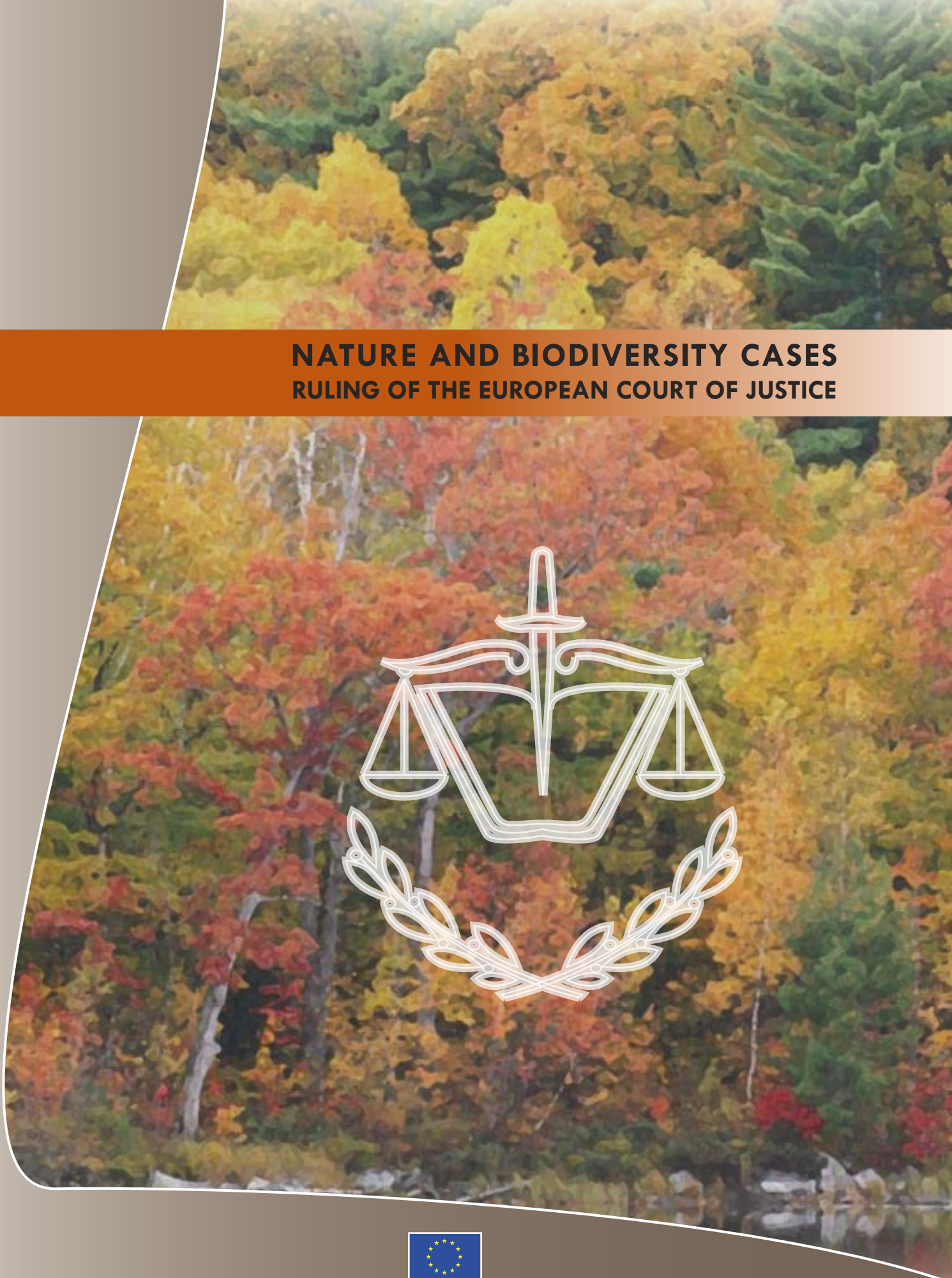
NATURE AND BIODIVERSITY CASES
RULING OF THE EUROPEAN COURT OF JUSTICE



European Commission

NATURE AND BIODIVERSITY CASES
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European Commission

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Luxembourg: Office for Official Publications of the European Communities, 2006

ISBN 92-79-02561-9

Printed in Luxembourg

Printed on white chlorine-free paper.

