Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 October 2011[1]

Case C-43/10

Nomarchiaki Aftodioikisi Aitoloakarnanias and Others
(Reference for a preliminary ruling

from the Simvoulio tis Epikratias (Greece))

(Environmental protection — Directive 2000/60/EC — European Union water policy — Diversion of a river — Time-limit for the production of river basin management plans — Advance effects — Public participation — Directive 2001/42/EC — Environmental impact assessment of plans and programmes — Temporal applicability — Directive 85/337/EEC — Environmental impact assessment — Use of earlier reports — Directive 92/43/EEC — Protection of wild fauna and flora — Protection of sites of Community importance — Directive 79/409/EEC — Protection of birds — Protection of special protection areas — Assessment of implications — Prohibition of deterioration — Justification of adverse effects)

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I – Introduction

1. For more than 20 years, the Greek authorities have been working to divert the River Acheloos in western Greece partially into the River Pinios in eastern Greece and to utilise its upper waters for power generation. However, the Simvoulio tis Epikratias (the Council of State) has repeatedly annulled the relevant development consent decisions. The main proceedings concern the validity of a law enacted in 2006 which authorised the project again.

2. The very comprehensive and complex reference for a preliminary ruling focuses on the question whether or to what extent that law is to be assessed on the basis of the Water Framework Directive,[2] even though a transitional period was still running in respect of the relevant provisions in that directive when the law was enacted. It must also be clarified to what extent it is compatible with the EIA Directive[3] to refer, in the legislative process, to an environmental impact assessment conducted in an earlier administrative procedure. The question is also asked whether the Directive on the assessment of the effects of certain plans and programmes on the environment[4] ('the SEA Directive'; SEA stands for 'strategic environmental assessment') was applicable and whether an assessment under the SEA Directive might also have been necessary in addition to the abovementioned environmental impact assessment reports. Lastly, it is necessary to consider several questions relating to the protection of affected Natura 2000 sites under the Habitats Directive.[5]

2 — Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), as amended by Decision No 2455/2001/EC of the European Parliament and of the Council of 20 November 2001 establishing the list of priority substances in the field of water policy in (OJ 2001 L 331, p. 1).

3 — 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), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes (OJ 2003 L 156, p. 17).

4 — Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 (OJ 2001 L 197, p. 30).

5 — 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), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ 2003 L 284, p. 1).

II – Legislative framework

A – *European Union law*

1. The Water Framework Directive

3. The main environmental objectives of the Water Framework Directive and possible exceptions are laid down in Article 4:

'1. In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iv) …;

without prejudice to the relevant international agreements referred to in Article 1 for the parties concerned;

(b) for groundwater

…

3. Member States may designate a body of surface water as artificial or heavily modified, when:

(a) the changes to the hydromorphological characteristics of that body which would be necessary for achieving good ecological status would have significant adverse effects on:

(i) the wider environment;

(ii) navigation, including port facilities, or recreation;

(iii) activities for the purposes of which water is stored, such as drinking-water supply, power generation or irrigation;

(iv) water regulation, flood protection, land drainage, or

(v) other equally important sustainable human development activities;

(b) the beneficial objectives served by the artificial or modified characteristics of the water body cannot, for reasons of technical feasibility or disproportionate costs, reasonably be achieved by other means, which are a significantly better environmental option.

Such designation and the reasons for it shall be specifically mentioned in the river basin management plans required under Article 13 and reviewed every six years.

4. …

5. Member States may aim to achieve less stringent environmental objectives than those required under paragraph 1 for specific bodies of water when they are so affected by human activity, as determined in accordance with Article 5(1), or their natural condition is such that the achievement of these objectives would be infeasible or disproportionately expensive, and all the following conditions are met:

(a) the environmental and socioeconomic needs served by such human activity cannot be achieved by other means, which are a significantly better environmental option not entailing disproportionate costs;

(b) Member States ensure,

— for surface water, the highest ecological and chemical status possible is achieved, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution,

— …

(c) no further deterioration occurs in the status of the affected body of water;

(d) the establishment of less stringent environmental objectives, and the reasons for it, are specifically mentioned in the river basin management plan required under Article 13 and those objectives are reviewed every six years.

6. …

7. Member States will not be in breach of this Directive when:

— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

— failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.

8. When applying paragraphs 3, 4, 5, 6 and 7, a Member State shall ensure that the application does not permanently exclude or compromise the achievement of the objectives of this Directive in other bodies of water within the same river basin district and is consistent with the implementation of other Community environmental legislation.

9. Steps must be taken to ensure that the application of the new provisions, including the application of paragraphs 3, 4, 5, 6 and 7, guarantees at least the same level of protection as the existing Community legislation.'

4. Under Article 5 of the Water Framework Directive, the Member States were to conduct an analysis of a certain characteristics of each river basin district by 22 December 2004. Under Article 8 of the Water Framework Directive, the Member States should establish programmes for the monitoring of waters by 22 December 2006. They must report on both measures to the Commission within three months under Article 15(2).

5. Article 11 governs the programmes of measures which the Member States are to establish for the river basin districts. The time-limit for their production is laid down in paragraph 7:

'The programmes of measures shall be established at the latest nine years after the date of entry into force of this Directive and all the measures shall be made operational at the latest 12 years after that date.'

6. Article 13 of the Water Framework Directive lays down rules on the production of river basin management plans. Article 13(1) imposes the obligation to produce plans and Article 13(6) specifies the time-limit for their publication:

'1. Member States shall ensure that a river basin management plan is produced for each river basin district lying entirely within their territory.

…

6. River basin management plans shall be published at the latest nine years after the date of entry into force of this Directive.'

7. Article 14 of the Water Framework Directive contains rules on public participation:

'1. Member States shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans. Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users:

(a) a timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;

(b) an interim overview of the significant water management issues identified in the river basin, at least two years before the beginning of the period to which the plan refers;

(c) draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers.

On request, access shall be given to background documents and information used for the development of the draft river basin management plan.

2. Member States shall allow at least six months to comment in writing on those documents in order to allow active involvement and consultation.'

8. Under Article 24, the period for the transposition of the Water Framework Directive ends on 22 December 2003.

2. The EIA Directive

9. Article 2(1) defines the aim of the EIA Directive:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.'

10. However, Article 1(5) of the EIA Directive contains an exception for legislative acts:

'This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.'

11. Article 5 of the EIA Directive governs the information which must be provided in an environmental impact assessment:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.'

12. Points 12 and 15 of Annex I to the EIA Directive include works for the transfer of water resources and dam projects.

3. The SEA Directive

13. Plans and programmes are defined in Article 2(a) of the SEA Directive:

‘For the purposes of this Directive:

(a) “plans and programmes” shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

— which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

— which are required by legislative, regulatory or administrative provisions’.

14. Article 3 of the SEA Directive lays down which plans and programmes are to be subject to an assessment. Paragraphs 1 to 5 are of particular relevance:

‘1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

6. …’

15. Article 11 of the SEA Directive governs the relationship with the requirements under the EIA Directive and other environmental assessment procedures:

‘1. An environmental assessment carried out under this Directive shall be without prejudice to any requirements under Directive 85/337/EEC and to any other Community law requirements.

2. For plans and programmes for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, Member States may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation in order, inter alia, to avoid duplication of assessment.

3. …'

16. The SEA Directive was, under Article 13(1), to be transposed by 21 July 2004.

17. Article 13(3) governs the temporal application of the SEA Directive. In essence, it applies only to procedures which were begun after the end of the transposition period. It applies to procedures begun before that time only with reservations:

'The obligation referred to in Article 4(1) shall apply to the plans and programmes of which the first formal preparatory act is subsequent to the date referred to in paragraph 1. Plans and programmes of which the first formal preparatory act is before that date and which are adopted or submitted to the legislative procedure more than 24 months thereafter, shall be made subject to the obligation referred to in Article 4(1) unless Member States decide on a case by case basis that this is not feasible and inform the public of their decision.'

4. The Birds Directive

18. Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds[6] ('the Birds Directive') provides that the Member States are required to identify as special protection areas ('SPAs') the areas most suitable for the protection of the birds referred to in Annex I to the directive and of migratory birds.

19. The first sentence of Article 4(4) of the Birds Directive governs the protection of SPAs:

'In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article.'

5. The Habitats Directive

20. Under Article 4(1) and Annex III (Stage 1) of the Habitats Directive, the Member States propose to the Commission sites which host natural habitat types in Annex I and species in Annex II that are native to their territory. The Commission selects from those proposals pursuant to Article 4(2) and Annex III (Stage 2) the sites which it places on a list of sites of Community importance ('SCIs').

21. Article 4(5) of the Habitats Directive governs the temporal application of the provisions on protection of sites:

'As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

6 — OJ 1979 L 103, p. 1, as amended by Council Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity) (OJ 2003 L 122, p. 36), later consolidated by Directive 2009/147/EC of 30 November 2009 (OJ 2010 L 20, p. 7).

22. By Commission Decision 2006/613/EC of 19 July 2006 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Mediterranean biogeographical region,[7] the following sites were included in the list:

— 'Delta Acheloou, Limnothalassa Mesologgiou-Aitolikou, Ekvoles Evinou, Nisoi Echinades, Nisos Petalas' (GR2310001),

— 'Limni Amvrakia' (GR2310007),

— 'Limni Ozeros' (GR2310008),

— 'Limnes Trichonida kai Lysimachia' (GR2310009) and

— 'Aspropotamos' (GR1440001[8]).

23. According to the EUR-Lex database, this decision was notified to the Member States on 19 July 2006[9] and published in the *Official Journal of the European Union* on 21 September 2006.

24. The provisions on protection of sites are laid down in Article 6(2) to (4) of the Habitats Directive:

'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.'

25. Article 7 of the Habitats Directive extends those provisions to SPAs under the Birds Directive.

7 — OJ 2006 L 259, p. 1.

8 — In the order for reference the code GR2310001 is given, presumably in error.

9 — http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006D0613(1):EN:NOT, under dates.

B – *Greek law*

26. The Water Framework Directive was implemented by Law 3199/2003 [10] and Presidential Decree No 51/2007. [11] The present case concerns amendments to Law 3199/2003 by Law 3481/2006. [12]

27. Article 9 of Law 3481/2006 adds a paragraph 5 to Article 7 of Law 3199/2003:

'5. Until the national management and protection programme for the country's water resources has been approved and the relevant regional management plans have been produced, the abstraction of water from a particular river basin, and the transfer of water to another river basin, shall be permitted on the basis of an approved management plan for the waters of that basin or those basins, for the purpose of:

(a) meeting urgent needs to supply towns and settlements with water or

(b) …,

(c) … or

(d) the generation of power by large hydroelectric works with a capacity exceeding 50 MW. …"

28. Article 13 of Law 3481/2006 concerns the contested project:

'1. The works for the partial diversion of the upper waters of the River Acheloos towards Thessaly shall be classified as large-scale projects of national importance.

2. The management plan for the river basins of the River Acheloos and the River Pinios (Thessaly) is hereby approved ….

3. Approval is given to the environmental conditions and restrictions in respect of which all the procedures, including the publicity procedures and procedures for consultation with interested members of the public and the departments sharing responsibility, laid down by the provisions in force of national and Community legislation on the environment and the protection of antiquities and the cultural heritage, have been fully observed and which relate to the construction and operational phases of the project for the partial diversion of the upper waters of the River Acheloos towards Thessaly. …

4. Public works, and works of the Dimosia Epikhirisi Ilektrismou (Public Power Corporation, DEI), which have been completed or are at the construction stage and relate to works for the diversion of upper waters of the River Acheloos towards Thessaly and works for the generation of electricity may be brought into operation or be completed in accordance with the approved management plan and the environmental conditions approved under the preceding paragraph.'

III – Facts and reference for a preliminary ruling

29. The project at issue before the referring court relates to the partial diversion of the upper waters of the River Acheloos (western Greece) towards the River Pinios (eastern Greece, specifically Thessaly). In addition to the diversion itself, the project also covers various dams which are to be used for power generation.

10 — FEK A' 280, 9 December 2003.

11 — FEK A' 54, 8 March 2007.

12 — FEK A' 162, 2 August 2006.

30. The River Acheloos, which is approximately 220 kilometres long and up to 90 metres wide, has its source in the Pindos mountain range, in the area of Metsovo, and, fed by the waters of a good number of tributaries, it flows into the sea west of Mesolongi in the Gulf of Patras; it is one of the most important natural water systems in the country and constitutes a particularly important fluvial ecosystem.

31. The Pinios also has its source in the Pindos mountains, but runs in an eastward direction through the Thessaly plain and enters the Gulf of Salonica.

32. Various ministerial decisions and, most recently, Law 3481/2006, have been adopted in order for the project to be carried out.

