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Provisional text

JUDGMENT OF THE COURT (First Chamber)

9 July 2020 (*)

(Reference for a preliminary ruling — Environment — Environmental liability — Directive 2004/35/EC — Second indent of the third paragraph of Annex I — Damage not having to be classified as ‘significant damage’ — Concept of ‘normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators’ — Article 2(7) — Concept of ‘occupational activity’ — Activity carried out in the public interest pursuant to a statutory assignment of tasks — Whether or not included)

In Case C-297/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decision of 26 February 2019, received at the Court on 11 April 2019, in the proceedings

Naturschutzbund Deutschland — Landesverband Schleswig-Holstein eV

v

Kreis Nordfriesland,

other parties:

Deich- und Hauptsielverband Eiderstedt, Körperschaft des öffentlichen Rechts,

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht,

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, M. Safjan, L. Bay Larsen, C. Toader and N. Jääskinen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Naturschutzbund Deutschland — Landesverband Schleswig-Holstein eV, by J. Mittelstein, Rechtsanwalt,

– Kreis Nordfriesland, by G. Koukakis, Rechtsanwalt,

– Deich- und Hauptsielverband Eiderstedt, Körperschaft des öffentlichen Rechts, by C. Brandt, Rechtsanwältin,

– the German Government, by J. Möller and S. Eisenberg, acting as Agents,

– the European Commission, by A.C. Becker and G. Gattinara, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(7) of and the second indent of the third paragraph of Annex I to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56).

2 The request has been made in proceedings between Naturschutzbund Deutschland — Landesverband Schleswig-Holstein eV ('Naturschutzbund Deutschland') and Kreis Nordfriesland (the District of Nordfriesland, Germany) concerning measures to limit and remedy environmental damage that have been asked for by Naturschutzbund Deutschland.

Legal context

EU law

Directive 2004/35

3 Recitals 1 to 3, 8 and 9 of Directive 2004/35 state:

'(1) There are currently many contaminated sites in the Community, posing significant health risks, and the loss of biodiversity has dramatically accelerated over the last decades. Failure to act could result in increased site contamination and greater loss of biodiversity in the future. Preventing and remedying, in so far as is possible, environmental damage contributes to implementing the objectives and principles of the Community's environment policy as set out in the Treaty. Local conditions should be taken into account when deciding how to remedy damage.

(2) The prevention and remedying of environmental damage should be implemented through the furtherance of the "polluter pays" principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such

damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.

(3) Since the objective of this Directive, namely to establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level by reason of the scale of this Directive and its implications in respect of other Community legislation, namely Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [(OJ 1979 L 103, p. 1)], 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)], and 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)], the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the [EC Treaty]. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

…

(8) This Directive should apply, as far as environmental damage is concerned, to occupational activities which present a risk for human health or the environment. Those activities should be identified, in principle, by reference to the relevant Community legislation which provides for regulatory requirements in relation to certain activities or practices considered as posing a potential or actual risk for human health or the environment.

(9) This Directive should also apply, as regards damage to protected species and natural habitats, to any occupational activities other than those already directly or indirectly identified by reference to Community legislation as posing an actual or potential risk for human health or the environment. In such cases the operator should only be liable under this Directive whenever he is at fault or negligent.'

4 Article 1 of Directive 2004/35 is worded as follows:

'The purpose of this Directive is to establish a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage.'

5 Article 2 of Directive 2004/35 states:

'For the purpose of this Directive the following definitions shall apply:

1. "environmental damage" means:

(a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;

Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive [92/43] or Article 9 of Directive [79/409] or, in the case of habitats and species not

covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

…

3. "protected species and natural habitats" means:

(a) the species mentioned in Article 4(2) of Directive [79/409] or listed in Annex I thereto or listed in Annexes II and IV to Directive [92/43];

(b) the habitats of species mentioned in Article 4(2) of Directive [79/409] or listed in Annex I thereto or listed in Annex II to Directive [92/43], and the natural habitats listed in Annex I to Directive [92/43] and the breeding sites or resting places of the species listed in Annex IV to Directive [92/43]; and

(c) where a Member State so determines, any habitat or species, not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives;

…

6. "operator" means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity;

7. "occupational activity" means any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character;

…'

6 Article 3(1) of Directive 2004/35 is worded as follows:

'This Directive shall apply to:

(a) environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities;

(b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.'