Table of Contents

Foreword

This year, the 10 new Member States made considerable progress in designating their sites for the European Natura 2000 network. When all Member States fulfil their obligations, an estimated 18% of the total EU25 land territory, an area larger than Germany, will be covered by Natura 2000 sites. The first, very important step in implementing this ambitious project is almost done – but this is only the beginning of a long term undertaking.

We are entering into the period of implementation: setting out and instigating management objectives for all Natura 2000 sites, monitoring and reporting the developments, and, not least, reacting to new challenges as e.g. climate change impact or still increasing fragmentation of European nature habitats. Nevertheless, there is much experience already available, and many lessons have been learned. Sharing those experiences and lessons means to spare time and work more efficiently.

One part of our common experience is the way how the legal framework –i.e. the 'birds' and 'habitats' directives are interpreted. To ensure a common understanding, the Commission has provided clarification of specific requirements and provisions of the nature directives in some guidance documents dealing with managing of Natura 2000 sites, assessment of plans and projects significantly affecting Natura 2000 sites, hunting and financing issues.

However in case of dispute or diverging views, it rests with the EU Court of Justice to provide definitive interpretation of a Directive. Even if most Court rulings primarily concern failures of individual Member States to fulfil their obligations or specific national situations, all EC and national authorities are bound by the general interpretation of the Court. In other words, the rulings of the Court are legally binding and both EC and national authorities are obliged to follow them. The Court rulings on nature conservation provide an important case-law. They are accessible to the public – nevertheless, their number is growing and it is sometimes quite complicated to the persons not directly working as lawyers to find and extract the most important parts regarding specific interpretation of European law.

From my numerous discussions at various levels of implementation – in national Parliaments, national and regional Governments, but also in daily contacts with concerned stakeholders – landowners, industries, citizens, environmental and other NGO's etc. - it appears that understanding and interpretation of European directives often varies, and the knowledge of the Court rulings have always been most helpful to build a common understanding and find practical solutions. I believe that the collection of rulings presented in this book will serve the same purpose. It is foreseen to be a daily tool to clarify the legal basis of EU provisions in the Nature protection area and avoid misunderstandings in their implementation in advance – before the real problem appears.

The booklet is organised along the two main pieces of nature legislation and contains most important and up to date rulings – so that the reader can find all information relevant to particular paragraphs or clauses in one place, together with the original text of the legislation. In addition, rulings are also provided as such to enable to see the broader context. It must be stressed, that this document is meant purely as a documentation and informative tool, it will need to evolve in line with any emerging jurisprudence on this subject and – as it is created as a compilation of existing documents - the Commission does not assume any liability for its contents. The presentation of the judgements reproduced in this booklet obviously does not commit the Court.

In May this year, the Commission adopted its Communication on Biodiversity stating, that achievement of our main political goal – to halt the decline of biodiversity in the European Union by 2010 – is achievable only if all actors will strengthen their efforts, and if the existing legal framework is fully and correctly implemented. I believe that this booklet, which will also be available on the Commission's web site http://ec.europa.eu/environment/index_en.htm will contribute to this target and will find its way into daily business of all concerned actors.

Ladislav Miko
Director, Protection of Natural Resources
Environment Directorate General

References:

- The Court of Justice of the European Communities: http://curia.eu.int
- Numerical access to the case-law of the Court of Justice, the Court of First Instance or the Civil Service Tribunal: http://curia.eu.int/cs/content/juris/index_form.htm
- EurLex: http://europa.eu.int/eur-lex/lex/en/index.htm
- List of the leading cases and judgements of the ECJ on environment:

  http://europa.eu.int/comm/environment/law/cases_judgements.htm
- DG Environment Nature & Biodiversity website:

  http://europa.eu.int/comm/environment/nature/home.htm
- Report on Birds Directive European Court of Justice Cases with Case Summaries, The Royal Society for the Protection of Birds, 2004

Guidelines:

- Guidance document on hunting under the Birds Directive

http://www.europa.eu.int/comm/environment/nature/nature_conservation/focus_wild_birds/sustainable_hunting/pdf/hunting_guide_en.pdf

- Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC

http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf

- Assessment of Plans and Projects Significantly Affecting Natura 2000 sites

http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/natura_2000_assess_en.pdf

- Habitats Directive: Article 12 – Strict Protection of Animal species (in preparation)

http://europa.eu.int/comm/environment/nature/nature_conservation/species_protection/specific_articles/art12/index_en.htm

- Article 8 of Habitats Directive (working group website)

http://europa.eu.int/comm/environment/nature/nature_conservation/natura_2000_network/financing_natura_2000/art8_working_group/index_en.htm

- Monitoring and Reporting - Habitats Directive Article 17

http://europa.eu.int/comm/environment/nature/nature_conservation/monitor_indic_reporting/monitoring_and_reporting/habitats/art17/index_en.htm

- Natura 2000 And Forests - Challenges and Opportunities

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/n2kforest_en.pdf

- Sustainable Tourism & Natura 2000

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/sust_tourism.pdf

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/sust_tourism_annex.pdf

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/sust_tourism_gpract.pdf

Other documents:

- Frequently Asked Questions - FAQ

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/memo_natura.pdf

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/faq_en.pdf

- EU Focus Nature 2002

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/focus_en.pdf

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/focus_corrigendum_en.pdf

- Natura 2000 & People: A Partnership

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/conf.pdf

- Implementing The Habitats Directive In Marine And Coastal Areas

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/implhmc.pdf

- EC Wetlands Communication

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/wetlands_en.pdf

- Natura 2000 - Managing Our Heritage

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/brochure-en.pdf

- Interpretation Manual of EU natural Habitats

http://europa.eu.int/comm/environment/nature/nature_conservation/eu_enlargement/2004/pdf/habitats_im_en.pdf

- Natura 2000, the European Commission nature newsletter

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/newsletter_natura/index_en.htm

- "Jewels in the crown" - Good practices Natura 2000 and leisure

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/documents_publications/pdf/jewels_in_the_crown.pdf

- Discover species of the Birds Directive

http://europa.eu.int/comm/environment/nature/nature_conservation/focus_wild_birds/species_birds_directive/index_en.htm

- Sustainable Hunting

http://europa.eu.int/comm/environment/nature/nature_conservation/focus_wild_birds/sustainable_hunting/index_en.htm

- Hunting, an added value for Biodiversity

http://www.face-europe.org/case-studies/default.htm

- Biodiversity monitoring and indicators

http://biodiversity-chm.eea.eu.int/information/indicator/

- Streamlining European 2010 Biodiversity Indicators

http://biodiversity-chm.eea.eu.int/information/indicator/F1090245995

- Natura 2000 - Europe's nature for you

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/pictures/europe_nature_for_you/brochure_europe_nature.pdf

- Pictures & Posters

http://europa.eu.int/comm/environment/nature/nature_conservation/useful_info/pictures/index_en.htm

Introduction

About Europe's nature conservation

The cornerstones of Europe's legislation on nature conservation are Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (hereinafter "the Birds Directive") and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereinafter "the Habitats Directive"). These Directives represent the most ambitious and large scale initiative ever undertaken to conserve our natural heritage across the European Union.

The Birds Directive aims to protect all wild birds and their most important habitats across the EU. The Directive puts an end to certain practices such as the keeping and sale of native wild birds, or indiscriminate methods of killing and introduces a legal mechanism for regulating other activities, such as hunting, to ensure that they are sustainable. The Directive also requires all 25 Member States to protect the most important sites for all migratory birds and 194 particularly threatened species, paying particular attention to wetlands of international importance.

The Habitats Directive introduces similar measures to the Birds Directive to protect Europe's wildlife but extends its coverage to a much wider range of rare, threatened or endemic species, including around 450 animals and 500 plants. Some 200 rare and characteristic habitat types are also, for the first time, targeted for conservation in their own right.