33. In particular, joint ministerial decisions in 1991 and 1992 approved, initially, environmental conditions for individual technical works in the framework of the overall project to divert the River Acheloos towards Thessaly. Those joint ministerial decisions were annulled by judgments delivered by the Simvoulio tis Epikratias in 1994.

34. Following those judgments, a single environmental impact assessment in respect of the entire diversion works was produced under the responsibility of the Ministry for the Environment, Regional Planning and Public Works. In 1995, two ministerial decisions were adopted regarding land use and approval of the environmental conditions. Those decisions were also annulled, in 2000, by judgment of the Simvoulio tis Epikratias.

35. Following that judgment of the Simvoulio tis Epikratias annulling the two decisions, the Ministry for the Environment, Regional Planning and Public Works produced a supplementary environmental impact assessment report on the diversion of the River Acheloos towards Thessaly. In 2003 a joint ministerial decision was adopted regarding approval of the environmental conditions for the construction and operation of the project. That joint ministerial decision was annulled by judgment of the Simvoulio tis Epikratias in 2005.

36. On 6 July 2006 legislative proposals were therefore made in the procedure for the adoption of Law 3481/2006, which provided for river basin management plans for the Acheloos and the Pinios and authorisation of the abovementioned project. The law was adopted with those provisions and entered into force upon publication on 2 August 2006.

37. In the main proceedings, the Nomarchiaki Aftodioikisi Aitoloakarnanias (Prefectural Authority of Aitoloakarnania) and others claim that the project should be annulled in its entirety. In order to decide on this application, the Simvoulio tis Epikratias asks the Court the following 14 questions:

‘(1) Does Article 13(6) of the Water Framework Directive merely set an ultimate temporal limit (22 December 2009) for the drawing up of management plans for water resources or does it lay down, up until that date, a special time-limit for transposition of the relevant provisions of Articles 3, 4, 5, 6, 9, 13 and 15 of that directive?

(2) Should the Court of Justice hold that the foregoing provision of the directive merely sets an ultimate temporal limit for the drawing up of management plans for water resources, the following question must additionally be referred for a preliminary ruling:

Is national legislation that permits the transfer of water from a particular river basin to another river basin, without the plans having yet been drawn up for the river basin districts within which the river basins from and towards which water will be transferred are located, consistent with Articles 2, 3, 4, 5, 6, 9, 13 and 15 of the Water Framework Directive, given that, under Article 2(15) of that directive, the main unit for management of a river basin is the river basin district to which it belongs?

(3) Should the preceding question be answered in the affirmative, the following question must additionally be referred for a preliminary ruling:

For the purpose of Articles 2, 3, 5, 6, 9, 13 and 15 of the Water Framework Directive, is the transfer of water from a river basin district to a neighbouring river basin district permitted? Should the answer be in the affirmative, can the purpose of that transfer be only to meet drinking water supply needs or can irrigation and power generation also be served? Is it in any event a requirement, for the purpose of those provisions of the directive, that the administrative authorities have decided, stating reasons and on the basis of the necessary scientific study, that the receiving river basin district cannot meet with its own water resources the needs which it has in respect of drinking water supply, irrigation and so forth?

(4) Should the Court of Justice hold, as regards Question 1, that Article 13(6) of the Water Framework Directive does not merely set an ultimate temporal limit (22 December 2009) for the drawing up of management plans for water resources, but lays down a special time-limit for transposition of the relevant provisions of Articles 3, 4, 5, 6, 9, 13 and 15 of that directive, the following question must additionally be referred for a preliminary ruling:

Does national legislation, enacted within that special time-limit for transposition, that permits the transfer of water from a particular river basin to another river basin, without the plans having yet been drawn up for the river basin districts within which the river basins from and towards which water will be transferred are located, place, without more, the practical effect of that directive at risk, or is it necessary, in order to assess whether the practical effect of the directive is placed at risk, to take account of criteria such as the scale of the interventions provided for and the objectives of the transfer of the water?

(5) Is a legislative provision which is enacted by a national parliament and which approves river basin management plans without the relevant national rules providing for a public consultation stage in the procedure before the national parliament, and without it being apparent from the case-file that that the consultation procedure before the administrative authorities that is provided for in the directive was observed, compatible with Articles 13, 14 and 15 of the Water Framework Directive which concern the procedures for informing and consulting the public and for public participation?

(6) For the purpose of the EIA Directive, does an environmental impact assessment which relates to the construction of dams and the transfer of water and which was placed for approval before the national parliament after the annulment by a judicial decision of the measure by which it had previously been approved and in respect of which the publicity procedure had previously been observed, without that procedure being observed anew, meet the requirements of Articles 1, 2, 5, 6, 8 and 9 of the directive regarding informing the public and public participation?

(7) Does a plan to divert a river fall within the field of application of the SEA Directive where that plan

(a) concerns the construction of dams and the transfer of water from one river basin district to another,

(b) falls within the field of application of the Water Framework Directive,

(c) concerns works under the EIA Directive and

(d) may have environmental effects on areas covered by the Habitats Directive?

(8) Should the preceding question be answered in the affirmative, the following question must additionally be referred for a preliminary ruling:

For the purpose of Article 13(1) of the SEA Directive, can acts which concerned the scheme at issue and have been annulled with retroactive effect by judicial decisions be considered to be formal preparatory acts which were issued before 21 July 2004 so that there is no obligation to prepare a strategic environmental report?

(9) Should the preceding question be answered in the negative, the following question must additionally be referred for a preliminary ruling:

For the purpose of Article 11(2) of the SEA Directive, if a plan simultaneously falls within the field of application of that directive and within that of the Water Framework Directive and the EIA Directive which also require the environmental effects of that scheme to be assessed, are the assessments which have been drawn up on the basis of the provisions of the Water Framework Directive and the EIA Directive sufficient for observance of the requirements of the SEA Directive, or will an autonomous strategic environmental report have to be prepared?

(10) For the purpose of Articles 3, 4 and 6 of the Habitats Directive, were the areas which were included in the national lists of sites of Community importance (SCIs) and, ultimately, were included in the Community list of SCIs covered by the protection afforded by the Habitats Directive before the publication of Commission Decision 2006/13/EC of 19 July 2006, by which the list of protected SCIs for the Mediterranean biogeographical region was adopted?

(11) Is it possible, for the purpose of Articles 3, 4 and 6 of the Habitats Directive, for the competent national authorities to grant consent authorising the carrying out of a project for the diversion of waters which is not directly connected with or necessary to the conservation of a district included within a special protection area when all the studies that are contained in the file for that project record a complete lack of information or an absence of reliable and updated data regarding the birds in that district?

(12) For the purpose of Articles 3, 4 and 6 of the Habitats Directive, can reasons for which a project to divert waters is undertaken that relate principally to irrigation and secondarily to drinking water supply constitute the imperative public interest which the directive requires in order for that scheme to be permitted to be carried out notwithstanding all its adverse effects on areas protected by the directive?

(13) Should the preceding question be answered in the affirmative, the following question must additionally be referred for a preliminary ruling:

In determining the sufficiency of the compensatory measures which are necessary to ensure that the overall coherence of a Natura 2000 area that is harmed by a project to divert waters is protected, for the purpose of Articles 3, 4 and 6 of the Habitats Directive should criteria such as the breadth of that diversion and the extent of the works which the diversion entails be taken into account?

(14) For the purpose of Articles 3, 4 and 6 of the Habitats Directive, interpreted in the light of the principle of sustainable development as enshrined in Article 6 of the EC Treaty (now Article 11 TFEU), may the competent national authorities grant consent for the carrying out of a project to divert waters within a Natura 2000 area that is not directly connected with or necessary to the preservation of the coherence of that area, when it is apparent from the environmental impact assessment for the project that the project will result in the conversion of a natural fluvial ecosystem into a man-made fluvial and lacustrine ecosystem?’

38. The Prefectural Authority of Aitoloakarnania and Others (Western Greece), the Thessalian Prefectural Authorities of Larisa, Magnisia,[13] Karditsa and Trikala and Others,[14] the electricity undertaking Dimosia Epikhirisi Ilektrismou (DEI), the Hellenic Republic, the Kingdom of Norway and the European Commission submitted written observations. Apart from Norway, these parties were also all represented at the hearing held on 24 May 2011.

IV – Legal assessment

39. The Simvoulio tis Epikratias asks 14 complex questions on the interpretation of four separate directives, which I will examine in sequence: the main focus of the case is the Water Framework Directive (see part A below), which is, however, applicable *ratione temporis* essentially in terms of its advance effects.[15] It is then necessary to answer a question concerning the EIA Directive, more precisely the requirements under that directive relating to the authorisation of a project by legislation (see part B below). In addition, the material and temporal applicability of the SEA Directive and the possibility of a combined environmental assessment under that directive, the Water Framework Directive and the EIA Directive must be considered (see part C below). Lastly, I will examine several questions on the applicability of the Habitats Directive and its requirements in relation to the contested project (see part D below).

40. It should first be pointed out, however, that the argument put forward by DEI to the effect that the Mesohora dam works should be separated from the overall project is irrelevant to the preliminary ruling proceedings. Because the Simvoulio tis Epikratias has not asked any questions in that regard, the Court cannot comment on that point.

A – *The Water Framework Directive*

41. The first question asked by the Simvoulio tis Epikratias is whether the relevant provisions of the Water Framework Directive were applicable to Law 3481/2006 (see below, section 1). It must then be clarified whether the transfer of waters between river basin districts is actually permissible (see below, section 2), whether such a transfer requires management plans within the meaning of the Water Framework Directive (see below, section 3), which objectives may justify a transfer (see below, section 4) and to what extent alternatives must be explored (see below, section 5). As I conclude that those rules are not yet applicable *ratione temporis*, their advance effects are of central importance (see below, section 6). Lastly, the Simvoulio tis Epikratias also asks about the necessary public participation in the adoption of management plans under the Water Framework Directive (see below, section 7).

1. The first question – temporal application of Article 4 of the Water Framework Directive

42. By the first question, the Simvoulio tis Epikratias wishes to ascertain whether Article 13(6) of the Water Framework Directive merely sets an ultimate time-limit for the drawing up of management plans or lays down a special time-limit for transposition of the provisions which relate to such plans.

43. Article 13(6) of the Water Framework Directive provides that management plans must be published at the latest nine years after the date of entry into force of the directive, i.e. on 22 December 2009. On the other hand, under Article 24 the transposition period for the directive expired on 22 December 2003.

13 — The pleadings submitted by the Prefectural Authority of Magnisia are largely identical to parts of the pleadings submitted by DEI.

14 — The pleadings submitted by the Prefectural Authority of Karditsas and by the Prefectural Authority of Trikala and Others are largely identical.

15 — See below, A.6, point 97 et seq.

44. The interrelationship between the management plans and Article 4 of the Water Framework Directive is of particular interest to the main proceedings and the reference. That provision contains the principal environmental objectives of the directive. Under Article 4(1)(a)(i), Member States must implement the necessary measures to prevent deterioration of the status of all bodies of surface water, such as the River Acheloos. Furthermore, Article 4(1)(a)(ii) and (iii) requires that all bodies of surface water be protected, enhanced and restored with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of the directive, i.e. 22 December 2015.

45. In principle, Greece also had to transpose Article 4 of the Water Framework Directive within the three-year period laid down in Article 24.[16] However, the environmental objectives set out in Article 4(1) do not apply to any action whatsoever, but only *in* making operational the *programmes of measures* specified in the *management plans*. Management plans are subject to the nine-year transitional period laid down in Article 13(6). The same period applies under Article 11(7) to the establishment of programmes of measures. There is a further period of three years, i.e. up to 22 December 2012, for making operational those programmes of measures.

46. Such plans and programmes must therefore have existed and been implemented only since 22 December 2009. By the end of the following year the programmes of measures should have been implemented. The Greek authorities have therefore been required since the end of 2009 to apply Article 4 of the Water Framework Directive, that is to say they must examine whether already approved measures, such as the diversion project, may continue to be implemented in the light of environmental objectives or must be modified or possibly even abandoned.

47. However, the duties which have existed since the end of 2009 possibly have no immediate relevance to the main proceedings, which concern the validity of provisions of Law 3481/2006. It must be assumed that in accordance with the applicable national procedural law, the legal situation when that law was enacted is relevant. However, Article 13(6) and Article 11(7) of the Water Framework Directive did not require that management plans or programmes of measures be in existence in 2006. In the absence of such plans and programmes, the obligations under Article 4 could not yet be applied, despite the expiry of the transposition period.

48. By Article 13(2) of Law 3481/2006, however, management plans were adopted for the Acheloos and Pinios rivers. If the Simvoulio tis Epikratias were to find that these were plans within the meaning of Article 13 of the Water Framework Directive, it could also conclude that the contested project is part of a programme of measures within the meaning of Article 11 of the directive.

