeing to a plan or project?

(b) Do the terms ‘appropriate steps’ or ‘appropriate assessment’ have independent meaning or, in assessing these terms, is account also to be taken of Article 174(2) EC and in particular the precautionary principle referred to therein?

(c) If account must be taken of the precautionary principle referred to in Article 174(2) EC, does that mean that a particular activity, such as the cockle fishing in question, can be authorised where there is no obvious doubt as to the absence of a possible significant effect or is that permissible only where there is no doubt as to the absence of such an effect or where the absence can be ascertained?

5. Do Article 6(2) or Article 6(3) of the Habitats Directive have direct effect in the sense that individuals may rely on them in national courts and those courts must provide the protection afforded to individuals by the direct effect of Community law, as was held *inter alia* in Case C-312/93 *Peterbroeck* [1995] ECR I-4599?”

#### *4. Proceedings in the ECJ*

The Wadden Sea Society, the Netherlands Society for the Protection of Birds, the applicant association, the respondent Government and the European Commission all submitted observations to the ECJ. Following proceedings in writing, the ECJ held an oral hearing on 18 November 2003.

On 29 January 2004 the Advocate General’s advisory opinion was read out in public. Its conclusion was the following:

“152. I propose that the Court [i.e. the ECJ] answer the questions referred for a preliminary ruling by the Raad van State as follows:

(1) The words ‘plan and project’ in 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 also cover an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period.

(2) Article 6(3) of Directive 92/43 lays down the procedure for authorising plans and projects which do not affect the integrity of protection sites, whereas Article 6(2) thereof lays down permanent obligations irrespective of the authorisation of plans and projects, namely to avoid deterioration and disturbance which could be significant in relation to the objectives of the directive.

(3) An appropriate assessment is always necessary where reasonable doubt exists as to the absence of significant adverse effects. Any effect on the conservation objectives has a significant effect on the site concerned.

(4) An appropriate assessment must

- precede agreement to a plan or project,
- take account of cumulative effects, and
- document all adverse effects on conservation objectives.

The competent authorities may agree to a plan or project only where, having considered all the relevant information, in particular the appropriate assessment, they are certain that the integrity of the site concerned will not be adversely affected. This presupposes that the competent authorities are satisfied that there is no reasonable doubt as to the absence of such adverse effects.

Where Article 6(2) of Directive 92/43 applies to the authorisation of a scheme such authorisation must, in substantive terms, provide the same standard of protection as authorisation granted pursuant to Article 6(3) of the habitats directive.

(5) Individuals may rely on Article 6(3) of Directive 92/43 in so far as avenues of legal redress against measures infringing the abovementioned provisions are available to them under national law. They may, under the same conditions, rely on Article 6(2) of Directive 92/43 in so far as error of assessment is claimed. An indirect burden on citizens which does not encroach on legal positions protected by Community law does not preclude the recognised (vertical) binding of State authorities to directly applicable directives.”

This concluded the oral proceedings.

In a letter of 11 February 2004 the applicant association requested permission to submit a written response to the Advocate General’s advisory opinion in writing; in the alternative, an order for the reopening of the oral proceedings; and in the further alternative, some other opportunity to revisit the advisory opinion.

On 28 April 2004 the ECJ gave an order containing the following reasoning<sup>1</sup>:

“5. To begin with, PO Kokkelvisserij [the applicant association] indicates that the positions taken in that Opinion are wrong both as to the facts and in law. In support of its primary and further alternative requests PO Kokkelvisserij invokes the right to adversarial proceedings in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereafter ‘the Convention’), as construed by the European Court of Human Rights. The alternative request is based on Article 61 of the Rules of Procedure. PO Kokkelvisserij states that it would run counter to the proper ordering of the proceedings to set out the merits of its objections against the Advocate General’s opinion in its letter of 11 February 2004.