7 Article 19(1) of Directive 2004/35 sets the time limit for the directive's transposition as 30 April 2007, whilst Article 20 states that the directive is to enter into force on the day of its publication in the *Official Journal of the European Union*, that is to say, 30 April 2004.

8 Annex I to Directive 2004/35, headed 'Criteria referred to in Article 2(1)(a)', provides:

'The significance of any damage that has adverse effects on reaching or maintaining the favourable conservation status of habitats or species has to be assessed by reference to the conservation status

at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration. Significant adverse changes to the baseline condition should be determined by means of measurable data such as:

– the number of individuals, their density or the area covered,

– the role of the particular individuals or of the damaged area in relation to the species or to the habitat conservation, the rarity of the species or habitat (assessed at local, regional and higher level including at Community level),

– the species' capacity for propagation (according to the dynamics specific to that species or to that population), its viability or the habitat's capacity for natural regeneration (according to the dynamics specific to its characteristic species or to their populations),

– the species' or habitat's capacity, after damage has occurred, to recover within a short time, without any intervention other than increased protection measures, to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

Damage with a proven effect on human health must be classified as significant damage.

The following does not have to be classified as significant damage:

– negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question,

– negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators,

– damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.'

The Habitats Directive

9 Article 1(j) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive') states:

'For the purpose of this Directive:

…

(j) site means a geographically defined area whose extent is clearly delineated'.

10 Article 2 of the Habitats Directive provides:

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

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

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

The Birds Directive

11 Article 1(1) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive') states:

'This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.'

12 Article 2 of the Birds Directive is worded as follows:

'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.'

German law

13 Point 2 of the second sentence of Paragraph 19(5) of the Gesetz über Naturschutz und Landschaftspflege (Law on nature conservation and care of the countryside) of 29 July 2009 (BGBl. 2009 I, p. 2542), in the version applicable to the dispute in the main proceedings ('the BNatSchG'), provides:

'As a rule, there is no significant damage in the case of … negative variations due to natural causes or resulting from intervention that relates to management of sites which is to be regarded as normal on the basis of the habitat records or target documents or which corresponds to the management as carried on previously by owners or operators.'

14 Paragraph 5(2) of the BNatSchG is worded as follows:

'In the case of agricultural use, in addition to requirements arising from the provisions applying to agriculture and from Paragraph 17(2) of the Bundes-Bodenschutzgesetz [(Federal law on soil protection) of 17 March 1998 (BGBl. 1998 I p. 502)], the following principles of good professional practice shall in particular be observed:

1. cultivation must be appropriate to the relevant location, and the sustainable fertility of the soil and long-term usability of the land must be ensured;

2. the natural features of the area under cultivation (soil, water, flora, fauna) must not be impaired beyond the extent required to achieve a sustainable yield;

3. the landscape components required for the linking of biotopes must be preserved and, where possible, their numbers increased;

4. animal husbandry must be in a balanced relationship to crop cultivation, and harmful environmental impacts are to be avoided;

5. on slopes at risk from erosion, in flood plains, in locations with a high groundwater level and in marshy locations, grassland must not be ploughed up;

6. fertilisers and plant protection products must be applied in accordance with agricultural legislation; the application of fertilisers must be documented in accordance with Paragraph 10 of the Düngeverordnung [Regulation on fertilisers] of 26 May 2017 (BGBl. I, p. 1305), in the version applicable at the time, and the application of plant protection products must be documented in accordance with the second sentence of Article 67(1) of Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1).'

15 Paragraph 2(4) of the Gesetz über die Vermeidung und Sanierung von Umweltschäden (Law on the prevention and remedying of environmental damage) of 10 May 2007 (BGBl. 2007 I, p. 666), in the version applicable to the dispute in the main proceedings ('the USchadG'), states:

'"occupational activity" means any activity carried out in the course of an economic activity, a business or an undertaking, irrespective of its private or public, profit or non-profit character.'

16 The first sentence of Paragraph 39(1) of the Gesetz zur Ordnung des Wasserhaushalts (Law on the management of water resources) of 31 July 2009 (BGBl. 2009 I, p. 2585), in the version applicable to the dispute in the main proceedings ('the WHG'), provides:

'Maintenance of surface waters shall include their care and development as a public law obligation (maintenance obligation).'

17 The first sentence of Paragraph 40(1) of the WHG is worded as follows:

'Maintenance of surface waters shall be the responsibility of the owners of the waters, unless under *Land* law it is a task of local authorities, water and soil associations, special-purpose associations of municipalities or other public law corporations.'