49. The first question can therefore also be construed as asking whether Article 4 of the Water Framework Directive was applicable when the time-limits for the creation of the conditions for its application had not yet expired, but those conditions were nevertheless already satisfied.

50. It should be stated, first of all, that in accordance with the scheme of the directive there was no such obligation at the material time. The obligation to apply Article 4 arose only upon the expiry of the deadline for establishing the management plans and programmes of measures. Before that date under European Union law it was permissible for Article 4 not to be applied.

51. This does not preclude the *national* provisions implementing the Water Framework Directive, in particular Article 4, being applicable to management plans and programmes of measures produced ahead of time, irrespective of European Union law.[17] Such plans and programmes should normally be applied, in accordance with the will of the transposing legislature, in the same way before and after the expiry of the time-limit for their production.

16 — See Case C-32/05 *Commission* v *Luxembourg* [2006] ECR I-11323, in particular paragraph 63, in which the validity of that period for transposing the provisions of the Water Framework Directive was not called into question.

17 — See Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 29, and Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* [2011] ECR I-6561, paragraph 70.

52. It is a particular feature of the present case, however, that the management plan in question and possible measures, in particular the consent given to the project at issue, were adopted in the form of a law which amended the Greek provisions implementing the Water Framework Directive.[18] It would therefore seem unlikely that the national implementing legislation for the Water Framework Directive would oppose the contested project.

53. The answer to the first question is therefore that Article 13(6) and Article 11(7) of the Water Framework Directive do not set a time-limit for transposition of Article 4 of the directive, but merely an ultimate time_limit for the production of management plans or programmes of measures. The directive does not, however, require the application of Article 4 before the expiry of that time-limit.

54. On the basis of this answer, there is much to suggest that Questions 2 and 3, which are asked only on a conditional basis and which concern the requirements under the Water Framework Directive in respect of the transfer of waters to other river basin districts, are of no further interest to the Simvoulio tis Epikratias. They may nevertheless be informative in determining the advance effects of the directive. I will therefore examine them in the alternative in sections 2, 3, 4 and 5.

2. The first part of the third question – the permissibility of the diversion of water to other river basin districts

55. It is first necessary to examine the first part of the third question, namely whether the diversion of water from one river basin district to a neighbouring river basin district can actually be compatible with the Water Framework Directive.

56. In this regard, the Simvoulio tis Epikratias states that the Water Framework Directive does not contain any provisions relating to the diversion of water between river basin districts. It thus rightly considers that there is not an absolute prohibition on the diversion of water.

57. This is not altered by the fact that – as the Simvoulio tis Epikratias stresses – point 12 of Annex I to the EIA Directive mentions works for the diversion of water resources. DEI rightly argues that the EIA Directive neither authorises nor prohibits the projects mentioned in its annexes. A diversion of water between two river basin districts may significantly affect the environment. In that case, it could be expected to be incompatible with the environmental objectives laid down in Article 4(1) of the Water Framework Directive. However, Article 4 does permit derogations from those objectives under certain conditions.

58. Article 4 of the Water Framework Directive is therefore of primary importance.

a) The conservation and restoration duties under Article 4 of the Water Framework Directive

59. Article 4(1)(a) of the Water Framework Directive requires the deterioration of the status of all bodies of surface water to be prevented and good surface water status to be achieved by the end of 2015. For artificial and heavily modified bodies of water, at least good ecological potential and good chemical status must be achieved.

60. It would have to be determined on the basis of Article 4(3) of the Water Framework Directive whether the Acheloos should be regarded as an artificial or heavily modified body of water. Such classification would seem unlikely, however, before the diversion project is implemented. I will therefore assume hereinafter that that river is not an artificial or heavily modified body of water.

18 — See point 27 of the section on legislative framework.

61. Consequently, under Article 4(1)(a) of the Water Framework Directive, Greece must in principle prevent any further deterioration of the Acheloos and even take measures to restore the good status of that river if its status is not good. Greece must therefore eliminate adverse effects of existing projects and deterioration of waters caused in the past.

b) The application of Article 4 of the Water Framework Directive to projects

62. Article 4 of the Water Framework Directive not only contains obligations in relation to programmes, but also concerns specific projects, at least where they affect the status of a body of water significantly. Article 4(7) permits the status of waters to be adversely affected by new modifications or alterations under certain conditions. Those alterations may include projects.

63. Consequently, the diversion project must, in principle, also be included in the programme of measures for the Acheloos river basin district. Under part B of Annex VI to the Water Framework Directive, such programmes may include abstraction controls (viii) and construction projects (xi).

c) Good water status

64. Article 4 of the Water Framework Directive may therefore preclude the diversion of waters into another river basin district where it prevents good water status being maintained or achieved.

65. The Water Framework Directive defines the desired water status. Under Article 2(18) of the Water Framework Directive, surface water status is good when both its ecological status and its chemical status are at least ‘good’. Good chemical status refers to concentrations of pollutants in accordance with Article 2(24). The requirements laid down for good ecological status are laid down in Article 2(22) and Annex V.

66. The partial diversion of a river, i.e. the abstraction of significant quantities of water from a river basin district, is not expressly covered by the criteria for good surface water status. However, the Commission argues reasonably that the impoundment of surface water with a view to partial diversion affects its status. Reducing the quantity of water can also have an adverse effect on the ecological or chemical status of the water. Thus, under point 1.1.1 of Annex V to the Water Framework Directive, the assessment of status for rivers must include the hydrological regime, in particular the quantity of water flow, and the morphological conditions, i.e. river depth and width variation, structure and substrate of the river bed and structure of the riparian zone. Accordingly, letter (viii) of part B of Annex VI provides that programmes of measures may include abstraction controls; letter (i) of the first indent of Article 8(1) requires the monitoring of the volume and level or rate of flow to the extent relevant for ecological and chemical status and ecological potential of surface waters, and in accordance with the 41st recital in the preamble, for water quantity overall principles should be laid down for control on abstraction and impoundment in order to ensure the environmental sustainability of the affected water systems.

67. If the Simvoulio tis Epikratias should therefore conclude that the diversion project prevents good water status being maintained or achieved, it would be incompatible with the environmental objectives laid down in Article 4(1) of the Water Framework Directive.

d) Derogation from environmental objectives

68. However, infringing the environmental objectives is not an insuperable obstacle for a project. Article 4 of the Water Framework Directive also contains provisions concerning derogation from the environmental objectives.

69. Article 4(4) of the Water Framework Directive permits the time-limits for achieving good status to be extended. This primarily relates to the obligation to restore waters. The prohibition on deterioration of waters, on the other hand, is not qualified. This provision is not therefore applicable to the authorisation of a measure which affects water status.

70. Article 4(5) of the Water Framework Directive permits less stringent environmental objectives to be achieved for specific bodies of water when they are so affected by human activity that the achievement of these objectives would be infeasible or disproportionately expensive, and certain additional conditions are met. That provision may be significant after the diversion project has been implemented, but it cannot be applicable as regards the authorisation of the project.

71. Article 4(6) of the Water Framework Directive is likewise not relevant, as that provision concerns only temporary deterioration in water status.

72. As regards a new project, as in this case, the legitimacy of a derogation from the environmental objectives should rather be assessed having regard to Article 4(7) of the Water Framework Directive. That provision sets out in detail how a derogation from the environmental objectives under Article 4(1) by new projects can be justified by overriding interests. Other conditions governing derogations from Article 4(1) are laid down in Article 4(8) and (9). The conditions under Article 4(7) to (9) are addressed, to some extent, in the other elements of the second and third questions.

73. Should the Court answer the first part of the third question asked by the Simvoulio tis Epikratias, the answer can be summarised as follows: the authorisation of the diversion of waters from one river basin district to a neighbouring river basin district is compatible with the Water Framework Directive if it satisfies the conditions under Article 4(1), (7), (8) and (9) of the Water Framework Directive.

3. The second question – the need for management plans for river basin districts

74. By the second question, the Simvoulio tis Epikratias wishes to know whether national legislation that permits the diversion of water from a particular river basin to another river basin, without the plans having yet been drawn up for the river basin districts within which the river basins are located, is consistent with the Water Framework Directive.

75. At first glance, this question appears hypothetical, since Law 3481/2006 contains management plans for both affected river basins. It is not evident that the river basin districts in question also include other river basins for which there are still no management plans. However, there are doubts as to the validity of the management plans adopted. Furthermore, the Simvoulio tis Epikratias takes the view that under Articles 3(1), 5(1), 11(1) and 13(1) of the Water Framework Directive management plans and programmes of measures should not be established, as in the present case, in isolation for specific river basins, but that comprehensive national and regional plans are needed. Otherwise, it is unlawful in any case to divert water from one river basin district to another river basin district. The question is thus not only whether there are management plans for the specifically affected river basin districts, but also whether plans must exist for the rest of Greece.

76. Under Article 3(1) of the Water Framework Directive, all river basins are assigned to river basin districts. Under Article 13(1), Member States must ensure that a river basin management plan is produced for *each* river basin district lying entirely within their territory. Under Article 11(1), they must also ensure the establishment for *each* river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the – previously conducted – analyses required under Article 5, in order to achieve the objectives established under Article 4.

77. The Member States are thus required to produce a management plan for each river basin district by the expiry of the deadline, but it does not follow directly from these provisions that a diversion of water between river basin districts is unlawful if management plans do not exist for all the Member State's river basin districts.

78. As has already been explained, however, Article 4 of the Water Framework Directive may preclude such a diversion where it prevents good surface water status being maintained or achieved. In the present case, the transfer would be lawful only if the conditions under Article 4(7) are satisfied.

79. Under Article 4(7)(b) of the Water Framework Directive, the reasons for a project which is contrary to the environmental objectives under Article 4(1) must be specifically set out and explained in the river basin management plan required under Article 13 and the objectives must be reviewed every six years. Furthermore, under Article 4(8), it must be ensured that any derogation does not permanently exclude or compromise the achievement of the objectives of the directive in other bodies of water within *the same* river basin district.

80. Consequently, the affected river basin districts must be analysed comprehensively and their management must have been planned before measures which are inconsistent with the environmental objectives under Article 4(1) of the Water Framework Directive may be implemented.

81. On the other hand, the Water Framework Directive does not contain any provisions which make such measures expressly dependent on an analysis of *other* river basin districts or on the establishment of management plans for river basins in those districts. Such analyses and plans may be necessary in an individual case only in so far as recourse to other river basin districts represents a possible alternative to the proposed diversion.

82. Should the Court answer this question, it should therefore find that the affected river basin districts must be analysed comprehensively and their management must have been planned before measures which are inconsistent with the environmental objectives under Article 4(1) of the Water Framework Directive may be implemented. Analyses of other river basin districts and corresponding management plans for river basins in those districts are necessary only in so far as recourse to those river basin districts is a possible alternative to the proposed measures.

4. The second part of the third question – the permissible objectives of a diversion

83. With the second part of the third question, the Simvoulio tis Epikratias is seeking to ascertain whether the purpose of the diversion must be only to meet drinking water supply needs or whether irrigation and power generation can also be served.

84. Under Article 4(7)(c) of the Water Framework Directive, the reasons for alterations must be of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in Article 4(1) must be outweighed by the benefits of the new alterations to human health, to the maintenance of human safety or to sustainable development.

85. Adequate drinking water supply for the population is, as a rule, of overriding public interest and, moreover, is also generally of great importance for human health. Accordingly, the 15th recital in the preamble to the Water Framework Directive designates the supply of water as a service of general interest.

86. Furthermore, the Prefectural Authorities of Karditsa and Trikala rightly point out that Article 4(3)(a)(iii) of the Water Framework Directive in principle recognises, alongside drinking water supply, power generation and irrigation as legitimate public interests. However, the latter two interests are less important than drinking water supply, since they are primarily economic in nature.

87. Nevertheless, despite its detrimental effects on the environment, water power is a typical example of sustainable power generation.

88. It also cannot be ruled out *a priori* that the irrigation of agricultural land is to be regarded as an overriding public interest or – perhaps – as a sustainable development measure. It may be a legitimate objective of national agricultural policy to permit irrigation in certain areas.

89. Recognition of these objectives does not necessarily mean, however, that they justify the project. Both variants of a justifying objective mentioned in Article 4(7)(c) of the Water Framework Directive effectively weigh up the benefits of the measure and the adverse effects on maintaining or achieving good water status. For measures for the benefit of human health, the maintenance of human safety or sustainable development, express provision is made for the interests to be weighed. *A fortiori*, another public interest in a measure – by nature less important – must outweigh the adverse effects of the measure in order to be recognised as 'overriding'.