6. It should be recalled that the Statute of the Court of Justice and the Court’s Rules of Procedure do not provide for any possibility for parties to submit observations in reply to the Opinion of the Advocate General (see the decision of 4 February 2000, *Emesa Sugar*, C-17/98, [2000] ECR (European Court Reports) I-665, point 2). This circumstance however does not violate a party’s right to adversarial proceedings flowing from Article 6 § 1 of the Convention as construed by the European Court of Human Rights (see the above-mentioned *Emesa Sugar* decision, points 3-16).

7. PO Kokkelvisserij’s request to submit written remarks in reply to the Opinion of the Advocate General, or to be granted the opportunity otherwise to revisit the advisory opinion, must therefore be denied.

8. In view of the purpose of adversarial proceedings, which is to prevent the Court from being influenced by arguments to which parties have not been able to respond, the Court may, *ex proprio motu* or at the suggestion of the Advocate General or at the request of the parties as the case may be, reopen the oral proceedings pursuant to Article 61 of the Rules of Procedure if it considers that it has been insufficiently informed or if the case must be decided on the basis of an argument that has not

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<sup>1</sup> Translation by the Registry. Official ECJ versions of this order exist in Dutch and French only.

been discussed by the parties (see the above-mentioned *Emesa Sugar* decision, point 18).

9. In the instant case PO Kokkelvisserij's request contains no precise information which makes it appear either useful or necessary to reopen the proceedings.

10. PO Kokkelvisserij's request for reopening of the oral proceedings must therefore be dismissed."

On 7 September 2004 the ECJ delivered its judgment. The preliminary ruling which it contained was in the following terms:

"1. Mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of 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.

2. Article 6(3) of Directive 92/43 establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is 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, while Article 6(2) of that directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).

3. (a) The first sentence of Article 6(3) of Directive 92/43 must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.

(b) Pursuant to the first sentence of Article 6(3) of Directive 92/43, where a plan or project not directly connected with or necessary to the management of a site is likely to 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.

4. Under Article 6(3) of Directive 92/43, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

5. Where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of Directive 92/43, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed

into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.”

#### *5. The eventual decision of the Administrative Jurisdiction Division*

The Administrative Jurisdiction Division of the Council of State allowed the participants in the proceedings before it to respond in writing to the judgment of the ECJ. It held a further hearing on 11 November 2004 at which the Wadden Sea Society, the Netherlands Society for the Protection of Birds, the Deputy Minister and the applicant association were represented.

The applicant association argued that the ECJ had acted *ultra vires* by finding as a matter of fact that mechanical cockle fishing in the Wadden Sea was to be considered a “plan” or a “project” within the meaning of Article 6(3) of the Habitats Directive; moreover, that finding had been based on an incorrect factual assessment. It further argued that the judgment of the ECJ should be disappplied, having been delivered following proceedings that violated Article 6 § 1 of the Convention.

On 22 December 2004 the Administrative Jurisdiction Division gave judgment. It rejected the argument that the ECJ had acted *ultra vires* and found that the applicant association had not established that the ECJ had based its judgment on facts other than those presented in the Administrative Jurisdiction Division’s own judgment of 27 March 2002. Finding it established, in the absence of scientific evidence to the contrary, that the impact of mechanical cockle fishing on natural habitat appeared likely to be “significant”, it annulled the cockle-fishing licences issued to the applicant association on the ground that they contravened Article 6(3) of the Habitats Directive.

As far as the Court is aware, mechanical cockle fishing in the Netherlands waters of the Wadden Sea has ceased entirely since then.

## **B. Relevant European Community law and practice**

### *1. The EC treaty*

Provisions of the EC treaty relevant to the case are the following:

#### **Article 220**

“The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

In addition, judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty.”

**Article 221**

“The Court of Justice shall consist of one judge per Member State.

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice.

When provided for in the Statute, the Court of Justice may also sit as a full Court.”

**Article 222**

“The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement.”

**Article 223**

“The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed. ...”

**Article 234**

“The Court of Justice shall have jurisdiction to give preliminary rulings concerning

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

...

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

**Article 281**

“The Community shall have legal personality.”