At the heart of both Nature Directives lies the creation of a Europe-wide ecological network of protected sites – called the **Natura 2000**. Every country has designated Natura 2000 sites to help conserve the rare habitats and species present in their territory. The individual Natura 2000 sites range in size from less than 1 ha to over 5,000 km² depending on the species or habitats they aim to conserve; the majority are around 100–1,000 ha. Some are located in remote areas but most form an integral part of our countryside, and contain a range of different habitats, buffer zones and other elements of the landscape. As a result, Natura 2000, is not only safeguarding some of Europe's rarest species and habitats, but it also provides a safe haven for countless other animals, plants and wildlife features which, although more common, are an equally important part of our natural heritage.

About the Court

For the purpose of European construction, the Member States concluded treaties creating first the European Communities and subsequently the European Union, with institutions which adopt laws in specific fields. The Communities therefore produce their own legislation, known as regulations, directives and decisions. To ensure that the law is enforced, understood and uniformly applied in all Member States, a judicial institution is essential. That institution is **the Court of Justice of the European Communities**. It is composed of three courts: the Court of Justice (created in 1952), the Court of First Instance (created in 1988) and the Civil Service Tribunal (created in 2004).

The Civil Service Tribunal resolves disputes between the European institutions and their officials and servants.

The Court of First Instance has jurisdiction to hear and determine at first instance all direct actions brought by individuals and the Member States, with the exception of those to be assigned to a 'judicial panel' and those reserved for the Court of Justice. Thus, the Court of First Instance deals with actions for annulment (against acts of the Community institutions), actions for failure to act (against inaction by the Community institutions), actions for damages (for the reparation of damage caused by unlawful conduct on the part of a Community institution), actions based on an arbitration clause (disputes concerning contracts in public or private law entered into by the Community, containing such a clause), and actions concerning the civil service (appeals against decisions of the Civil Service Tribunal on the disputes between the Community and its officials and other servants).

The Court of Justice, as a supreme court or constitutional court, has a primary purpose to examine the legality of Community acts and to ensure, in particular by examining references for a preliminary ruling, that Community law is interpreted and applied uniformly. It also applies Community law and resolves disputes between Community institutions or between those institutions and the Member States or even between Member States themselves. The Court of Justice is made up of 25 Judges and 8 Advocates-General who are appointed by common accord of the governments of the Member States and hold office for a renewable term of six years. They are chosen from legal experts whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are of recognised competence. The Judges select one of their numbers to be President of the Court for a renewable term of three years. The Advocates-General assist the Court in its task. They deliver, in open court and with complete impartiality and independence, opinions in all cases, save as otherwise decided by the Court where a case does not raise any new points of law. Their duties should not be confused with those of a public prosecutor or similar body.

It is the responsibility of the Court of Justice to ensure that the law is observed in the interpretation and application of the Treaties establishing the European Communities and of the provisions laid down by the competent Community institutions. To enable it to carry out that task, the Court has wide jurisdiction to hear **various types of action**, e.g. actions for annulment, actions for failure to act, application for compensation or appeals. Rulings which are mentioned in this booklet come from actions for failure to fulfil obligations or from references for a preliminary ruling.

Actions for failure to fulfil obligations - such proceedings enable the Court of Justice to determine whether a Member State has fulfilled its obligations under Community law. The commencement of proceedings before the Court of Justice is preceded by a preliminary procedure conducted by the Commission, which gives the Member State the opportunity to reply to the complaints against it. If that procedure does not result in termination of the failure by the Member State, an action for breach of Community law may be brought before the Court of Justice. That action may be brought by the Commission – as is practically always the case – or by another Member State. If the Court finds that an obligation has not been fulfilled, the Member State concerned must terminate the breach without delay. If, after new proceedings are initiated by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may, upon the request of the Commission, impose on the Member State a fixed or a periodic financial penalty.