18 Point 1 of the first sentence of Paragraph 38(1) of the Wassergesetz des Landes Schleswig-Holstein (Law on water of the *Land* of Schleswig-Holstein) of 11 February 2008 (Gesetz- und Verordnungsblatt für Schleswig-Holstein, 2008, p. 91), in the version applicable to the dispute in the main proceedings, provides:

'Maintenance of a body of water shall include, in addition to the measures listed in the second sentence of Paragraph 39(1) of the WHG, in particular also … the preservation and safeguarding of proper runoff, …'

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

19 In the course of 2006 to 2009, part of the Eiderstedt peninsula, located in the western part of the *Land* of Schleswig-Holstein (Germany), was classified as a 'protection area' on account, inter alia, of the presence of the black tern (*Chlidonias niger*), a protected aquatic bird 15 to 30 centimetres long with blue-grey plumage and a black head that is found mainly in the marshes of the Atlantic coast. According to the management plan, the protection area in respect of that species

remains for the most part managed traditionally as grassland over extensive areas and, by reason of its size in particular, it is still the most important breeding ground for the black tern in Schleswig-Holstein.

20 The Eiderstedt peninsula has to be drained for the purposes of habitation and agricultural use. This takes place by means of ditches, located between the plots, which run into a network of channels and are maintained by the respective users of the adjoining land. Responsibility for maintenance of the channels as receiving watercourses rests with 17 water and soil associations established on the Eiderstedt peninsula.

21 Deich- und Hauptsielverband Eiderstedt, Körperschaft des öffentlichen Rechts, a water and soil association established in the legal form of a corporation governed by public law, federates those 17 associations. One of the tasks that has been entrusted to it by statute is maintenance of the surface waters as a public law obligation. In order to carry out that task, Deich- und Hauptsielverband Eiderstedt operates, inter alia, the Adamsiel facilities, which comprise a sluice and a pumping station. The pumping station drains the entire area covered by the federated associations by means of a pump which is activated automatically when a certain water level is reached. The pumping operations set in motion take the water level down.

22 Since it took the view that, by operating that pumping station, Deich- und Hauptsielverband Eiderstedt caused environmental damage harming the black tern, Naturschutzbund Deutschland, in accordance with the USchadG which was adopted in order to transpose Directive 2004/35, requested measures to limit and remedy that damage from the District of Nordfriesland, a request which was rejected.

23 After unsuccessfully contesting the decision rejecting that application before the Verwaltungsgericht (Administrative Court, Germany), Naturschutzbund Deutschland lodged an appeal against that court's judgment before the Oberverwaltungsgericht (Higher Administrative Court, Germany), which set aside the judgment and required the District of Nordfriesland to adopt a fresh decision.

24 The District of Nordfriesland and Deich- und Hauptsielverband Eiderstedt then appealed on a point of law to the Bundesverwaltungsgericht (Federal Administrative Court, Germany).

25 For the purpose of determining whether the environmental damage at issue in the main proceedings must be considered not to be 'significant', within the meaning of point 2 of the second sentence of Paragraph 19(5) of the BNatSchG, which transposes the second indent of the third paragraph of Annex I to Directive 2004/35, the referring court raises the question of the interpretation of the phrase 'normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators', which appears in that annex.

26 In particular, the referring court seeks to ascertain, first, whether the concept of 'management' must be understood as corresponding solely to agricultural activities or whether it also covers the operation of a pumping station to irrigate and drain agricultural land, second, whether the question whether management is 'normal' must be assessed solely in the light of the habitat records and target documents, or may also be assessed in the light of other general principles of national law such as the good professional practices referred to in Paragraph 5(2) of the BNatSchG, third, whether, in order for management to be as carried on previously by the owner or operator, such management need only have been carried on at some time before the date for transposing Directive 2004/35, namely 30 April 2007, or whether it must also have continued to be

carried on on that date, and fourth, whether or not such previous management occurs irrespective of the habitat records and target documents.

27 Furthermore, for the purpose of determining whether Deich- und Hauptsielverband Eiderstedt, when operating the pumping station, carried out an 'occupational activity' within the meaning of Paragraph 2(4) of the USchadG, which transposes Article 2(7) of Directive 2004/35, the referring court seeks to ascertain, if its first series of questions is answered in the affirmative, whether an activity carried out in the public interest pursuant to a statutory assignment of tasks can be regarded as occupational in nature, within the meaning of the latter provision.