## 2. *The Statute of the ECJ*

The Statute of the ECJ is in the form of a Protocol to the EC Treaty. As relevant to the case before the Court, it provides as follows:

### **Article 2**

“Before taking up his duties each Judge shall, in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

### **Article 3**

The Judges shall be immune from legal proceedings. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written.

The Court, sitting as a full Court, may waive the immunity.

Where immunity has been waived and criminal proceedings are instituted against a Judge, he shall be tried, in any of the Member States, only by the court competent to judge the members of the highest national judiciary.

Articles 12 to 15 and Article 18 of the Protocol on the privileges and immunities of the European Communities shall apply to the Judges, Advocates-General, Registrar and Assistant Rapporteurs of the Court, without prejudice to the provisions relating to immunity from legal proceedings of Judges which are set out in the preceding paragraphs.”

### **Article 4**

“The Judges may not hold any political or administrative office.

They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council.

When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

Any doubt on this point shall be settled by decision of the Court.”

### **Article 5**

“Apart from normal replacement, or death, the duties of a Judge shall end when he resigns.

Where a Judge resigns, his letter of resignation shall be addressed to the President of the Court for transmission to the President of the Council. Upon this notification a vacancy shall arise on the bench.

Save where Article 6 applies, a Judge shall continue to hold office until his successor takes up his duties.”

### **Article 6**

“A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of

the Court, he no longer fulfils the requisite conditions or meets the obligations arising from his office. The Judge concerned shall not take part in any such deliberations.

The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council.

In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification.”

#### **Article 7**

“A Judge who is to replace a member of the Court whose term of office has not expired shall be appointed for the remainder of his predecessor’s term.”

#### **Article 8**

“The provisions of Articles 2 to 7 shall apply to the Advocates-General.”

#### **Article 18**

“No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly.

Any difficulty arising as to the application of this article shall be settled by decision of the Court. ...”

#### **Article 20**

“The procedure before the Court shall consist of two parts: written and oral.

The written procedure shall consist of the communication to the parties ... of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.

...

The oral procedure shall consist of the reading of the report presented by a Judge acting as Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.”

#### **Article 23**

“In the cases governed ... by Article 234 of the EC Treaty ... the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court shall be notified to the Court by the court or tribunal concerned. The

decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and also to the Council or to the European Central Bank if the act the validity or interpretation of which is in dispute originates from one of them...

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, ... the Council ... shall be entitled to submit statements of case or written observations to the Court. ...”

### 3. *The Rules of Procedure of the ECJ*

Provisions of the ECJ’s Rules of Procedure (*OJ* – Official Journal of the European Communities – L 176 of 4 July 1991, p. 7, as amended and corrected) relevant to the case are the following:

#### **Article 59**

“1. The Advocate General shall deliver his opinion orally at the end of the oral procedure.

2. After the Advocate General has delivered his opinion, the President shall declare the oral procedure closed.”

#### **Article 61**

“The Court may after hearing the Advocate General order the reopening of the oral procedure.”

### 4. *ECJ case-law*

In its order of 4 February 2000, *Emesa Sugar*, C-17/98, [2000] ECR I-665, the ECJ held as follows:

“5. In its judgment in *Vermeulen v Belgium*, cited above, the European Court of Human Rights found that the Procureur Général’s department at the Belgian Court of Cassation had as ‘its main duty, at the hearing as at the deliberations, ... to assist the Court of Cassation and to help ensure that its case-law is consistent’ (paragraph 29) ‘with the strictest objectivity’ (paragraph 30); it also considered that ‘great importance must be attached to the part actually played in the proceedings by the member of the Procureur Général’s department, and more particularly to the content and effects of his submissions. These contain an opinion which derives its authority from that of the Procureur Général’s department itself [in the French version, “ministère public”]. Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Court of Cassation’ (paragraph 31).