References for a preliminary ruling are specific to Community law. Whilst the Court of Justice is, by its very nature, the supreme guardian of Community legality, it is not the only judicial body empowered to apply Community law. That task also falls to national courts, inasmuch as they retain jurisdiction to review the administrative implementation of Community law, for which the authorities of the Member States are essentially responsible; many provisions of the Treaties and of secondary legislation - regulations, directives and decisions - directly confer individual rights on nationals of Member States, which national courts must uphold. National courts are thus by their nature the first guarantors of Community law. To ensure the effective and uniform application of Community legislation and to prevent divergent interpretations, national courts may, and sometimes must, turn to the Court of Justice and ask that it clarify a point concerning the interpretation of Community law, in order, for example, to ascertain whether their national legislation complies with that law. A reference for a preliminary ruling may also seek review of the legality of an act of Community law. The Court of Justice's reply is not merely an opinion, but takes the form of a judgment or a reasoned order. The national court to which that is addressed is bound by the interpretation given. The Court's judgment also binds other national courts before which a problem of the same nature is raised. References for a preliminary ruling also serve to enable any European citizen to seek clarification of the Community rules which concern him. Although such a reference may be made only by a national court, which alone has the power to decide that it is appropriate do so, all the parties involved – that is to say, the Member States, the parties in the proceedings before national courts and, in particular, the Commission – may take part in proceedings before the Court of Justice. In this way, a number of important principles of Community law have been laid down in preliminary rulings, sometimes in answer to questions referred by national courts of first instance.

About this booklet

Purpose of this booklet is to have a brief and handy collection of main Courts' rulings (produced until 15th July 2006)* related to crucial articles of Birds and Habitats Directives. As it was already mentioned above the Court plays unfungible role in application, interpretation and enforcement of the Community legislation. Therefore knowledge of its judgements is necessary for proper understanding of substance and aims of any legislation. And in case of the two directives on nature conservation it is especially true because they are complex and complicated pieces of legislation.

The substance of this booklet is made of selected Court's rulings which are the most important ones in particular issues of these two directives. The **first part**, divided into three chapters, contains statements of the Court, as they were pronounced in each particular case, concerning appropriate articles of the Birds and Habitats Directive (chapter 2. and 3.) and also statements which can be considered as common principles of both these directives or rather of the Community law as a whole (chapter 1.). More detailed version of those rulings as they were subject of procedure before the Court, with arguments of the parties and information about background of each case, can be found in **second part**. To see the original version of a ruling it is possible to use the internet link mentioned in heading of each case.

In **Annex** there is an overview of all rulings of the Court in this field in order as they were released with a brief summary including concerned articles of the Directives.

* Please note that following the printing of this booklet, the Court has delivered a further important ruling on 14 September 2006 (Bund Naturschutz Bayern - C-244/05), which clarifies its previous ruling in the Dragaggi case (C-117/03).
This will be covered by future updates of this booklet.

PART I.

1. Common principles:

According to the case-law of the Court:

Under the third paragraph of Article 249 EC[1], a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods for implementing the Directive in question in domestic law. However, in accordance with settled case-law, while **the transposition of a directive** into domestic law does not necessarily require that the content of the Directive be incorporated formally and verbatim in express, specific legislation and, depending on its content, a general legal context may be adequate for the purpose, that is on condition that that context does indeed guarantee the full application of the Directive in a sufficiently clear and precise manner. In that regard, it is important in each individual case to determine the nature of the provision, laid down in a directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States.

(C-6/04, Commission v. United Kingdom)

The provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. The **principle of legal certainty** requires appropriate publicity for the national measures adopted pursuant to Community rules in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by Community law.

(C-415/01, Commission v. Belgium)

It would be contrary to the **principle of legal safety** if a Member State could rely on the regional authorities' power to issue regulations in order to justify national legislation which does not comply with the prohibitions laid down in a directive.

(C-157/89, Commission v. Italy)

Member States are, in the context of the [Habitats] Directive, under a particular duty to ensure that their legislation intended to transpose that Directive is **clear and precise**.

(C-98/03, Commission v. Germany)

A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order **to justify a failure to comply** with the obligations and time-limits laid down in a directive.

(C-166/97, Commission v. France – “Seine Estuary”)

The fact, should it be established, that **a practice** is in conformity with the requirements of a directive which concern protection cannot constitute a reason for not transposing that Directive into the domestic law of the Member State concerned.