90. In that weighing exercise, the Member States enjoy an appropriate margin of discretion, since the decision is complex and involves predictions.[19] However, particular consideration must be given, having regard to the interest in providing irrigation, to the argument put forward by the Prefectural Authority of Aitoloakarnania and Others that the cultivation of cotton can be particularly harmful to the environment.[20] The interest in a particularly harmful form of agriculture is of relatively low importance. Contrary to the claim made by the Prefectural Authority of Aitoloakarnania and Others, however, it cannot be stated unreservedly that European agricultural policy would be opposed to the cultivation of cotton. Quite the reverse, support for such cultivation is still laid down in primary law, namely in Protocol No 4 on cotton, which is annexed to the Act of Accession for Greece,[21] and is thus also implemented in secondary law.[22]

91. The second part of the third question should therefore be answered, if necessary, to the effect that, under Article 4(7)(c) of the Water Framework Directive, the objectives of drinking water supply, irrigation and power generation may justify measures which are inconsistent with the environmental objectives under Article 4(1) where the contribution made by those measures to achieving those objectives outweighs the adverse effect on the environmental objectives.

5. The third part of the third question – examination of alternatives

92. The third part of the third question is important, alongside other factors, in weighing up the abovementioned objectives. The Simvoulio tis Epikratias would like to know whether it is in any event a requirement that the administrative authorities have decided, stating reasons and on the basis of the necessary scientific study, that the receiving river basin district cannot meet with its own water resources the needs which it has in respect of drinking water, irrigation and so forth.

19 — See, for example, Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 119; Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 61; Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 63; Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraphs 41 and 68, each regarding social-policy and employment-policy objectives, and in environmental law my Opinions in Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, point 125, and in Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-6995, point 58.

20 — Cf. recital 13 in the preamble to the now repealed Council Regulation (EC) No 1051/2001 of 22 May 2001 on production aid for cotton (OJ 2001 L 148, p. 3): 'The cultivation of cotton in regions not suited to it is likely to have harmful effects on the environment as well as on the agricultural economy of those regions where this crop is important ...'. See also the study by Alliance Environnement commissioned by the Commission, *Évaluation des impacts sur l'environnement des mesures de la PAC relatives au coton* (Evaluation of the environmental impacts of CAP measures related to cotton) (2007), http://ec.europa.eu/agriculture/eval/reports/coton/index_fr.htm, visited on 11 July 2011.

21 — OJ 1979 L 291, p. 174.

22 — See Council Regulation (EC) No 637/2008 of 23 June 2008 amending Regulation (EC) No 1782/2003 and establishing national restructuring programmes for the cotton sector (OJ 2008 L 178, p. 1), as amended by Council Regulation (EC) No 472/2009 of 25 May 2009 (OJ 2009 L 144, p. 1).

93. As the Commission argues, the necessity of establishing the needs in the receiving river basin district stems from the examination of alternatives provided for in Article 4(7)(d) of the Water Framework Directive. Under that provision, the justification of a derogation from the environmental objectives under Article 4(1) also requires that the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.

94. Consequently, before a diversion, there must be an examination of whether the receiving river basin district can meet its water needs from its own resources at proportionate cost and whether that would constitute a significantly better environmental option. It would also be necessary in this connection to consider reorganising agriculture to involve cultivation of other crops which would require less irrigation.[23]

95. The result of that assessment is a part of the reasons which are necessary for any diversion under the Water Framework Directive. It should therefore be specifically set out and explained in the management plan under Article 4(7)(b) of the Water Framework Directive.

96. The answer to the third part of the third question should thus be that under Article 4(7)(b) and (d) of the Water Framework Directive it must be set out and explained in the management plan that the receiving river basin district cannot meet its water needs with its own resources at proportionate cost or that this would not constitute a significantly better environmental option.

6. The fourth question – advance effects of the Water Framework Directive

97. The Simvoulio tis Epikratias asks the fourth question in case, in particular, Article 4 of the Water Framework Directive is not applicable *ratione temporis* to the contested project. In accordance with my view on the first question,[24] it must therefore be answered.

98. The Simvoulio tis Epikratias wishes to know whether the practical effect of the Water Framework Directive is placed at risk if the diversion of water from one river basin to another river basin is permitted, without the management plans having yet been drawn up for the river basin districts, or whether account must be taken of criteria such as the scale of the interventions provided for and the objectives of the diversion of water.

a) The case-law on the advance effects of directives

99. This question is based on settled case-law, according to which, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. Such an obligation to refrain is owed by all the national authorities and covers the adoption of any measure, general or specific, liable to produce such a compromising effect.[25] It is also owed by the Member States, by virtue of the application of Article 4(3) TEU in conjunction with the third paragraph of Article 288 TFEU, during a transitional period in which the Member States are authorised to continue to apply their national systems, even though those systems do not comply with the directive in question.[26]

23 — See the study cited in footnote 20, p. 12.

24 — See above, point 53.

25 — Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45, and Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others* [2011] ECR I-4599, paragraph 78 and the cited case-law.

26 — Case C-316/04 *Stichting Zuid-Hollandse Milieufederatie* [2005] ECR I-9759, paragraph 42; Case C-138/05 *Stichting Zuid-Hollandse Milieufederatie* [2006] ECR I-8339, paragraph 42; and *Stichting Natuur en Milieu and Others*, paragraph 79.

100. Consequently, during the transitional period for the establishment of management plans and programmes of measures, the Member States must also refrain from taking any measures liable seriously to compromise the attainment of the results prescribed by the Water Framework Directive.

101. In view of the prohibition of deterioration laid down in Article 4(1)(a)(i) of the Water Framework Directive, this obligation is even more justified than in the case of other directives. The environmental objectives of that provision do not simply amount to the prohibition of deterioration, i.e. an obligation to prevent damage. Rather there is also, at the latest after the expiry of the transitional period for producing management plans, a duty to restore pursuant to letter (ii), i.e. a duty to achieve good water status. It would be contradictory first to cause the water status to deteriorate, only to have to restore it again subsequently.

b) Protection of legitimate expectations and legal certainty

102. The principles of protection of legitimate expectations and legal certainty also do not preclude the prohibition of deterioration having an advance effect.

103. In accordance with settled case-law the principle of the protection of legitimate expectations forms part of the European Union legal order and must be observed by the Member States when they exercise the powers conferred on them by European Union legislation.[27] Where a person has acquired a right under legislation a subsequent legislative amendment retroactively depriving him of that right is incompatible with that principle.[28] Accordingly, the substantive rules of European Union law must be interpreted as applying to situations which are *fully established* before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them.[29]

104. In the present case, however, there are no acquired rights to the authorisation of the diversion project, as the Simvoulio tis Epikratias has annulled all previously issued development consents. The situation is not already fully established.[30] The mere fact of conducting a procedure for the issuing of development consent does not establish any right that the procedure be successfully completed.

105. It is also not a breach of the principle of protection of legitimate expectations if, during a procedure for obtaining development consent, more stringent conditions applied to the granting of such consent. It is permissible in principle to apply new rules to the future consequences of situations which arose under the earlier rules.[31] That is because that principle cannot be extended to the point of justifying a general prohibition on a new rule applying to the future effects of situations which arose under the earlier rules.[32]

106. The ongoing development consent procedure must be regarded as a situation which arose under the earlier rules; the final decision is a future effect of that situation which must be determined on the basis of the new rules.[33] In this respect, the principle of protection of legitimate expectations is not relevant.

27 — Case 316/86 *Krücken* [1988] ECR 2213, paragraph 22, and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 44 and the cited case-law.

28 — See, with regard to claims for the refund of overpaid taxes, Case C-107/10 *Enel Maritsa Iztok 3* [2011] ECR I-3873, paragraph 39 and the cited case-law.

29 — Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 49, and Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-9465, paragraph 44.

30 — See Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraph 45.

31 — Case C-60/98 *Butterfly Music* [1999] ECR I-3939, paragraph 25 and the cited case-law; *Commission* v *Freistaat Sachsen*, cited in footnote 29, paragraph 43; and Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 46.

32 — *Commission* v *Freistaat Sachsen*, paragraph 43 and the cited case-law.

33 — *Germany* v *Commission*, paragraph 46 et seq.

107. However, the advance effect of the prohibition of deterioration is limited by the Court's case-law regarding the application of fundamental procedural law amendments to proceedings which had already been initiated when the relevant provisions of the directive took effect. Procedural rules are generally held to apply to all legal proceedings pending at the time when they enter into force.[34] As the Thessalian Prefectural Authorities and DEI state, however, the Court has refused to apply significant amendments to procedural law to ongoing proceedings even after the transposition period has expired, in both environmental law[35] and public procurement.[36] In those judgments it was a matter of further assessing the environmental effects under the EIA Directive in ongoing consent procedures, which would have required expensive studies and public participation, and in public procurement law of examining whether the requirements under Directive 93/38/EEC[37] governing the formal tender procedure had to be observed in ongoing tender procedures. The Court wanted to avoid a situation where the relevant procedures, which are already complex at national level and which are formally initiated prior to the date of the expiry of the period for transposing a directive, are made more cumbersome and time-consuming by the specific requirements imposed by the directive, and situations already established are affected by it.[38] The advance effect of the Water Framework Directive is thus not intended to lead to additional, expensive procedural steps. A distinction should be made, however, with the application of substantive law requirements, such as the prohibition of deterioration.[39]

108. In determining the precise extent of the advance effect of the prohibition of deterioration, the considerations highlighted with regard to Article 4 of the Water Framework Directive in connection with the second and third questions may be helpful. Nevertheless, not every impending infringement of Article 4 seriously threatens the objectives of the directive. Rather, the threat must *continue* even after the expiry of the time-limits for the application of Article 4 and do so not only temporarily. Furthermore, it must be serious, that is to say not merely minor. Lastly, the advance effects of the Water Framework Directive may not extend so far that the Member States have to anticipate the preparatory steps for the application of the directive or the duty to restore, contrary to the timetable expressly laid down.

c) The circumstance of this case

109. The following points should therefore be made with regard to the circumstance of this case:

110. The continuing character of the diversion project is obvious. The competent national authorities, and if appropriate the Simvoulio tis Epikratias, must examine whether it seriously threatens the objectives of the directive.

111. However, a serious threat cannot be taken to exist solely because the diversion is implemented before the management plans for the relevant districts exist. After the expiry of the transitional period, such plans would indeed be necessary, in accordance with what has been said on the second question,[40] but it could emerge, entirely independently of those plans, that the diversion does not infringe, or does so only to a minor extent, the environmental objectives under Article 4(1) of the Water Framework Directive.

34 — Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9; Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405, paragraph 19; and Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission and Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, paragraph 75.

35 — Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23, and Case C-209/04 *Commission* v *Austria* (Lauteracher Ried) [2006] ECR I-2755, paragraph 56 et seq., with regard to the Habitats Directive.

36 — Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraph 35 et seq.

37 — Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

38 — See the judgments in *Gedeputeerde Staten van Noord-Holland* and *Commission* v *Austria* (Lauteracher Ried), cited in footnote 35.

39 — See, with regard to the Habitats Directive, my Opinion of 28 June 2011 in the pending Case C-404/09 *Commission* v *Spain* (Alto Sil), point 69 et seq.

40 — See above, point 75 et seq.

112. The first step in determining whether there is a serious threat to the objectives of the Water Framework Directive as a result of the diversion is therefore to examine, on the basis of the criteria laid down in the directive, the effects of the project on the objectives of Article 4(1).

113. If it is concluded that the objectives are seriously jeopardised, it is also necessary to examine whether the measure is justified, as before the expiry of the transitional period freedom of action may not be subject to any greater restriction than would be the case if the Water Framework Directive were fully applicable. In addition, as has already been explained, a breach of the environmental objectives laid down in Article 4(1) of the Water Framework Directive may be justified.

114. There are two possible legal bases for a justification: first, the abovementioned treatment of the project as a new modification to the physical characteristics of a body of surface water or a new sustainable human development activity within the meaning of Article 4(7) of the Water Framework Directive [41] and, second, the treatment of the water as already affected by human activity within the meaning of Article 4(5). The latter provision would facilitate a justification. Both grounds for justification must be applied having regard to Article 4(8) and (9).

115. Article 4(5) of the Water Framework Directive has not yet been discussed, since thus far it has been a question of *new* modifications to a body of water. Such modifications are subject to Article 4(7). In the context of the advance effects of the Water Framework Directive, however, it is necessary to prevent measures which, at a *later* date, namely upon the expiry of the transitional period for the application of Article 4 at the end of 2009, would lead to a status which was incompatible with that provision. If, therefore, the effect of Law 3481/2006 was that the river Acheloos was already significantly affected by human activity at the end of 2009, that effect, and consequently that law, must be assessed in the light of Article 4(5).