6. The Court of Human Rights went on to consider that ‘the fact that it was impossible for Mr Vermeulen to reply to them [the submissions] before the end of the hearing infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service [in the French version, ‘magistrat indépendant’], with a view to influencing the court’s decision’. Accordingly, the Court of Human Rights found that this fact in itself amounted to a breach of Article 6(1) (paragraph 33) (see also, to the same effect, the judgments of: 20 February 1996 in *Lobo Machado v Portugal*, Reports of Judgments and Decisions 1996-I, p. 195,

paragraphs 28 to 31; 25 June 1997 in *Van Orshoven v Belgium*, Reports of Judgments and Decisions 1997-III, p. 1040, paragraphs 38 to 41; 27 March 1998 in *J.J. v Netherlands*, Reports of Judgments and Decisions 1998-II, p. 604, paragraphs 42 and 43; and 27 March 1998 in *K.D.B. v Netherlands*, Reports of Judgments and Decisions 1998-II, p. 621, paragraphs 43 and 44).

7. Emesa takes the view that this case-law applies to the Opinion delivered before the Court by the Advocate General and accordingly seeks leave to reply to it.

8. As the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures (see, in particular, Opinion 2/94 of 28 March 1996 [1996] ECR I-1759, paragraph 33). For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have cooperated or of which they are signatories. The Convention has special significance in that respect (see, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).

9. Moreover, those principles have been incorporated in Article 6(2) of the Treaty on European Union, according to which ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’. According to Article 46(d) of the Treaty on European Union, the Court is to ensure that this provision is applied ‘with regard to action of the institutions, in so far as [it] has jurisdiction under the Treaties establishing the European Communities and under [the] Treaty [on European Union]’.

10. It is also appropriate to recall the status and role of the Advocate General within the judicial system established by the EC Treaty and by the EC Statute of the Court of Justice, as set out in detail in the Court’s Rules of Procedure.

11. In accordance with Articles 221 and 222 of the EC Treaty, the Court of Justice consists of Judges and is assisted by Advocates General. Article 223 lays down identical conditions and the same procedure for appointing both judges and Advocates General. In addition, it is clear from Title I of the EC Statute of the Court of Justice, which, in law, is equal in rank to the Treaty itself, that the Advocates General have the same status as the Judges, particularly so far as concerns immunity and the grounds on which they may be deprived of their office, which guarantees their full impartiality and total independence.

12. Moreover, the Advocates General, none of whom is subordinate to any other, are not public prosecutors nor are they subject to any authority, in contrast to the manner in which the administration of justice is organised in certain Member States. They are not entrusted with the defence of any particular interest in the exercise of their duties.

13. The role of the Advocate General must be viewed in that context. In accordance with Article 222 of the EC Treaty, his duty is to make, in open court, acting with complete impartiality and independence, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it, which is to ensure that in the interpretation and application of the Treaty, the law is observed.

14. Under Article 18 of the EC Statute of the Court of Justice and Article 59 of the Rules of Procedure of the Court, the Opinion of the Advocate General brings the oral procedure to an end. It does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion

addressed to the judges or to the parties which stems from an authority outside the Court or which ‘derives its authority from that of the Procureur Général’s department [in the French version, “ministère public”]’ (judgment in *Vermeulen v Belgium*, cited above, paragraph 31). Rather, it constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself.

15. The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to it. Furthermore, the Opinion is published together with the Court’s judgment.

16. Having regard to both the organic and the functional link between the Advocate General and the Court, referred to in paragraphs 10 to 15 of this order, the aforesaid case-law of the European Court of Human Rights does not appear to be transposable to the Opinion of the Court’s Advocates General.

17. Moreover, given the special constraints inherent in Community judicial procedure, connected in particular with its language regime, to confer on the parties the right to submit observations in response to the Opinion of the Advocate General, with a corresponding right for the other parties (and, in preliminary ruling proceedings, which constitute the majority of cases brought before the Court, all the Member States, the Commission and the other institutions concerned) to reply to those observations, would cause serious difficulties and considerably extend the length of the procedure.