28 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1)(a) Does the term "management" within the meaning of the second indent of the [third] paragraph of Annex I to [Directive 2004/35] include activities inextricably bound up with direct use for land yield purposes?

If so:

(b) Under what conditions is the management of sites, as defined in habitat records or target documents, to be considered "normal" within the meaning of [Directive 2004/35]?

(c) What is the timescale for deciding if management is "as carried on previously" by owners or operators within the meaning of [Directive 2004/35]?

(d) Should the question of whether management is as carried on previously by owners or operators within the meaning of [Directive 2004/35] be answered independently of the habitat records or target documents?

(2) Does an activity carried out in the public interest pursuant to a statutory assignment of tasks constitute an "occupational activity" within the meaning of Article 2(7) of [Directive 2004/35]?'

Consideration of the questions referred

Question 1

29 By its first question, the referring court asks how the phrase 'normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators', in the second indent of the third paragraph of Annex I to Directive 2004/35, should be interpreted.

30 As a preliminary point, it should be noted that the first question falls within the context of 'environmental damage' allegedly caused to a species of bird, the black tern (*Chlidonias niger*).

31 In that regard, it should be pointed out that the purpose of Directive 2004/35 is to establish a framework of environmental liability based on a high degree of environmental protection and on the precautionary principle and 'polluter-pays' principle, with a view to preventing and remedying environmental damage caused by operators (see, to that effect, judgment of 13 July 2017, *Túrkevei Tejtermelő Kft.*, C-129/16, EU:C:2017:547, paragraphs 47 and 53 and the case-law cited).

32 The three categories of damage falling within the concept of ‘environmental damage’ that are defined in Article 2(1) of Directive 2004/35 include, in Article 2(1)(a), damage to protected species and natural habitats, which is damage that can cause the directive to apply under both Article 3(1)(a) and Article 3(1)(b) thereof.

33 Whilst the concept of ‘protected species and natural habitats’ must, in accordance with Article 2(3) of Directive 2004/35, be understood as referring in particular to the species and habitats listed in the Habitats Directive and the Birds Directive, among which, by virtue of Annex I to the Birds Directive, is the black tern (*Chlidonias niger*), damage to such species and habitats is defined, in the first subparagraph of Article 2(1)(a) of Directive 2004/35, as any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of those species or habitats.

34 It follows from the use of the adjective ‘significant’ in the first subparagraph of Article 2(1)(a) of Directive 2004/35 that only damage of a certain seriousness, classified as ‘significant damage’ in Annex I to that directive, can be regarded as damage to protected species and natural habitats, which means that it is necessary in each specific case to assess the importance of the effects of the damage concerned.

35 The first subparagraph of Article 2(1)(a) of Directive 2004/35 states that such an assessment must be carried out with reference to the baseline condition of the species and habitats concerned, taking account of the criteria set out in Annex I to that directive. The first two paragraphs of Annex I state the criteria that should be taken into account in determining whether or not the adverse changes to the baseline condition are significant, while specifying that damage with a proven effect on human health must be classified as ‘significant damage’.

36 The third paragraph of Annex I to Directive 2004/35 states, however, that the damage which it lists does not have to be classified as ‘significant damage’. It is apparent from the use of the words ‘does not have to’ that it is open to the Member States when transposing the directive to regard such damage as significant or as not significant for the purposes of Annex I thereto.

37 The second subparagraph of Article 2(1)(a) of Directive 2004/35 further provides that damage to protected species and natural habitats does not include adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of the Habitats Directive or Article 9 of the Birds Directive or, in the case of habitats and species not covered by EU law, in accordance with equivalent provisions of national law on nature conservation. It follows that any damage falling within the second subparagraph of Article 2(1)(a) of Directive 2004/35 is automatically excluded from the concept of ‘damage to protected species and natural habitats’.

38 That being so, the first question, which concerns the case of alleged damage to a protected species referred to in Annex I to the Birds Directive, is relevant only in a situation where the exclusion in the first alternative of the second subparagraph of Article 2(1)(a) of Directive 2004/35 is not applicable.

39 Consequently, damage caused by operation of a pumping station where its operation was expressly authorised by the relevant authorities on the basis of the provisions of the Habitats Directive or the Birds Directive that are referred to in the second subparagraph of Article 2(1)(a) of Directive 2004/35 cannot be classified as ‘damage to protected species and natural habitats’, within the meaning of Article 2(1)(a) of Directive 2004/35, and does not fall within that directive’s scope pursuant to either Article 3(1)(a) or Article 3(1)(b) thereof.