116. It is apparent from the information provided by the parties that one dam in particular may have been largely completed, although the actual diversion has not yet been implemented. It seems therefore unlikely that the Acheloos is already affected within the meaning of Article 4(5) of the Water Framework Directive by the diversion.

117. Consequently, in assessing whether the diversion project would seriously jeopardise the objectives of the Water Framework Directive, Article 4(7) of the Water Framework Directive will also probably be relevant. Reference can be made in this respect to what has been said on the second and third questions.

118. As opposed to when the Water Framework Directive is fully applicable, there is also no need, in connection with the justification of adverse effects on the environmental objectives under Article 4(1), for management plans already to exist. In accordance with the express wording of Article 13(6), those plans were not yet due. In addition, their adoption requires a considerable amount of time on account of the necessary public participation. [42] Nevertheless, a justification requires a scientific basis comparable to that of the management plans. That is because without the appropriate information, the necessary weighing up exercise and examination of alternatives is not possible. The competent authorities would not be able properly to assess either the benefits of the measure or its adverse effects.

119. To some extent, results of the transposition of the Water Framework Directive must already have existed when Law 3481/2006 was enacted and could have been useful to that assessment. For example, under Article 5(1) of the Water Framework Directive it was necessary to produce for each river basin district by 22 December 2004 an analysis of its characteristics, a review of the impact of human activity

41 — See above, point 72 et seq.

42 — See below, point 125.

on the status of surface waters and on groundwater, and an economic analysis of water use. The programmes for the monitoring of water status under Article 8 and the timetables and work programmes for the production of the management plans under Article 14(1)(a) also had to be largely prepared, since they were due on 22 December 2006. Only in so far as further information was necessary for a justification would they have had to be produced in anticipation of the subsequent transposition of the Water Framework Directive.

120. Moreover, the objectives of the measure are crucial with regard to this justification, as was discussed in connection with the third part of the third question. [43]

121. In summary, the answer to the fourth question is that national legislation which is enacted before the expiry of the time-limit for producing management plans or programmes of measures and which permits the diversion of water from a particular river basin to another river basin seriously affects the objectives of the Water Framework Directive if that diversion leads to water status which for a lasting period and not merely insignificantly is incompatible with Article 4 of the directive. A justification on the basis of overriding public interests is also possible in connection with the advance effects of Article 4; management plans are not necessary, but the national legislation must be adopted on the basis of sufficient data.

7. The fifth question – public participation

122. By the fifth question, the Simvoulio tis Epikratias is seeking to ascertain whether a legislative provision which is enacted by a national parliament and which approves river basin management plans is compatible with the Water Framework Directive, although the relevant national rules do not provide for a public consultation stage in the procedure before the national parliament and it is not apparent from the documents before that court that the consultation procedure that is provided for in the directive was observed by the administrative authorities.

123. The Prefectural Authority of Magnisia and DEI consider that question to be hypothetical, as the obligation to produce management plans did not yet exist when the contested law was enacted. Nevertheless, the main proceedings also concern two management plans which were adopted by Law 3481/2006 and, by all appearances, continue to be in force, that is to say after the expiry of the transitional period. Furthermore, the Simvoulio tis Epikratias possibly takes the view that those management plans were necessary under Greek law, which it wishes to apply prospectively in accordance with the procedural requirements of the directive. It cannot therefore be ruled out that an answer to this question is necessary to the decision in the main proceedings.

124. The lack of consultation could infringe Article 14 of the Water Framework Directive. That provision is intended to confer on individuals and interested parties a right to be actively involved in the implementation of the directive and, in particular, in the production, review and updating of the river basin management plans. [44]

125. To that end, Article 14 of the Water Framework Directive requires various documents to be published at certain intervals *before* the beginning of the period to which the plan refers. There must be published; at least three years before the plan enters into force a timetable for its production, two years before it enters into force an interim overview of the relevant water management issues, and draft copies of management plan must be made available at least one year before the plan enters into force. Other background documents must be disclosed on request. Under Article 14(2), Member States must allow at least six months to comment in writing on those documents in order to allow active involvement and consultation.

43 — See above, point 84 et seq.

44 — *Commission* v *Luxembourg*, paragraph 80.

126. There is no provision for derogation from these conditions in the production of management plans. In particular, there is no exception for legislative measures like that contained in Article 1(5) of the EIA Directive.

127. Contrary to the view taken by the Prefectural Authority of Larisa, this does not constitute a legal lacuna which should be filled by applying, by analogy, the EIA Directive.[45] Rather, the Union legislature must be assumed to have *consciously* refrained from providing for a comparable exception for legislative processes. This is suggested in particular by the judgment in *WWF and Others*,[46] which had been delivered when the Water Framework Directive was adopted, and the *Linster* case,[47] pending at that time, which both concerned the conditions governing the exception under the EIA Directive for legislative processes and the SEA Directive, which was adopted a short time later and which makes express provision for public participation in connection with environmental assessments of legislative measures.

128. The Prefectural Authority of Larisa is also incorrect in its argument that, in the absence of an exception for legislative processes, the Member States would be prevented from adopting management plans in the form of laws. They can indeed choose that course of action if they integrate the steps provided for in Article 14 of the Water Framework Directive into their legislative process or its preparation by the administrative authorities.

129. The answer to the fifth question must therefore be that it is incompatible with Article 14 of the Water Framework Directive to produce management plans without ensuring the envisaged public participation.

B – *The EIA Directive*

130. The sixth question concerns the EIA Directive. It seems that no new environmental impact assessment relating to the construction of dams and the diversion of water was conducted before Law 3481/2006 was enacted. Instead, reference was made to the environmental impact assessment which had already been conducted, on which the approval of the project in 2003, annulled in 2005, was based. The Simvoulio tis Epikratias asks whether this course of action satisfies the requirements laid down in the EIA Directive.

131. The Simvoulio tis Epikratias takes the view that the environmental impact assessment for the annulled authorisation contained all the information required under the EIA Directive. However, the public participation amounted only to publishing the subsequently annulled authorisation from 2003.

132. The conditions laid down in the EIA Directive are relevant only if the directive is actually applicable. Under Article 1(5), however, it does not apply to projects the details of which are adopted by a specific act of national legislation. The provision expressly states that the objectives of the directive, including that of supplying information, are achieved through the legislative process.

133. That provision accordingly exempts projects envisaged by the EIA Directive from the assessment procedure where two conditions are met. The first requires the details of the project to be adopted by a specific legislative act; under the second, the objectives of the directive, including that of supplying information, must be achieved through the legislative process.[48]

45 — See below, point 131 et seq.

46 — Case C-435/97 *WWF and Others* [1999] ECR I-5613.

47 — Case C-287/98 *Linster* [2000] ECR I-6917.

48 — *WWF and Others*, cited in footnote 46, paragraph 57.

134. Thus, it is only where the legislature has available to it information equivalent to that which would be submitted to the competent authority in an ordinary procedure for authorising a project that the objectives of the directive may be regarded as having been achieved through the legislative process.[49]

135. The Court has therefore ruled that the details of a project cannot be considered to be adopted by a law, for the purposes of Article 1(5) of the EIA Directive, if the law does not include the elements necessary to assess the environmental impact of the project but, on the contrary, requires a study to be carried out for that purpose, which must be drawn up subsequently, and if the adoption of other measures are needed in order for the developer to be entitled to proceed with the project.[50]

136. Advocate General Sharpston has recently made clear that the EIA Directive is not about formalism, but it is concerned with providing effective EIAs for all major projects and with ensuring adequate public participation in the decision-making process.[51] Provided that the legislature has the necessary material and performs its democratic function correctly and effectively, i.e. the people's elected representatives were able properly to examine and debate the proposed project, the legislative process achieves the objectives of the EIA Directive.[52] Conversely, a legislative process that merely provides the formal rubber-stamp for an earlier administrative process which has effectively already taken the relevant decisions will not provide the same safeguards as those required by the EIA Directive.[53]

137. It must therefore be clarified in the main proceedings whether the legislature had the material necessary in the procedure under the EIA Directive and was able properly to examine and debate the environmental effects of the project.

138. The EIA Directive does not contain any specific requirements as to how updated the material must be. However, a project's environmental effects can be accurately assessed only on the basis of the best available information at the time when consent is given. Accordingly, Article 5(1) of the EIA Directive in particular contains indications that recent information must be submitted where this is required by the circumstances of the relevant case.

139. Thus, Article 5(1)(b) of the EIA Directive requires that the extent of the information to be supplied by the developer must be determined having regard to current knowledge. This is, as a rule, current knowledge at the beginning of an development consent procedure, since it must be decided at that time what information must be supplied by the developer. However, the extent of that information under Article 5(1)(a) of the EIA Directive also depends on whether the information is relevant to a given stage of the consent procedure and to the particular characteristics of a particular project or type of project and of the environmental features likely to be affected.

140. If, at a subsequent stage of the consent procedure, it transpires that more updated information is necessary in order to give an accurate assessment of a project's environmental effects, that information must be requested.[54]

141. The Simvoulio tis Epikratias is therefore required to examine whether the information which was sufficient in 2003 was still sufficient in 2006 in order to assess the project's environmental effects. If that is the case, it was permissible to re-use the relevant documents in the legislative process.

49 — *Linster*, cited in footnote 47, paragraph 54.

50 — *WWF and Others*, paragraph 62, and *Linster*, paragraph 57.

51 — Opinion of 19 May 2011 in the pending Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others*, point 79.

52 — Opinion in *Boxus and Others*, points 84 and 87.

53 — Opinion in *Boxus and Others*, point 88.

54 — See Case C-50/09 *Commission* v *Ireland* [2011] ECR I-873, paragraph 40.

142. Particular consideration must be given to whether the material was still sufficiently updated and – as the Prefectural Authority of Aitoloakarnania and Others rightly claim – whether the project had been altered vis-à-vis the earlier assessment of environmental effects in such a way that would lead to more severe effects on the environment.[55] The Prefectural Authority of Aitoloakarnania and Others also raise the perfectly relevant question whether it is sufficient to base the assessment of environmental effects in 2006 on material which was compiled largely before 1995 and only supplemented before 2003. The Simvoulio tis Epikratias itself stresses in the order for reference that there is no reliable and updated data regarding the birds in the relevant protection areas.[56]

143. According to the submissions made by the Prefectural Authority of Aitoloakarnania and Others regarding the parliamentary procedure for the enactment of Articles 9 and 13 of Law 3481/2006, that procedure also merits closer inspection. If the representatives were not actually informed about the content of those provisions or the approved project,[57] it is extremely doubtful that they were able properly to examine and debate its environmental effects.

144. The answer to the sixth question must therefore be that an environmental impact assessment report which was placed for approval before the national parliament after the annulment by court order of the administrative measure by which it had previously been approved meets the requirements of Article 1(5) of the EIA Directive where, first, it provided the legislature with the information necessary in the procedure under the directive – i.e. sufficiently updated and comprehensive – and, second, the legislature was able properly to examine and debate the environmental effects of the project on that basis.

C – *The SEA Directive*

145. Through questions 7, 8 and 9, the Simvoulio tis Epikratias also wishes to clarify whether Law 3481/2006 meets the conditions of the SEA Directive. To that end, it asks whether the project falls within the material and, if appropriate, also the temporal scope of the SEA Directive (see sections 1 and 2 below). If so, it wishes to know whether, in addition to the assessments under the Water Framework Directive and the EIA Directive, a separate environmental assessment under the SEA Directive is necessary (see section 3 below).

1. The seventh question – the material scope of the SEA Directive

146. By the seventh question, the Simvoulio tis Epikratias wishes to know whether the SEA Directive is applicable to a project to divert a river where that project: concerns the construction of dams and the transfer of water from one river basin district to another; falls within the field of application of the Water Framework Directive; involves works within the scope of the EIA Directive, and may have environmental effects on areas covered by the Habitats Directive.

147. In order to ascertain whether such a project falls within the material scope of the SEA Directive, it must be examined, first, whether it is a plan or programme within the meaning of Article 2(a) of that directive and, second, whether it comes under Article 3(2) to (4).

a) Plans and programmes

148. Under Article 2(a) of the SEA Directive, ‘plans and programmes’ means plans and programmes which are subject to preparation and/or adoption by an authority or which are prepared for adoption through a legislative procedure *and* which are required by legislative, regulatory or administrative provisions.

55 — See Case C-247/06 *Commission* v *Germany* (Nivelsteiner Sandwerke), not published in the ECR, paragraph 49 et seq., summary printed in [2008] ECR I-150*.

56 — See below, point 204.

57 — Paragraph 44 of the observations submitted by the Prefectural Authority of Aitoloakarnania and Others.