18. Admittedly, constraints inherent in the manner in which the administration of justice is organised within the Community cannot justify infringing a fundamental right to adversarial procedure. However, no such situation arises in that, with a view to the very purpose of adversarial procedure, which is to prevent the Court from being influenced by arguments which the parties have been unable to discuss, the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, with regard to the reopening of the oral procedure, the order of 22 January 1992 in Case C-163/90 *Legros and Others*, not published in the ECR, and the judgment of 16 July 1992 in Case C-163/90 *Legros and Others* [1992] ECR I-4625; the order of 9 December 1992 in Case C-2/91 *Meng*, not published in the ECR, and the judgment of 17 November 1993 in Case C-2/91 *Meng* [1993] ECR I-5751; the order of 13 December 1994 in Case C-312/93 *Peterbroeck*, not published in the ECR, and the judgment of 14 December 1995 in Case C-312/93 *Peterbroeck* [1995] ECR I-4599; the order of 23 September 1998 in Case C-262/96 *Sürül*, not published in the ECR, and the judgment of 4 May 1999 in Case C-262/96 *Sürül* [1999] ECR I-2685; and the order of 17 September 1998 in Case C-35/98 *Verkooijen*, not published in the ECR).

19. In the instant case, however, Emesa’s application does not relate to the reopening of the oral procedure, nor does it rely on any specific factor indicating that it would be either useful or necessary to do so.”

On 28 June 2007 Advocate General Sharpston delivered an advisory opinion in case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government*. It included the following passage (footnote reference omitted, emphasis added):

“156. ... I am fully conscious of the fact that, in the present case, only one Member State (...) has intervened. It would seem desirable for a proper exploration of the elements that I have canvassed above to take place against the background of fuller participation from the Member States and (as a corollary) a more developed presentation by the Commission. It might be that, on more detailed examination, the prima facie case that I have outlined above is refuted.

157. The Court would not, I suspect, wish to decide such a fundamental point in the present case (*unless, of course, it decides to reopen the oral procedure and invite Member States to make their views on this issue known*); and I do not see an overriding need for it to do so. ...”

### 5. *The Habitats Directive*

Article 6 of the Habitats Directive states:

“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.”

## COMPLAINT

The applicant association complained under Article 6 § 1 of the Convention that its right to adversarial proceedings had been violated as a result of the refusal of the ECJ to allow it to respond to the Opinion of the Advocate General.

## THE LAW

The applicant association's complaint is that it was not allowed to submit a response to the Opinion of the Advocate General before the ECJ gave judgment. It relies on Article 6 § 1 of the Convention, which provides, in relevant part:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

### **A. The applicant association's submissions**

The applicant association stated that the Opinion of the Advocate General contained errors of fact and of law. Moreover, the Opinion failed to take account of the interests of its industry and did not address its arguments. Basing its argument on that premise, it considered its rights under Article 6 of the Convention to have been violated by both the Netherlands and the European Community as a result of the ECJ's refusal to allow it to respond to the Opinion.

In its submission, the discretion which Article 61 of the ECJ's Rules of Procedure left to the ECJ to refuse to reopen the oral proceedings deprived it of a safeguard that the Court, in a line of precedent including *Kress v. France* [GC], no. 39594/98, § 76, ECHR 2001-VI, had held to be encompassed by Article 6 § 1 of the Convention. In *Mantovanelli v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 437, § 36, and *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 45, 3 March 2000, violations of Article 6 § 1 had been found in that the applicants had not had the opportunity to comment on documentary evidence. Similarly, in *Pellegrini v. Italy*, no. 30882/96, § 45, ECHR 2001-VIII, the Court had held that it was for the parties to a dispute alone to decide whether a document produced by the other party or by witnesses called for their comments.

## **B. The Court's assessment**

### *1. Applicability of Article 6*

The applicant association's complaint is based on the unspoken assumption that Article 6 protects its rights in proceedings under Article 234 of the EC Treaty. The Court proposes to proceed on the same assumption, leaving open the questions to what extent the protection which that Article offers is the same for an interested third party – such as the applicant association was in this case – as for the appellant and the defendant parties, that is to say the Wadden Sea Society, the Netherlands Society for the Protection of Birds and the State of the Netherlands respectively; and to what extent the preliminary rulings procedure under Article 234 of the EC Treaty “determined” the applicant association's civil rights and obligations.