[1] http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C_2002325EN.003301.html

(C-6/04, Commission v. United Kingdom)

The **aim of the pre-litigation procedure** provided for in Article 169 of the Treaty (now Article 226 EC)[2] is to give the Member State concerned an opportunity to justify its position or, as the case may be, to comply of its own accord with the requirements of the Treaty. If that attempt to reach a settlement proves unsuccessful, the Member State is requested to comply with its obligations as set out in the reasoned opinion which concludes the pre-litigation procedure, within the period prescribed in that opinion. The proper conduct of that procedure constitutes an essential guarantee intended by the Treaty not only to protect the rights of the Member State concerned but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter, the subject-matter being determined by the Commission's reasoned opinion. Where it is not disputed that the reasoned opinion and the procedure leading up to it were properly conducted, a Member State's right to a fair hearing is not infringed by the circumstance that the contentious procedure is opened by an application which takes no account of any new matters of fact or law put forward by the Member State concerned in its reply to the reasoned opinion. It is fully open to that State to raise those matters in the contentious procedure, to begin with in its first pleading in defence.

(C-3/96, Commission v. Netherlands)

In an action under Article 169 of the Treaty (now Article 226 EC), the question whether a Member State has failed to fulfil its obligations must be determined by reference to **the situation prevailing at the end of the period laid down in the reasoned opinion**. The Court cannot therefore take account of any subsequent changes.

(C-166/97, Commission v. France – "Seine Estuary"; C-96/98, Commission v. France – "Poitevin Marsh"; C-38/99, Commission v. France; C-71/99, Commission v. Germany; C-220/99, Commission v. France)

Where by means of a directive the Community authorities have placed Member States under **a duty to adopt a certain course of action**, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before the courts and national courts were prevented from taking it into consideration as an element of Community law.

Consequently, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by **an individual against any authority** of a Member State where that State has either failed to implement the Directive in national law by the end of the period prescribed or has failed to implement it correctly. Moreover, a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.

(C-118/94, Italy – "Regione Veneto")

Member States exercise sovereign rights in their **exclusive economic zone** and on the **continental shelf** and the [Habitats] Directive is to that extent applicable beyond the Member States' territorial waters. It follows that the Directive must be implemented in that exclusive economic zone.

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[2] If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

In an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to **prove the allegation** that the obligation has not been fulfilled and it may not rely on any presumption.

(C-6/04, Commission v. United Kingdom)

2. The Birds Directive

Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25.4.1979, p. 1)[3]

2.1. The method of transposing the Birds Directive

According to the case-law of the Court:

The transposition of a directive into national law does not necessarily require the provision of the directive to be enacted in precisely the same words in a specific, express legal provision; a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficient clear and precise manner. However, a faithful transposition becomes particularly important in a case such as the transposition of the Birds Directive concerning the conservation of wild birds in which the management of the common heritage is entrusted to the Member States in their respective territories.

(C-247/85, Commission v. Belgium; C-252/85, Commission v. France, C-118/94, Italy – "Regione Veneto")

2.2. Field governed by the Directive

Article 1

1. 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.

2. It shall apply to birds, their eggs, nests and habitats.

3. This Directive shall not apply to Greenland.

According to the case-law of the Court:

The general system of protection which the Directive seeks to establish concerns **all bird species**, including those with particular colour, even if such species are rare.

A provision of national legislation which limits the protection required by the Directive to the species of birds living in the wild state in the Member State is in accordance with the requirements of the Directive if it also covers bird species living naturally or usually in the European territory of the Member States. Also birds which are only passing through a Member State must be regarded as living naturally in the wild state in the Member State albeit for a limited period. The **protective effect** of the Directive also covers species of naturally occurring birds in the wild state in the European territory of another Member State which are not naturally or usually to be found in the territory of a Member State but which are transported there, kept there or marketed there, whether alive or dead.

(C-247/85, Commission v. Belgium)

[3] http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31979L0409:EN:HTML

Article 2

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 .

According to the case-law of the Court:

Article 2 is **not an independent derogation** from the obligations and requirements of the Directive.

(C-262/85, Commission v. Italy)

See particularly in rulings relating to Article 4 and Article 9.

Article 3

1. In the light of the requirements referred to in Article 2, member states shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

(a) creation of protected areas;
(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;
(c) re-establishment of destroyed biotopes;
(d) creation of biotopes.