149. It is not clear from the order for reference whether a ‘plan to divert a river’ is *required* by legislative, regulatory or administrative provisions. In so far as a plan is developed irrespective of any obligation, there is no need for an environmental assessment under the SEA Directive.[58]

150. According to the submissions made by DEI, it does seem possible that a diversion project may be the subject of a land-use plan provided for by Greek law. However, such a plan is not the subject of the order for reference, but, according to DEI, was not considered to be necessary by the Simvoulio tis Epikratias in an earlier decision.

151. If specific projects require development consent, an environmental assessment under the SEA Directive would likewise not appear to be necessary. Project development consent is not, in itself, a plan or programme.

152. Nevertheless, the question also concerns the management plans for the Acheloos and Pinios river basin districts, which form part of Law 3481/2006. It is beyond doubt that they are plans within the meaning of the SEA Directive. They must be established under Article 13 of the Water Framework Directive. They were also prepared by an authority for adoption, through a legislative procedure, by Parliament.

b) The duty to assess management plans

153. Under Article 3(1) of the SEA Directive, an environmental assessment, in accordance with Articles 4 to 9, must be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

154. Under Article 3(2)(a) of the SEA Directive, an environmental assessment must be carried out for plans which are prepared for water management and which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive.

155. The management plans set out the framework for the authorisation of such projects, e.g. for the transfer of water resources under point 12 of Annex I to the EIA Directive and dam projects under point 15 of Annex I. The primary issue is not authorisations of parts of the diversion project, since the management plans were in any case not yet binding under Union law. However, since the expiry of the time-limit for the production of the management plans any further authorisation of relevant projects must respect the framework set by them.

156. Furthermore, there is also much – in the present case at least – to support the presumption that a duty to assess exists under Article 3(2)(b) of the SEA Directive. That provision covers plans which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive. Protection areas under that directive fall within the scope of the management plans. They could be affected in the application of the plans, in particular where those plans provide for the diversion of waters to a significant degree.[59]

157. It must therefore be stated that management plans within the meaning of Article 13 of the Water Framework Directive must, in principle, be subjected to an environmental assessment under the SEA Directive.

58 — The question whether plans and programme which are merely provided for by legislative, regulatory or administrative provisions fall under the SEA Directive is the subject of the pending proceedings in Case C-567/10 *Inter-Environnement Bruxelles and Others*. The management plans which are not yet due under Water Framework Directive could possibly be regarded as ‘provided for’ plans; this will be discussed below under (b).

59 — See, specifically with regard to the necessary assessment, my Opinion in Joined Cases C-105/09 and C-110/09 *Terre wallonne* [2010] ECR I-5611, point 87 et seq.

2. The eighth question – the temporal applicability of the SEA Directive

158. It is therefore also necessary to clarify the eighth question, namely whether measures which concerned the project at issue and have been annulled with retroactive effect by court orders can be considered to be formal preparatory acts which were issued before 21 July 2004 so that there is no obligation to prepare a strategic environmental report.

159. This question concerns the first sentence of Article 13(3) of the SEA Directive, which, with reference to the period for implementation under Article 13(1), defines the general rule for the application of the directive: plans and programmes of which the first formal preparatory act is after 21 July 2004 are subject to an environmental assessment.

160. The development consents which were judicially annulled do not therefore come into question because they were the (interim) result of a consent procedure. Only steps taken to initiate the consent procedure may be preparatory. It is thus *a fortiori* irrelevant whether the consent was annulled with retroactive effect.

161. Rather, it is of interest in the main proceedings whether the *initiation* of the consent procedure may be regarded as a preparatory act for the management plans or whether it may be the preparatory act for a plan to divert the Acheloos.

a) The preparation of the management plans

162. The SEA Directive does not define the notion of ‘formal preparatory acts’. However, it is clearly designed to provide a reliable criterion for determining the date on which a procedure was initiated. It thereby provides for legal certainty and contributes to the effectiveness of the directive.[60] A formal preparatory act for a procedure within the meaning of the SEA Directive must thus be clearly directed to the preparation of the plan or programme which is subject to the directive.

163. In connection with the EIA Directive, the Court has therefore considered informal contacts and meetings between the competent authority and the developer to be insufficient to indicate the date of commencement of a procedure.[61]

164. Nor can it be sufficient in connection with the SEA Directive to initiate certain procedures relating to projects to which a management plan would relate, e.g. consent procedures for diversion of waters. It is not clear from such procedure that they (also) have in view a management plan.

165. Moreover, almost no management plan could be subject to an environmental assessment *ratione temporis* if procedures for the authorisation of the relevant projects, begun before 21 July 2004, were to be regarded as formal preparatory acts for subsequent management plans. Within the scope of each management plan there are many such existing projects to which the plan potentially relates, on account of the prohibition of deterioration and the duty to restore under Article 4 of the Water Framework Directive.

166. Lastly, in this case the chronology also contradicts the claim that initial formal preparatory acts for the management plans were produced before 21 July 2004. Objections were raised to the absence of management plans for the Acheloos and Pinios river basin districts for the first time in Judgment 1688/2005 of the Simvoulio tis Epikratias, i.e. after 21 July 2004. This suggests that the preparations for their adoption also began only after that date.

60 — See, with regard to the EIA Directive, Case C-431/92 *Commission* v *Germany* (Großkrotzenburg) [1995] ECR I-2189, paragraph 32.
61 — Case C-431/92 *Commission* v *Germany* (Großkrotzenburg).

b) The preparation of a plan to divert the Acheloos

167. The situation would be different if – contrary to the answer to the seventh question – there existed a plan for the partial diversion of the Acheloos, which was subject to an assessment.

168. The arrangements governing preparatory acts are intended to make it possible to conclude current procedures without impairment as a result of fundamentally new procedural conditions. They are not intended, on the other hand, to preclude the environmental assessment of plans merely because some administrative measures have been taken in the past in respect of the same subject-matter.

169. The crucial factor would therefore be whether the procedure for the authorisation of the plan was continuously in progress. The judicial decisions would not be regarded as an interruption in this connection if the competent authorities immediately took the necessary measures in order to remedy the deficiencies established by the court. The shift from an administrative procedure to a legislative procedure should also not be regarded as an interruption.

170. The initiation of the procedure for obtaining development consent for the diversion project could therefore be a formal preparatory act for the establishment of a plan relating to that project, which is subject to an assessment.

171. It should also be pointed out that a mandatory assessment under the second sentence of Article 13(3) of the SEA Directive is ruled out in this case. That comes into consideration if plans and programmes, of which the first formal preparatory act is before 21 July 2004, are adopted or submitted to the legislative procedure more than 24 months thereafter. However, according to the order for reference, the contested provisions of Law 3481/2006 were submitted to the Greek Parliament on 6 July 2006.[62]

c) Conclusion on the eighth question

172. The answer to the eighth question is therefore that neither annulled consents to a project to divert a river nor the initiation of the corresponding authorisation procedure under Article 13(1) of the SEA Directive may be regarded as formal preparatory acts for river basin district management plans under the Water Framework Directive. However, the initiation of a development consent procedure could be regarded as a preparatory act for a plan to divert a river which is subject to an assessment if the consent procedure is continuously in progress without interruption.

3. The ninth question – scope of the environmental assessment

173. In view of the answer to the eighth question, the ninth question must also be answered. The Simvoulio tis Epikratias is essentially seeking to ascertain whether an autonomous strategic environmental assessment will have to be conducted if assessments have already been conducted under the Water Framework Directive and under the EIA Directive.

174. The answer follows from Article 11(1) and (2) of the SEA Directive, which has already been cited by the Simvoulio tis Epikratias. Under Article 11(1), an environmental assessment carried out under the SEA Directive is without prejudice to any requirements under the EIA Directive and to any other Community law requirements. However, for plans and programmes for which the obligation to carry

62 — Paragraph 29 of the order for reference.

out assessments of the effects on the environment arises simultaneously from the SEA Directive and other European Union legislation, Article 11(2) permits the Member States to provide for coordinated or joint procedures fulfilling the requirements of the relevant Union legislation in order, inter alia, to avoid duplication of assessment.

175. Those provisions show that the production of the various environmental assessments under European Union law need not be formalistic. Rather, the important factor is that the conditions laid down in the various rules are implemented. If this is done, it does not matter how the assessment in question is designated.[63]

176. Whether certain reports on the basis of other provisions satisfy the requirements of the SEA Directive is a question which must be examined by the national courts, having regard to the specific features of each individual case. Such reports must satisfy both the substantive and the procedural requirements of the SEA Directive. Because the EIA Directive and SEA Directive are largely parallel, this is possible, in principle, where both assessments have the same scope, i.e. if the project and the plan are largely congruent. It also would not appear to be ruled out that, if the conditions governing a management plan under Article 13(4) and Annex VII of the Water Framework Directive are satisfied, that is sufficient to meet the conditions governing an environmental assessment for the plan under the SEA Directive.

177. In the light of the comments regarding the EIA Directive,[64] however, it should be pointed out that any deficiencies in the assessment under that directive should, in all likelihood, also be regarded as deficiencies in an environmental assessment under the SEA Directive. Article 5(2) of the SEA Directive requires, in much clearer terms than the EIA Directive, that the assessment take into account current knowledge and methods of assessment. Article 8 of each directive also requires that information acquired regarding the environmental effects be taken into account in the decision.

178. The answer to the ninth question is therefore that for the purpose of Article 11(2) of the SEA Directive, if a plan simultaneously falls within the scope of that directive and within that of the Water Framework Directive and the EIA Directive which also require the environmental effects of that scheme to be assessed, no autonomous strategic environmental assessment need be conducted if the assessments which have been drawn up on the basis of the Water Framework Directive and the EIA Directive satisfy the requirements of the SEA Directive substantively and with respect to the procedure followed.

D – *Nature conservation*

179. Lastly, it is necessary to examine several questions relating to European Union nature conservation legislation. The Simvoulio tis Epikratias asks about the temporary protection of proposed sites of Community importance (SCIs) before they have been included in the Community list (see section 1 below), the lawfulness of a development consent without knowledge of the birds affected (see section 2 below), the justification of damage to sites with reference to the aims of irrigation and drinking water supply (see section 3 below), possible measures to maintain coherence (see section 4 below) and whether it is compatible with the Habitats Directive to convert a natural fluvial ecosystem into a man-made fluvial and lacustrine ecosystem (see section 5 below).

180. The answer to those questions is heavily characterised by the fact that the development consent procedure relating to the partial diversion of the Acheloos has already been in progress for a very long time. It began before the Habitats Directive was adopted. The procedure for the *ex-ante* assessment of projects under Article 6(3) cannot therefore be applied, but only the prohibition of deterioration under Article 6(2).

63 — Case C-295/10 *Valčiukienė and Others* [2011] ECR I-8819, paragraph 62. See, with regard to the EIA Directive, Case C-431/92 *Commission* v *Germany* (Großkrotzenburg), paragraph 41 et seq.; Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 56; and my Opinion in Case C-2/07 *Abraham and Others* [2008] ECR I-1197, point 84.

64 — See above, point 141 et seq.

1. The tenth question – protection of proposed sites in the enactment of Law 3481/2006

181. By the tenth question, the Simvoulio tis Epikratias is seeking to ascertain whether the areas which were included in the national lists of sites of Community importance (SCIs) and, ultimately, were included in the Community list of SCIs were covered by the protection afforded by the Habitats Directive before the publication of Commission Decision 2006/13, by which the list of protected SCIs for the Mediterranean biogeographical region was adopted.

182. The Simvoulio tis Epikratias refers to five SCIs[65] which were included in the list by that decision and are affected by the project.

183. In this question the Simvoulio tis Epikratias assumes that the relevant provisions of Law 3481/2006, Articles 9 and 13, were promulgated by the Law and entered into force on 2 August 2006, whilst Decision 2006/613 was not published until 21 September 2006. If the date of publication were relevant for inclusion of the sites concerned in the Community list, Article 6(2), (3) and (4) of the Habitats Directive would have been applicable, under Article 4(5) of that directive, only from 21 September 2006,[66] i.e. after the entry into force of Law 3481/2006.