40 By way of further preliminary observation, it should be noted that, among the damage that the Member States do not have to classify as 'significant damage' by virtue of the third paragraph of Annex I to Directive 2004/35, the second indent of that paragraph refers to negative variations which either are due to natural causes or result from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators. That indent thus provides for two cases in which damage does not have to be classified as 'significant damage', namely (i) damage due to natural causes and (ii) damage resulting from intervention relating to the normal management of sites, and the second of those cases, which forms the subject matter of the first question, itself covers two alternatives.

41 In point 2 of the second sentence of Paragraph 19(5) of the BNatSchG, the Federal Republic of Germany transposed the two cases referred to in the second indent of the third paragraph of Annex I to Directive 2004/35 and, for that purpose, it repeated verbatim the wording of that indent in the German language version of Directive 2004/35.

42 However, as the District of Nordfriesland states in its written observations, there is a divergence, in the wording of the second case referred to in the second indent of the third paragraph of Annex I to Directive 2004/35, between the German language version and the other language versions. Whilst the language versions of that directive other than the German language version tie the word 'normal' directly to the word 'management' so as to make both alternatives of the second case referred to in the second indent of the third paragraph of Annex I to Directive 2004/35 subject to the term 'normal management', the German language version ties only the word 'management' to both those alternatives, the word 'normal' relating only to the first alternative.

43 According to settled case-law of the Court, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement that EU law be applied uniformly. Where there is a divergence between the various language versions, the provision in question must thus be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (judgment of 9 March 2017, *GE Healthcare*, C-173/15, EU:C:2017:195, paragraph 65 and the case-law cited).

44 In that regard, it should be pointed out that, as is apparent from paragraphs 34 to 37 of the present judgment, Directive 2004/35 adopts a broad definition of damage to protected species and natural habitats by providing that operators must be answerable for any significant damage, with the exception of the damage exhaustively listed in the second subparagraph of Article 2(1)(a) of Directive 2004/35 and of damage regarded by the Member States as not being significant damage under the third paragraph of Annex I to that directive.

45 Accordingly, in so far as those provisions render the environmental liability regime in principle inapplicable in respect of certain damage that may affect protected species and natural habitats, and thus diverge from the main objective underlying Directive 2004/35, namely to establish a common framework for the prevention and remedying of environmental damage in order to combat effectively increased site contamination and greater loss of biodiversity, they must necessarily be interpreted strictly (see, by analogy, judgment of 16 May 2019, *Plessers*, C-509/17, EU:C:2019:424, paragraph 38 and the case-law cited).

46 As regards more specifically damage referred to in the third paragraph of Annex I to Directive 2004/35, whilst the first and third indents of that paragraph envisage damage that is minor with regard to the species or habitat concerned, the second indent of that paragraph concerns

damage whose scope may be considerable depending on the natural causes affecting the species or habitat concerned or the management measures taken by the operator.

47 To accept, as results from the German language version of the second indent of the third paragraph of Annex I to Directive 2004/35, that the Member States have the power to exempt operators and owners from all liability merely because damage has been caused by previous management measures and, therefore, irrespective of whether those measures are normal would be such as to compromise both the principles and the objectives underlying that directive.

48 Such an approach would effectively accord the Member States the power to accept — contrary to the requirements that follow from the precautionary principle and the 'polluter-pays' principle, and merely because they result from previous practice — management measures which could be excessively harmful and unsuitable for sites hosting protected species or natural habitats and which would thus be liable to endanger or even destroy those species or habitats and to increase the risk of biodiversity loss in breach of the conservation obligations owed by the Member States under the Habitats Directive and the Birds Directive. That approach would have the consequence of widening excessively the scope of the exceptions provided for in the third paragraph of Annex I to Directive 2004/35 and would render the environmental liability regime established by that directive partly redundant, by taking outside the regime potentially significant damage caused by voluntary abnormal action on the part of the operator.

49 It follows that the German language version of the second indent of the third paragraph of Annex I to Directive 2004/35 must be read as meaning that, as in the other language versions, the word 'normal' must relate directly to the word 'management' and that the term 'normal management' must relate to both alternatives of the second case provided for in that indent.