According to the case-law of the Court:

Article 3 of the Birds Directive requires Member States to take the requisite **measures to preserve, maintain or re-establish** a sufficient diversity and area of habitats for all the species of birds covered by the Directive. The obligations on Member States arising under Article 3 therefore exist before any reduction is observed in the number of birds or any risk of a protected species becoming extinct has materialised.

(C-355/90, Commission v. Spain - “Santoña Marshes”, C-117/00, Commission v. Ireland – “Owenduff-Nephin Beg Complex”)

2.3. Obligations of special conservation measures of species habitats: legal protection regime of special protection areas (SPA)

2.3.1. Classification of SPA and providing them with a legal protection

Article 4.1 and 4.2

1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. In this connection, account shall be taken of:

(a) species in danger of extinction;
(b) species vulnerable to specific changes in their habitat;
(c) species considered rare because of small populations or restricted local distribution;
(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

According to the case-law of the Court:

Article 4(1) and (2) requires the Member States to provide the special protection areas referred to therein with a **legal protection regime** that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the Directive and the breeding, moulting and wintering of migratory species which are regular visitors, albeit not listed in that Annex.

(C-166/97, Commission v. France – "Seine Estuary"; C-96/98, Commission v. France – "Poitevin Marsh"; C-415/01, Commission v. Belgium)

Article 4(1) requires Member States, if species mentioned in Annex I occur on their territory, to classify as special protection areas the most suitable territories in number and size for their conservation, an obligation which **is not possible to avoid by adopting other special conservation measures**.

(C-3/96, Commission v. Netherlands)

Sufficient protection for the purposes of that provision is not ensured by national legislation concerning water which fails to make provision for water management or by agri-environmental measures that are **voluntary and purely hortatory** in nature in relation to farmers working holdings located in special protection areas.

(C-96/98, Commission v. France – "Poitevin Marsh")

A protection regime under which the only status enjoyed by a special protection area is that it is part of **State-owned land** and of a **maritime game reserve** is incapable of providing adequate protection for the purposes of those provisions.

(C-166/97, Commission v. France – "Seine Estuary")

The Greek government argues that the legal instrument aiming to ensure the protection of the site in question is being prepared. It underlines in addition that the existing legal regime is enough to ensure effective protection of the Messolongi lagoon. This protection would come from a global legal framework made up from the application of the international conventions, Community environmental law and, constitutional and other provisions under national law. To this would be added the case-law of the Council of the State and the administrative practice.

With regard to the existing legal protection regime, applicable to the Messolongi lagoon, it is advisable to note that the aforementioned regime is too general and concerns neither the SPA in question specifically, nor the species living there (in this sense, please refer to the aforementioned judgements of 18 March 1999, Commission/France, C-166/97, paragraphs 24 and 25, and of 25 November 1999, Commission/France, C-96/98, paragraphs 25 and 26).

Consequently, the argumentation of the Greek government, according to which the mechanisms stated in paragraph 11 of this judgement establish an appropriate legal framework aiming to ensure the protection of the site concerned, should be rejected.

(C-166/04, Commission v. Grece – unpublished)

The Member States' margin of **discretion in choosing the most suitable territories** does not concern the appropriateness of classifying as special protection areas the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species in question. Consequently, where it appears that a Member State has classified as special protection areas sites, the number and total area of which are manifestly less than the number and total area of the sites considered to be the most suitable, it will be possible to find that that Member State has failed to fulfil its obligation under Article 4(1).

For assessing the extent to which the Member State has complied with that obligation, the Court may use as a basis of reference **the Inventory of Important Bird Areas in the European Community (IBA)** which draws up an inventory of areas of great importance for the conservation of wild birds in the Community.

(C-3/96, Commission v. Netherlands)

The **IBA**, although not legally binding on the Member States concerned, contains scientific evidence making it possible to assess whether a Member State has complied with its obligation to classify as special protection areas the most suitable territories in number and size for conservation of the protected species.

It follows from the general scheme of Article 4 that, where a given **area fulfils the criteria** for classification as a special protection area, it must be made the subject of special conservation measures capable of ensuring, in particular, the survival and reproduction of the bird species mentioned in Annex I to that Directive.