184. However, in accordance with Article 254(3) EC, which was applicable at that time (after amendment, now the third subparagraph of Article 297(2) TFEU), Decision 2006/613 took effect upon notification to those to whom it is addressed – namely, under Article 2 of the decision, the Member States.[67] There is no need, in the present case, to decide whether site protection could be imposed on individuals before the publication of the decision. The Simvoulio tis Epikratias will have to determine the date of notification – for which the database of European Union law (EUR-Lex) gives the date of the adoption of the decision, 19 July 2006.[68]

a) Temporary site protection of proposed sites

185. If it emerges that the Commission decision was notified to Greece only after Law 3481/2006 was enacted, Greece had to guarantee the temporary protection of proposed sites: under the Habitats Directive, the Member States must, as regards the sites identified with a view to their inclusion on the Community list, take appropriate protective measures in order to maintain the ecological characteristics of those sites. Member States cannot therefore authorise interventions which may pose the risk of seriously compromising the ecological characteristics of a site. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics.[69]

b) Protection of sites after inclusion in the Community list

186. If, on the other hand, the Commission had already notified its decision to Greece when Law 3481/2006 was enacted, the provisions of Article 6(2), (3) and (4) were applicable in principle, under Article 4(5) of the Habitats Directive, to the sites included in the list. However, I will show below that the fact that the procedure for the authorisation of the partial diversion of the Acheloos had already been in progress for some time precludes the application of the *ex-ante* assessment under Article 6(3). Instead, Article 6(2) is applicable, possibly in conjunction with the conditions under Article 6(4) governing justification of possible damage to sites.

65 — These are listed above under point 22.

66 — Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 25.

67 — See, with regard to decisions taking effect, Case C-18/08 *Foselev Sud-Ouest* [2008] ECR I-8745, paragraph 18.

68 — See above, footnote 9.

69 — Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, paragraphs 44 and 46; *Stadt Papenburg*, cited in footnote 31, paragraph 49; and Case C-308/08 *Commission* v *Spain* (Iberian lynx) [2010] ECR I-4281, paragraph 21.

The applicability of Article 6(3) of the Habitats Directive

187. It seems reasonable to require an assessment of the implications of the diversion of the Acheloos for the sites in view of the sites' conservation objectives pursuant to the first sentence of Article 6(3) of the Habitats Directive. Under that provision, plans or projects which are likely to have a significant effect on an area of conservation are subject to appropriate assessment of the implications for the site in view of the site's conservation objectives.

188. However, the Court has held that where a project has been authorised before the expiry of the time-limit for transposing the Habitats Directive or the procedure for authorisation was initiated prior to the date of accession of the Member State concerned to the European Union, it would not be subject to the requirements under Article 6(3) of the Habitats Directive relating to the procedure for prior assessment of the implications of the project for the site concerned.[70] It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more complex and time-consuming by the specific requirements imposed by the directive and for situations already established to be affected by it.[71]

189. The present case concerns neither a legally valid development consent before the expiry of the time-limit for transposing the Habitats Directive nor a consent procedure which began before Greece's accession to the European Union. It should nevertheless be treated in exactly the same way, even though the sites concerned had already been included in the Community list when Law 3481/2006 was enacted.

190. The procedure for obtaining development consent for the partial diversion of the Acheloos began in the early 1990s – that is to say possibly before the adoption of the Habitats Directive – and was not subject to the *ex-ante* assessment procedure until notification of the decision on the Community list with regard to the SCIs concerned.[72] If that procedure were still to be applied shortly before Law 3481/2006 was enacted, the course of the procedure could actually be significantly complicated and delayed.

191. Furthermore, it was difficult in practice to foresee when the Commission would adopt the Community list. Under Article 4(2) of the Habitats Directive, the list was to be drawn up by 1998, and other sub-lists had been notified long before the list for Mediterranean biogeographical regions, which covers Greece.[73] Greece could not therefore necessarily expect the protective regime under the Habitats Directive to be applicable before the project was approved.

192. There was consequently no need for an assessment of the implications for the SCIs under Article 6(3) of the Habitats Directive.

The applicability of Article 6(2) of the Habitats Directive

193. However, the abovementioned case-law concerns only the procedural aspects of the protective regime under the Habitats Directive. The Court has, on the other hand, repeatedly held that the substantive requirements governing the protection of sites, laid down in Article 6(2) of the Habitats Directive, are not excluded by existing development consents. That provision prohibits the deterioration of natural habitats and the habitats of species in the special areas of conservation, 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 the directive.

70 — *Commission* v *Austria* (Lauteracher Ried), paragraphs 53 to 62, and *Stadt Papenburg*, paragraph 48. I have already considered these ideas in the discussion of the advance effects of the Water Framework Directive during the transitional period for the establishment of management plans and programmes of measures; see above, point 107 et seq.

71 — *Commission* v *Austria* (Lauteracher Ried), cited in footnote 35, paragraph 57, with reference to the case-law on the EIA Directive.

72 — *Dragaggi and Others*, cited in footnote 66.

73 — For example, the Commission adopted Commission Decision 2002/11/EC adopting the list of sites of Community importance for the Macaronesian biogeographical region, pursuant to Council Directive 92/43/EEC (OJ 2002 L 5, p. 16) on 28 December 2001. By Decision 2006/613 there had been decisions on four other biogeographical regions.

194. The Court has held that application of Article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive, where a plan authorised under Article 6(3) or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error.[74] In addition, Article 6(2) may also require that a subsequent review of an existing authorisation be carried out;[75] accordingly, the implementation of a project authorised prior to the expiry of the time-limit for transposing the Habitats Directive falls within the scope of that provision.[76]

195. Consequently, Article 6(2) of the Habitats Directive requires Member States to take the necessary steps to avoid the deterioration and disturbance of protected areas also in relation to existing projects. The legitimate interests of the holders of authorisations must, where necessary, be satisfied by means of compensation.[77]

196. The foregoing case-law is not at odds with the prohibition on the retroactive application of rules of law. On the contrary, a new rule of law applies, in principle, from its entry into force. While it does not apply to legal situations which have become established and definitive under the old law, it does apply to their future effects.[78] Projects which may cause the deterioration of or disturb protection areas can also therefore be authorised only in so far as they are compatible with site protection, even if their authorisation procedure was not yet subject to the procedural conditions under Article 6(3) of the Habitats Directive.[79]

197. If the Commission included the SCIs on the Community list before Law 3481/2006 was enacted, the Simvoulio tis Epikratias must therefore examine whether the law is compatible with Article 6(2) of the Habitats Directive.

Justification of possible damage to SCIs

198. If the Simvoulio tis Epikratias concludes that natural habitats or habitats of species in the SCIs are damaged or disturbed as a result of Law 3481/2006, the question arises whether that damage may be justified.

199. Article 6(2) of the Habitats Directive – like Article 4(4) of the Birds Directive in relation to the protection of de facto bird protection areas – does not provide for a ground of justification based on overriding interests. After all, the protection of sites under the Habitats Directive is based on the idea that the deterioration or significant disturbance of protected areas must always be authorised (and, where so authorised, justified) in accordance with Article 6(3) and (4). Moreover, where such authorisation is based on an appropriate assessment of the implications for the site in question, there is in principle no scope for the application of Article 6(2).[80]

200. In the present case, by contrast, Article 6(3) and (4) of the Habitats Directive was not even yet applicable. It would, however, be unreasonable to deny to projects which, for reasons of date, are not subject to the prior assessment under Article 6(3) and (4) the possibility of being authorised by way of

74 — Case C-127/02 *Waddenvereniging und Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 37.

75 — Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 58.

76 — *Stadt Papenburg*, paragraph 49.

77 — See my Opinion in Case C-404/09 *Commission* v *Spain* (Alto Sil), point 70 et seq.

78 — Case C-428/08 *Monsanto Technology* [2010] ECR I-6765, paragraph 66, and Case C-266/09 *Stichting Natuur en Milieu* [2010] ECR I-13119, paragraph 32. See also above, with regard to the advance effects of the Water Framework Directive, IV – A –6.b). Thus, for example, new rules of law on the protection of patents may restrict the scope of the protection afforded by existing patents (see *Monsanto Technology*, paragraph 69).

79 — See, with regard to the exercise of existing authorisations, my Opinion in Case C-404/09 *Commission* v *Spain* (Alto Sil), point 72.

80 — See *Waddenvereniging und Vogelbeschermingsvereniging*, paragraph 35, and my Opinion in Case C-404/09 *Commission* v *Spain* (Alto Sil), point 108.

derogation, as provided for in Article 6(4). Those projects would be more severely restricted than later projects, to which the provisions of Article 6(2) to (4) apply in their entirety.[81]

201. In the case of *old projects*, therefore, the deterioration or significant disturbance of protected areas must also be permitted under Article 6(2) of the Habitats Directive where the material conditions laid down in Article 6(4) are present, that is to say imperative reasons of overriding public interest, including those of a social or economic nature, the absence of an alternative solution and compensatory measures to ensure that the overall coherence of Natura 2000 is protected.[82]

202. The conditions governing justification will be examined in detail below in connection with the answers to the subsequent questions.

c) Conclusion on the tenth question

203. The answer to the tenth question is therefore that, prior to the notification of the Community list of sites of Community importance (SCIs), the Member States were required under the Habitats Directive, for the areas which were included in the national lists of SCIs and, ultimately, were included in the Community list, to take appropriate protective measures in order to maintain the characteristics of those sites.[83] Since notification, the Member States must, under Article 6(2) of the Habitats Directive, prevent deterioration or disturbance of natural habitats or habitats of species in the SCIs caused by projects whose authorisation procedure was initiated before notification, if any damage to the sites is not justified.

2. The eleventh question

204. By the eleventh question, the Simvoulio tis Epikratias would like to know whether is it possible for the competent national authorities to grant development consent for a project for the diversion of waters in the absence of reliable and updated data regarding the birds in the protection area concerned.

205. The Prefectural Authority of Magnisia objects that the Simvoulio tis Epikratias could not, under its procedural rules, establish the absence of information regarding the birds, and for that reason the question referred for a preliminary ruling is inadmissible. However, this objection cannot be accepted. In preliminary ruling proceedings, the Court is, in principle, bound by the information provided by the referring court and may not review whether the court has exceeded its powers under national law.[84]

206. The eleventh question must therefore be answered. The first sentence of Article 6(3) of the Habitats Directive would normally be relevant in this regard. However, since the authorisation procedure has already been in progress for a long time, that provision is not applicable. Article 6(2) applies instead.

a) The applicability of the first sentence of Article 6(3) of the Habitats Directive

207. The *ex-ante* assessment under the first sentence of Article 6(3) of the Habitats Directive is relevant in principle to the authorisation of projects and the information to be consulted in this regard. Such an assessment should rely on the best scientific knowledge relating to the birds in the area concerned.[85]

81 — See my Opinion in Case C-404/09 *Commission* v *Spain* (Alto Sil), point 110.

82 — See my Opinion in Case C-404/09 *Commission* v *Spain* (Alto Sil), point 111.

83 — See above, point 185.

84 — *WWF and Others*, paragraphs 31 to 33 and case-law cited.

85 — Case C-304/05 *Commission* v *Italy* (Santa Caterina) [2007] ECR I-7495, paragraph 59.

208. As has already been explained,[86] the first sentence of Article 6(3) of the Habitats Directive is not applicable to the SCIs concerned, but that provision could be applied with regard to the relevant special protection areas under the Birds Directive, which have been previously identified. Under Article 7 of the Habitats Directive, Article 6(2), (3) and (4) apply to such areas as from the date of its implementation or the date of classification or recognition by a Member State, where the latter date is later.

209. The Habitats Directive became applicable upon the expiry of the implementation period in 1994. The first sentence of Article 6(3) was thus applicable at the earliest from that date and at the latest as from the subsequent identification of the relevant SPAs.

210. However, the development consent procedure for the partial diversion of the Acheloos began before 1994, as the first consents were issued in 1992. The Simvoulio tis Epikratias annulled those consents, as it did subsequent ones, but there is much to suggest that the authorising of the project was the subject of a continuous procedure up to the contested provisions of Law 3481/2006.[87]

211. The development consent procedure must therefore be regarded as having been initiated before the first sentence of Article 6(3) of the Habitats Directive was applicable. The case-law cited above regarding development consent procedures which were initiated before the introduction of significant changes to procedural law[88] thus precludes an obligation to conduct an assessment of the implications for the site under that provision.

b) Article 6(2) and (4) of the Habitats Directive

212. On the other hand, Article 6(2) of the Habitats Directive is applicable.[89]

213. The need for the application of that provision is even more evident in the case of bird protection areas than in the case of protection areas under the Habitats Directive, namely the SCIs. Bird protection areas have had to be classified in Greece since the expiry of the period for transposition of the Birds Directive, 6 April 1981.[90] Even if the necessary classification has not been made, the relevant areas have been subject to the protection provided by the first sentence of Article 4(4) since that date.[91]

214. In this case it must therefore be examined whether the approved project causes the habitats of birds, for which the SPA was identified, to deteriorate or disturbs those species in a way which could be significant in the light of the objectives of the directive.[92]

215. If such deteriorations or disturbances are established, it will also be necessary to examine whether they can be justified on the basis of the substantive criteria laid down in Article 6(4) of the Habitats Directive. As has already been explained, any justification requires a weighing up process, the examination of alternatives and compensatory measures.[93]

86 — See above, point 188 et seq.