50 It is in the light of those preliminary considerations that the first question must be answered.

51 In that regard, it should be noted that, in accordance with the wording of the second indent of the third paragraph of Annex I to Directive 2004/35, the 'management' which that indent mentions must relate to a site. The latter term may in particular refer to sites in which protected species or natural habitats, as referred to in the Habitats Directive and the Birds Directive, are to be found. Indeed, Annex I to Directive 2004/35, to which Article 2(1)(a) thereof refers, falls exclusively within the context of damage to protected species and natural habitats, and the protected species and natural habitats correspond in particular, as is mentioned in paragraph 33 of the present judgment, to the species and habitats listed in the Habitats Directive and the Birds Directive.

52 The word 'normal' corresponds to the words 'usual', 'ordinary' or 'common', which result from various language versions of the second indent of the third paragraph of Annex I to Directive 2004/35, such as, for example, the Spanish version ('corriente') or Greek version ('συνήθη'). However, in order not to negate the effectiveness of the word 'normal' in the context of environmental protection, it should be added that management can be regarded as normal only if it is consistent with good practices such as, inter alia, good agricultural practices.

53 It is apparent from the foregoing considerations that the concept of 'normal management of sites', in the second indent of the third paragraph of Annex I to Directive 2004/35, must be understood as encompassing any measure which enables good administration or organisation of sites hosting protected species or natural habitats that is consistent, inter alia, with commonly accepted agricultural practices.

54 In that context, it should be made clear that, since management of a site hosting protected species and natural habitats, as referred to in the Habitats Directive and the Birds Directive, necessarily encompasses all the management measures taken for conservation of the species and habitats present on that site, the normal management of such a site must be determined in the light of the necessary measures that the Member States must adopt, on the basis of Article 2(2) of the Habitats Directive and Article 2 of the Birds Directive, for the conservation of the species and habitats present on that site and, in particular, of the management measures provided for in detail in Articles 6 and 12 to 16 of the Habitats Directive and Articles 3 to 9 of the Birds Directive.

55 It follows that management of a site covered by the Habitats Directive and the Birds Directive can be regarded as normal only if it complies with the objectives and obligations laid down in those directives.

56 In that regard, it should be stated that, in view of the interaction between a site and the species and habitats that are on it and, in particular, of the impact of the various forms of management of the site on those species and habitats, whether or not those forms of management relate specifically to them, the management measures that the Member States must adopt on the basis of the Habitats Directive and the Birds Directive, in order to comply with the objectives and obligations laid down by those directives, must necessarily take into account the characteristic aspects of the site, such as, in particular, the existence of a human activity.

57 In order to provide an answer specifically to Question 1(a) as resulting from the context set out by the referring court, it should be stated that the concept of ‘normal management’ may, in particular, cover agricultural activities taken as a whole carried out on a site hosting protected species and natural habitats, that is to say, including activities which may be the essential complement thereof, such as irrigation and drainage and, therefore, the operation of a pumping station.

58 That interpretation is confirmed by the first alternative of the second case referred to in the second indent of the third paragraph of Annex I to Directive 2004/35. By stating that the normal management of sites must be understood in the sense defined in habitat records and target documents, that first alternative confirms that such management must be defined in the light of all the management measures adopted by the Member States on the basis of the Habitats Directive and the Birds Directive in order to meet their obligations to maintain or restore species and habitats protected by those directives.

59 In that regard, whilst it is true that neither the Habitats Directive nor the Birds Directive refers, in any of its provisions, to the concepts of ‘habitat records’ and ‘target documents’, it is nevertheless apparent from the practice of certain Member States, as set out, inter alia, in the Report from the Commission on the implementation of the Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (SEC(2003) 1478) or Annex 2 to the Commission’s ‘Guidance on Aquaculture and Natura 2000’, that both habitat records and target documents correspond to the documents that the Member States must adopt pursuant to the Habitats Directive and the Birds Directive in order to meet the objectives of those directives and the conservation obligations that they owe under them. In particular, it is apparent from that report and that guidance that such documents contain the very measures necessary for management of protected species and natural habitats.

60 It should be stated, furthermore, for the purpose of answering Question 1(b) as clarified in paragraph 26 of the present judgment, that whilst, in the context of the first alternative of the second case referred to in the second indent of the third paragraph of Annex I to Directive 2004/35, the

question whether management is normal must be determined from the management documents adopted by the Member States on the basis of the Habitats Directive and the Birds Directive, a court of a Member State called upon to assess in the light of the specific circumstances whether or not a management measure is normal cannot be prevented, where (i) those management documents do not contain sufficient guidance to carry out that assessment and (ii) the normality of the measure cannot be determined on the basis of the second alternative of the second case either, from assessing those management documents in the light of the objectives and obligations laid down in the Habitats Directive and the Birds Directive or with the assistance of domestic legal rules that have been adopted to transpose those directives or, failing this, are compatible with the spirit and purpose of those directives. It is for the referring court to determine whether the good professional practices referred to in Paragraph 5(2) of the BNatSchG, which it contemplates using in order to determine whether the management of the Eiderstedt site is normal, satisfy those conditions.