### *2. Whether a violation of Article 6 § 1 can be imputed to the European Community*

The applicant association alleges a violation of Article 6 § 1 of the Convention “by the Netherlands and by the European Communities [*sic*], more specifically the European Court of Justice in Luxembourg”.

The European Community has separate legal personality as an international intergovernmental organisation (see Article 281 of the EC Treaty, quoted above). At present, the European Community is not a party to the Convention; nor indeed does the applicant association suggest otherwise. The application is therefore incompatible with the provisions of the Convention *ratione personae* within the meaning of Article 35 § 3 of the Convention in so far as the applicant association's complaints must be understood as directed against the European Community itself (see *Confédération française démocratique du travail v. the European Communities, alternatively: their Member States a) jointly and b) severally*, no. 8030/77, Commission decision of 10 July 1978, Decisions and Reports (DR) 13, p. 235) and must be rejected pursuant to Article 35 § 4.

Although thus prevented from examining the procedure of the ECJ in the light of Article 6 § 1 directly, the Court is not dispensed from considering whether the events complained of engage the responsibility of the Kingdom of the Netherlands as a respondent Party.

### *3. Whether a violation of Article 6 § 1 can be imputed to the respondent Party*

In its recent *Boivin* decision (*Boivin v. France and 33 other States* (dec.), no. 73250/01, ECHR 2008) the Court found that the impugned decision had been taken by an international tribunal not subject to the jurisdiction of the Contracting Parties cited as respondents, within the framework of a labour dispute between the applicant and an international organisation possessing

separate legal personality in which the said Contracting Parties had at no time been involved. It held on those grounds that the matters complained of by the applicant fell outwith the Contracting Parties' jurisdiction within the meaning of Article 1 of the Convention.

The present case differs from *Boivin* in that the applicant's complaint is based on an intervention of the ECJ actively sought by a domestic court in proceedings pending before it. It cannot therefore be found that the respondent Party is in no way involved.

In *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, §§ 152-56, ECHR 2005-VI, the Court held as follows:

“152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity (see [*M. & Co. v. the Federal Republic of Germany* (no. 13258/87, Commission decision of 9 February 1990, Decisions and Reports (DR) 64, p. 138] and [*Matthews v. the United Kingdom* [GC], no. 24833/94, § 32, ECHR 1999-I]). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party (see *Confédération française démocratique du travail v. European Communities*, no. 8030/77, Commission decision of 10 July 1978, DR 13, p. 231; *Dufay v. European Communities*, no. 13539/88, Commission decision of 19 January 1989, unreported; and *M. & Co.*, p. 144, and *Matthews*, § 32, both cited above).

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's 'jurisdiction' from scrutiny under the Convention (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports* 1998-I, pp. 17-18, § 29).

154. In reconciling both these positions and thereby establishing the extent to which a State's action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (see *M. & Co.*, p. 145, and [*Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-I]). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *mutatis mutandis*, *Matthews*, cited above, §§ 29 and 32-34, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 47, ECHR 2001-VIII).

155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see *M. & Co.*, cited above,

p. 145, an approach with which the parties and the European Commission agreed). By ‘equivalent’ the Court means ‘comparable’; any requirement that the organisation’s protection be ‘identical’ could run counter to the interest of international cooperation pursued (see paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights (see *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, pp. 27-28, § 75).”

In the same judgment (*loc. cit.*, § 165), the Court recognised the European Community as an organisation in respect of which the above-described rebuttable presumption applied.

The present case differs from *Bosphorus Airways* in that the central issue is not action taken by a Member State of the European Community in order to implement an act of an Institution of the European Community itself, but the guarantees offered by the European Community – specifically, the ECJ – in discharging its own jurisdictional tasks.

It is the applicant association’s position that the protection of its Convention rights by the ECJ was “manifestly deficient in this particular case”.