87 — See above, point 169.

88 — See above, point 188 et seq.

89 — See above, point 193 et seq.

90 — Case C-334/04 *Commission* v *Greece* [2007] ECR I-9215, paragraph 32.

91 — See Case C-374/98 *Commission* v *France* (Basses Corbières) [2000] ECR I-10799, paragraphs 47 and 57; Case C-388/05 *Commission* v *Italy* (Valloni e steppe pedegarganiche) [2007] ECR I-7555, paragraph 18; and Case C-186/06 *Commission* v *Spain* (Segarra-Garrigues Canal) [2007] ECR I-12093, paragraph 26.

92 — See, with regard to such an assessment, Case C-304/05 *Commission* v *Italy* (Santa Caterina), cited in footnote 85, paragraph 91 et seq., and my Opinion of 19 April 2007 in that case, point 61 et seq.

93 — See above, point 199 et seq.

216. While it is true that a formal assessment of the implications for the site in question, in accordance with Article 6(3) of the Habitats Directive, is not required, the discretion enjoyed by the Member States in the acceptance of a ground of justification is none the less subject to limits. [94]

217. The Court has found that Article 6(4) of the Habitats Directive can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4). Without it, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up exercise against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified. [95]

218. Consequently, in connection with the justification of damage under Article 6(2) of the Habitats Directive too, it is necessary carefully and impartially to examine all the relevant elements of the individual case and, in so doing, to ensure that those elements are capable of supporting the conclusions drawn from them. [96] In this connection too, the weighing up exercise, the examination of alternatives and the compensatory measures must be preceded by an appropriate assessment of the effects requiring justification. [97]

219. The effects can be properly assessed only on the basis of reliable and updated data regarding the birds in the relevant areas. Otherwise, purely hypothetical adverse effects would find their way into the weighing up exercise, the examination of alternatives and the determination of compensatory measures. It would not be certain that actual damage is taken into account.

c) Conclusion on the eleventh question

220. The answer to the eleventh question is therefore that it is possible, for the purpose of Article 6(2) of the Habitats Directive, for the competent national authorities to grant development consent for a project for the diversion of waters which causes a deterioration in the habitats of birds for which the SPA was identified, or disturbs those species in a way which could be significant in the light of the objectives of the directive, only if that project is justified on the basis of reliable and updated data regarding the birds in the relevant SPAs.

3. The twelfth question – imperative reasons of overriding public interest

221. By the twelfth question, the Simvoulio tis Epikratias wishes to know whether grounds for undertaking a project to divert waters that relate principally to irrigation and secondarily to drinking water supply can justify damage to a protection area.

222. The twelfth question relates to the first of the conditions under Article 6(4) of the Habitats Directive, namely imperative reasons of overriding public interest, including those of a social or economic nature. As has already been established in connection with the Water Framework Directive, irrigation and drinking water supply may be such reasons in principle. [98]

94 — See my Opinion in Case C-404/09 *Commission* v *Spain* (Alto Sil), point 112.

95 — Case C-304/05 *Commission* v *Italy* (Santa Caterina), paragraph 83.

96 — See, with regard to the review of the Commission's discretion, Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraph 77, and Case C-405/07 P *Netherlands* v *Commission* [2008] ECR I-8301, paragraph 55, and the case-law cited.

97 — See my Opinion in Case C-404/09 *Commission* v *Spain* (Alto Sil), cited in footnote 39, point 112.

98 — See above, point 83 et seq.

223. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised, under the second subparagraph of Article 6(4) of the Habitats Directive, 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.

224. Three SCIs mentioned in the order for reference host priority species or habitats: 'Delta Acheloou, Limnothalassa, Mesologgiou-Aitolikou, Ekvoles Evinou, Nisoi Echinades, Nisos Petalas' (GR2310001), 'Limnes Trichonida kai Lysimachia' (GR2310009) and 'Aspropotamos' (GR1440001).[99]

225. Because the Commission has not delivered an opinion in the present case, the number of possible justifying interests is severely limited by the wording of the second subparagraph of Article 6(4) of the Habitats Directive. Irrigation would not be an interest which could justify the project, as it would not be necessary either for human health, public safety, or beneficial consequences of primary importance for the environment. Drinking water supply, on the other hand, would be a consideration relating to human health.

226. However, it would be inappropriate to apply the more stringent conditions governing justification of adverse effects if the priority elements of the relevant sites are not damaged. Since the Commission has publicly expressed this position,[100] there is no need in such cases for its opinion before invoking other interests. The Simvoulio tis Epikratias must therefore ascertain whether priority elements of the sites concerned are damaged, and whether therefore more stringent conditions governing possible justification apply.

227. Furthermore, the reasons for a project are imperative and overriding only if they have greater importance than its negative effects on the areas protected by the Habitats Directive.[101]

228. The answer to the twelfth question is therefore that both irrigation and drinking water supply are imperative reasons of overriding public interest within the meaning of Article 6(4) of the Habitats Directive for a project to divert waters, if those reasons outweigh the adverse effects of that project on the sites protected by the directive. If, however, priority habitat types or species are damaged, only drinking water supply is a possible justification in the absence of an opinion delivered by the Commission.

4. The thirteenth question – measures to ensure the coherence of a Natura 2000

229. By the thirteenth question, the Simvoulio tis Epikratias wishes to ascertain whether in determining the sufficiency of the compensatory measures criteria such as the extent of that diversion and the scale of the works which the diversion entails should be taken into account.

230. This question concerns the third condition for a justification of damage to protection areas under Article 6(4) of the Habitats Directive, namely the compensatory measures necessary to ensure that, despite the damage to a site, the overall coherence of Natura 2000 is protected. Contrary to the wording of questions 13 and 14, it does not relate to the coherence of individual sites, but the coherence of the network of protection areas.

99 — Such sites are indicated by a star in column C in Decision 2006/613.

100 — See the Commission Guide, *Natura 2000 – Managing Natura 2000 Sites, The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*, Luxembourg 2000, p. 54.

101 — See Case C-304/05 *Commission* v *Italy* (Santa Caterina).

231. According to Article 3(1) of the Habitats Directive, Natura 2000 is a coherent European ecological network of special areas of conservation. This network is composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, and of the SPAs for the bird species mentioned in Annex I to the Birds Directive and for regularly occurring migratory species. Natura 2000 must 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. [102]

232. The necessary measures can therefore be identified only in relation to the damage to the area in question. The competent authorities must establish the damaged area's contribution to Natura 2000 that is lost as a result of the project and how that loss is to be offset so that overall the coherence of the network is maintained. [103]

233. Thus, the Court has previously found that in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified. [104] With regard to the compensatory measures, the extent of the diversion of the Acheloos and the scale of the works which the diversion entails should therefore be taken into account, if they damage protection areas.

234. The answer to the thirteenth question is therefore that in determining the sufficiency of the compensatory measures which are necessary, within the meaning of Article 6(4) of the Habitats Directive, to ensure that the overall coherence of Natura 2000 is protected, criteria such as the extent of the diversion of a river and the scale of the works which the diversion entails should be taken into account if they damage Natura 2000 protection areas.

5. The fourteenth question – conversion of a natural fluvial ecosystem

235. By the fourteenth question, the Simvoulio tis Epikratias is seeking to ascertain whether the Habitats Directive, interpreted in the light of the principle of sustainable development as enshrined in Article 6 EC (now Article 11 TFEU), permits the conversion of a natural fluvial ecosystem into a man-made fluvial and lacustrine ecosystem.

236. In all likelihood, the conversion of a natural fluvial ecosystem into a man-made fluvial and lacustrine ecosystem, i.e. a succession of reservoirs, would cause a deterioration of existing protected habitats within the meaning of Article 6(2) of the Habitats Directive. This would have to be assessed specifically having regard to the relevant conservation objectives.

237. However, any deterioration does not mean that the diversion project in question would be unlawful in any event. It might be justified on the basis of the criteria under Article 6(4) of the Habitats Directive.

238. The principle of sustainability must be taken into account in connection with the justification, that is to say in assessing the reasons of public interest, the damage and alternatives. If the project cannot achieve its objectives sustainably, or can do only partially, the weight of those objectives in the balancing of interests is reduced. Thus, merely temporary damage has less weight than sustained damage.

239. The answer to the fourteenth question is therefore that a project to divert waters within a Natura 2000 area, which would convert a natural fluvial ecosystem into a man-made fluvial and lacustrine ecosystem, may be approved if the conditions under Article 6(4) of the Habitats Directive are satisfied.

102 — See my Opinion in *Commission* v *Austria* (Lauteracher Ried), point 83.
103 — See my Opinion in *Commission* v *Austria* (Lauteracher Ried), point 84.
104 — Case C-304/05 *Commission* v *Italy* (Santa Caterina).

V – Conclusion

240. I propose that the Court give the following answers to the questions referred for a preliminary ruling:

(1) Article 13(6) and Article 11(7) of Directive 2000/60/EC establishing a framework for Community action in the field of water policy do not set a time-limit for transposition of Article 4 of the directive, but merely an ultimate time-limit for the production of management plans or programmes of measures. The directive does not, however, require the application of Article 4 before the expiry of that time-limit.

(2) National legislation which is enacted before the expiry of the time-limit for establishing management plans or programmes of measures and which permits the diversion of water from a particular river basin to another river basin seriously affects the objectives of Directive 2000/60 if the diversion leads to water status which is incompatible with Article 4 of the directive in a sustained and not merely minor way. A justification on the basis of overriding public interests is also possible in connection with the advance effects of Article 4; management plans are not necessary, but the national legislation must be adopted on the basis of sufficient data.

(3) It is incompatible with Article 14 of Directive 2000/60 to produce management plans without conducting the envisaged public participation.

(4) An environmental impact assessment which was placed for approval before the national parliament after the annulment by court order of the measure by which it had previously been approved by the administrative authorities meets the requirements of Article 1(5) of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes where, first, it provided the legislature with the information necessary in the procedure under the directive – i.e. sufficiently updated and comprehensive – and, second, the legislature was able properly to examine and debate the environmental effects of the project on that basis.

(5) Management plans within the meaning of Article 13 of Directive 2000/60 must, in principle, be subjected to an environmental assessment under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

(6) Neither measures which concerned the authorisation of an isolated project to divert a river and have been annulled with retroactive effect by court orders nor the initiation of the corresponding consent procedure under Article 13(1) of Directive 2001/42 may be regarded as formal preparatory acts for river basin district management plans under Directive 2000/60. However, they may be regarded as preparatory acts for a plan to divert a river which is subject to an assessment if the consent procedure is continuously in progress without interruption.

(7) For the purpose of Article 11(2) of Directive 2001/42, if a plan simultaneously falls within the scope of that directive and within that of Directive 2000/60 and Directive 85/337 which also require the environmental effects of that scheme to be assessed, no autonomous strategic environmental assessment need be conducted if the assessments which have been drawn up on the basis of Directive 2000/60 and Directive 85/337 satisfy the requirements of the Directive 2001/42 substantively and with respect to the procedure followed.

(8) Prior to the notification of the Community list of sites of Community importance (SCIs), the Member States were required under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, for the areas which were included in the national lists of SCIs and, ultimately, were included in the Community list, to take appropriate protective

measures in order to maintain the characteristics of those sites. Since notification, the Member States must, under Article 6(2) of the Directive 92/43, prevent deterioration or disturbance of natural habitats or habitats of species in the SCIs caused by projects whose authorisation procedure was initiated before notification, if any damage to the sites is not justified..

(9) It is possible, for the purpose of Article 6(2) of the Directive 92/43, for the competent national authorities to grant development consent for a project for the diversion of waters which causes a deterioration in the habitats of birds for which the special protection area was identified, or disturbs those species in a way which could be significant in the light of the objectives of the directive, only if that project is justified on the basis of reliable and updated data regarding the birds in the relevant special protection area.

(10) Both irrigation and drinking water supply are imperative reasons of overriding public interest within the meaning of Article 6(4) of Directive 92/43 for a project to divert waters, if those reasons outweigh the adverse effects of that project on the sites protected by that directive. If, however, priority habitat types or species are damaged, only drinking water supply is a possible justification in the absence of an opinion delivered by the Commission.

(11) In determining the sufficiency of the compensatory measures which are necessary, within the meaning of Article 6(4) of Directive 92/43, to ensure that the overall coherence of Natura 2000 is protected, criteria such as the extent of the diversion of a river and the scale of the works which the diversion entails should be taken into account if they damage Natura 2000 protection areas.

(12) A project to divert waters within a Natura 2000 area, which would convert a natural fluvial ecosystem into a man-made fluvial and lacustrine ecosystem, may be approved if the conditions under Article 6(4) of Directive 92/32 are satisfied.