61 Furthermore, as is clear from the second alternative of the second case referred to in the second indent of the third paragraph of Annex I to Directive 2004/35, normal management of a site may also result from a previous practice that is carried out by the owners or operators. That second alternative thus covers management measures which, because they have been carried out for a certain period of time, may be regarded as usual for the site concerned, provided however that, as mentioned in paragraph 55 of the present judgment, they do not call into question compliance with the objectives and obligations laid down in the Habitats Directive and the Birds Directive.

62 It should be stated, for the purpose of answering Question 1(d), that the second alternative covers management measures which are not necessarily defined in the management documents adopted by the Member States on the basis of the Habitats Directive and the Birds Directive. Whilst it is possible, in principle, that a previous management measure is also provided for in the management documents adopted by the Member States on the basis of the Habitats Directive and the Birds Directive and may thus fall within both the first and the second alternative of the second case referred to in the second indent of the third paragraph of Annex I to Directive 2004/35, it is clear from the coordinating conjunction ‘or’ separating those two alternatives that they may apply independently of one another. That may in particular be the case where management documents have not yet been drawn up or where a management measure carried out previously by the owners or operators is not mentioned in those documents.

63 As to whether management constitutes previous management, which is the subject of Question 1(c), given the fact that a management measure may equally well fall independently under one or other of the aforesaid alternatives, it cannot be determined whether previous management is involved by reference only to the date on which the management documents were adopted.

64 Furthermore, since the EU legislature did not specify, in the wording of the second indent of the third paragraph of Annex I to Directive 2004/35, the temporal reference point from which it must be assessed whether management constitutes previous management, it must be held that that assessment cannot be carried out in the light of the date of entry into force or the date for transposing Directive 2004/35, referred to, respectively, in Article 20 and Article 19(1) of that directive. Moreover, such an interpretation would have the effect of confining the second alternative of the second case referred to in the second indent of the third paragraph of Annex I to Directive 2004/35 solely to practices that began before one of those dates and would thus render that second alternative largely nugatory by preventing the Member States from having recourse to it so far as concerns management measures carried out by owners or operators after those dates. An important balance intended by the EU legislature would then be upset.

65 That being so, and in the light of the fact that the second case envisaged in the second indent of the third paragraph of Annex I to Directive 2004/35 has the objective of enabling the Member States to provide that owners and operators are exempt in respect of damage caused to protected species and natural habitats by normal management of the site concerned, it is to be concluded that it can be determined whether a practice constitutes previous practice only in the light of the date on which the damage occurs. Thus, it is only if a normal management measure was carried out for a sufficiently long period of time until the occurrence of the damage and is generally recognised and established that that damage can be regarded as not significant.

66 In the light of the foregoing considerations, the answer to Question 1 is that the concept of 'normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators', in the second indent of the third paragraph of Annex I to Directive 2004/35, must be understood as covering, first, any administrative or organisational measure liable to have an effect on the protected species and natural habitats which are on a site, that measure being in the form resulting from the management documents adopted by the Member States on the basis of the Habitats Directive and the Birds Directive and interpreted, if need be, by reference to any domestic legal rule which transposes the latter two directives or, failing this, is compatible with the spirit and purpose of those directives, and second, any administrative or organisational measure that is regarded as usual, is generally recognised, is established and was carried out by the owners or operators for a sufficiently long period of time until the occurrence of damage caused by virtue of that measure to the protected species and natural habitats, all of those measures having, in addition, to be compatible with the objectives underlying the Habitats Directive and the Birds Directive and, inter alia, with commonly accepted agricultural practices.

Question 2

67 By its second question, the referring court asks whether Article 2(7) of Directive 2004/35 must be interpreted as meaning that the concept of 'occupational activity' which is defined therein also covers activities carried out in the public interest pursuant to a statutory assignment of tasks.

68 Under Article 3(1) of Directive 2004/35, the directive's scope extends only to damage caused by an 'occupational activity', a concept which is defined in Article 2(7) of the directive.

69 Article 2(7) provides that the concept of 'occupational activity' must be understood as meaning any activity carried out in the course of an economic activity, a business or an undertaking, irrespective of its private or public, profit or non-profit character.