In *Vermeulen v. Belgium*, judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 234, § 33, the Court held as follows:

“Regard being had, therefore, to what was at stake for the applicant in the proceedings in the Court of Cassation and to the nature of the submissions made by Mr du Jardin, the *avocat général*, the fact that it was impossible for Mr Vermeulen to reply to them before the end of the hearing infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision (see, among other authorities and *mutatis mutandis*, the following judgments: *Ruiz-Mateos*, previously cited, p. 25, § 63; *McMichael v. the United Kingdom*, 24 February 1995, Series A no. 307-B, pp. 53-54, § 80; and *Kerojärvi v. Finland*, 19 July 1995, Series A no. 322, p. 16, § 42).

The Court finds that this fact in itself amounts to a breach of Article 6 § 1.”

The Court has expressed itself in similar terms in other judgments, including *inter alia* *Lobo Machado v. Portugal*, judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I, pp. 206-7, §§ 29-31; *Van Orshoven v. Belgium*, judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1051, §§ 39-41; and *K.D.B. v. the Netherlands*,

judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 631, § 44.

It does not follow, however, that the Court is bound to find a violation of Article 6 § 1 by the Netherlands in that the applicant association lacked an opportunity to respond to the Advocate General's Opinion. The Court cannot ignore the nature of preliminary ruling proceedings before the ECJ under Article 234 of the EC Treaty (formerly Article 177 of the EEC Treaty).

The nexus between a preliminary ruling by the ECJ under Article 234 of the EC Treaty and the domestic proceedings which give rise to it is obvious. It is the domestic court which, finding itself faced with a question of Community law to which it requires an answer in order to decide a case pending before it, seeks the ECJ's assistance in terms of its own choosing; the interpretation which the ECJ then gives of Community law is authoritative and cannot be ignored by the domestic court.

However, as already noted, there is a presumption that a Contracting Party has not departed from the requirements of the Convention where it has taken action in compliance with legal obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. As a corollary, this presumption applies not only to actions taken by a Contracting Party but also to the procedures followed within such an international organisation itself and, in particular, to the procedures of the ECJ. In that respect, the Court also reiterates that such protection need not be identical to that provided by Article 6 of the Convention; the presumption can be rebutted only if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.

Consequently, the Court must examine whether, in the present case, the procedure before the ECJ was accompanied by guarantees which ensured equivalent protection of the applicant's rights. In that respect, it gives weight to the possibility offered by Rule 61 of the ECJ's Rules of Procedure – a possibility which, in the light of the Advocate General's advisory opinion in case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government*, must be accepted as realistic and not merely theoretical – to order the reopening of the oral proceedings after the Advocate General has read out his or her opinion if it finds it necessary to do so and to the fact, as apparent from the ECJ's decision of 28 April 2004 in the present case, that a request for such reopening submitted by one of the parties to the proceedings is considered on its merits. In the present case, the ECJ found that the applicant association had

submitted no precise information which made it appear either useful or necessary to reopen the proceedings.

The Court further notes that the Administrative Jurisdiction Division of the Council of State could have submitted a further request for a preliminary ruling to the ECJ if it had found itself unable to decide the case based on the first such ruling.

As it was, it followed from the ECJ's ruling that as a matter of Community law the respondent Government could have granted a licence for mechanical cockle fishing to the applicant association provided that it was shown beyond reasonable scientific doubt that such fishing would not adversely affect natural habitat in the Wadden Sea. Consequently, had the applicant association been able to proffer evidence to such a standard, the Administrative Jurisdiction Division would not have been prevented from dismissing the appeals lodged by the Wadden Sea Society.

In the light of these considerations, the Court cannot find that the applicant association has shown that the protection afforded to it was 'manifestly deficient' in that it did not have an opportunity to respond to the opinion of the Advocate General. It has therefore failed to rebut the presumption that the procedure before the ECJ provided equivalent protection of its rights.

It follows that in so far as it is directed against the Kingdom of the Netherlands, the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

*Declares* the application inadmissible.

Stanley Naismith  
Deputy Registrar

Josep Casadevall  
President