70 In that regard, whilst it is true that the term 'economic activity' might appear to indicate that the occupational activity must be market-related or be competitive in nature, one or other, or even both, of the words 'business' and 'undertaking' may, depending on the various language versions, be understood both in an economic, commercial or industrial sense and in the more generic sense of 'occupation', 'operation', 'task' or 'work'. Such an interpretation is borne out by the wording of Article 2(7) of Directive 2004/35 which specifies that the occupational activity may pursue either a profit-making or non-profit-making objective.

71 It should nevertheless be borne in mind that it is necessary, in interpreting a provision of EU law, to take into account not only its wording, but also its context and the general scheme of the rules of which it forms part and the objectives pursued thereby (judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 36 and the case-law cited).

72 As regards, first, the context of Article 2(7) of Directive 2004/35, it should be pointed out that Annex III to that directive contains a list of occupational activities covered by the directive. That annex refers to activities, such as waste management operations, which are generally carried out in the public interest pursuant to a statutory assignment of tasks.

73 Furthermore, under the general scheme of Directive 2004/35, occupational activities covered by Article 2(7) thereof can be carried out solely by persons falling within the directive's scope, namely operators, who are defined in Article 2(6) as any natural or legal, private or public person who operates or controls the occupational activity (see, to that effect, judgment of 4 March 2015, *Fipa Group and Others*, C-534/13, EU:C:2015:140, paragraph 52). It is thus apparent from reading Article 2(6) of Directive 2004/35 together with Article 2(7) that the concept of 'occupational activity' has a broad meaning and also includes non-profit-making public activities carried out by public legal persons. Such activities, as a general rule, are neither market-related nor competitive in nature, so that to give the words 'business' and 'undertaking' in Article 2(7) of Directive 2004/35 a purely economic, commercial or industrial meaning would effectively exclude almost all of those activities from the concept of 'occupational activity'.

74 As regards, second, the objectives pursued by Directive 2004/35, it is apparent from reading recitals 2, 8 and 9 together that the directive, pursuant to the 'polluter pays' principle, seeks to hold operators financially liable where, on account of occupational activities posing a potential or actual risk for human health or the environment, they have caused environmental damage, so as to induce them to adopt measures and develop practices to minimise the risks of such damage.

75 An interpretation which, even though the words 'business' and 'undertaking' in Article 2(7) of Directive 2004/35 do not necessarily have, in all the language versions, a purely economic meaning, excludes from the concept of 'occupational activity' activities carried out in the public interest pursuant to a statutory assignment of tasks on the ground that they are not market-related or are not competitive in nature would deprive Directive 2004/35 of part of its practical effect, by taking outside its scope a whole series of activities, such as those at issue in the main proceedings, which pose an actual risk for human health or the environment.

76 It follows from the foregoing that the concept of 'occupational activity', referred to in Article 2(7) of Directive 2004/35, is not limited solely to activities which are market-related or are competitive in nature, but encompasses all activities carried out in an occupational context, as opposed to a purely personal or domestic context, and, therefore, activities carried out in the public interest pursuant to a statutory assignment of tasks.

77 In the light of the foregoing considerations, the answer to the second question is that Article 2(7) of Directive 2004/35 must be interpreted as meaning that the concept of 'occupational activity' which is defined therein also covers activities carried out in the public interest pursuant to a statutory assignment of tasks.

Costs

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

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

1. **The concept of 'normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators', in the second indent of the third paragraph of Annex I to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, must be understood as covering, first, any administrative or organisational measure liable to have an effect on the protected species and natural habitats which are on a site, that measure being in the form resulting from the management documents adopted by the Member States on the basis of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and interpreted, if need be, by reference to any domestic legal rule which transposes the latter two directives or, failing this, is compatible with the spirit and purpose of those directives, and second, any administrative or organisational measure that is regarded as usual, is generally recognised, is established and was carried out by the owners or operators for a sufficiently long period of time until the occurrence of damage caused by virtue of that measure to the protected species and natural habitats, all of those measures having, in addition, to be compatible with the objectives underlying Directive 92/43 and Directive 2009/147 and, inter alia, with commonly accepted agricultural practices.**

2. **Article 2(7) of Directive 2004/35 must be interpreted as meaning that the concept of 'occupational activity' which is defined therein also covers activities carried out in the public interest pursuant to a statutory assignment of tasks.**

[Signatures]

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* Language of the case: German.