(C-374/98, Commission v. France - “Basses Corbières”)

In implementing the Directive, Member States are not authorized to invoke, at their option, grounds of derogation based on taking **other interests** into account. With respect, more specifically, to the obligation to take special conservation measures for certain species under Article 4, such grounds must, in order to be acceptable, correspond to a general interest which is superior to the general interest represented by the ecological objective of the Directive.

In particular, the interests referred to in Article 2, namely **economic and recreational requirements** do not enter into consideration, as that provision does not constitute an autonomous derogation from the general system of protection established by the Directive.

(C-355/90, Commission v. Spain - “Santoña Marshes”)

It is the ornithological criteria laid down in paragraphs (1) and (2) of Article 4, which are to guide the Member States in designating and defining the boundaries of SPAs. Member States are not authorised to take account of the **economic requirements** mentioned in Article 2 when choosing and defining the boundaries of a Special Protection Area or even to take account of economic requirements constituting a general interest superior to that represented by the ecological objective of that Directive.

Member States may not take account of economic requirements in so far as they amount to **imperative reasons of overriding public interest** of the kind referred to in Article 6(4) of the Habitats Directive, as inserted in the Birds Directive. Although the latter provision widened the range of grounds on which it may be justified to encroach upon Special Protection Areas already designated as such, by

expressly including therein reasons of a social or economic nature, it nevertheless did not make any change regarding the initial stage of classification referred to in Article 4(1) and (2) of the Birds Directive, and therefore the classification of sites as Special Protection Areas must in all circumstances be carried out in accordance with the criteria accepted by those provisions.

(C-44/95, United Kingdom - "Lappel Bank")

A Member State may not reduce the surface area of an SPA or alter its boundaries unless the areas excluded from the SPA are no longer the most suitable territories for the conservation of species of wild birds within the meaning of Article 4(1) of the Directive.

(C-191/05, Commission v. Portugal)

The provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. The principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to Community rules in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by Community law. With regard to **maps demarcating SPAs**, they must be invested with unquestionable binding force.

(C-415/01, Commission v. Belgium)

2.3.2. Avoidance of pollution or deterioration of habitats

Article 4.4

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, 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. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.

According to the case-law of the Court:

In choosing the territories which are most suitable for classification as special protection areas pursuant to Article 4(1), Member States have a certain discretion which is limited by the fact that the classification of those areas is subject to certain ornithological criteria determined by the Directive, such as the presence of birds listed in Annex I to the Directive, on the one hand, and the designation of a habitat as a wetland area, on the other. However, Member States do not have the same **discretion under Article 4(4)** to modify or reduce the extent of such areas.

(C-57/89, Commission v. Germany - "Leybucht", C-355/90, Commission v. Spain - "Santoña Marshes")

The power of the Member States to reduce the extent of special protection areas can be justified only on exceptional grounds corresponding to a general interest which is superior to the general interest represented by the ecological objective of the Directive. In that context the **economic and recreational requirements** referred to in Article 2 do not enter into consideration, since that provision does not constitute an autonomous derogation from the system of protection established by the Directive.

(C-57/89, Commission v. Germany - "Leybucht")

The first sentence of Article 4(4) requires Member States to take appropriate steps to avoid, inter alia, deterioration of habitats, not only in areas classed as special protection areas in accordance with

Article 4(1), but also in areas which are the most suitable for the conservation of wild birds, **even if they have not been classified as special protection areas**, provided that they merit such classification. It follows, with regard to the latter areas, that any infringement of the first sentence of Article 4(4) presupposes that the areas in question are among the most suitable territories in number and size for the conservation of protected species, within the meaning of the fourth subparagraph of Article 4(1), and that these areas have suffered deterioration.

Even if it were assumed that Community **aid measures for agriculture** are disadvantageous to agriculture compatible with the conservation requirements laid down by the Directive that would not dispense a Member State from its obligations under that Directive, in particular, those under the first sentence of Article 4(4) thereof.

(C-96/98, Commission v. France – "Poitevin Marsh")

See also Article 7 of the Habitats Directive.

2.4. Obligations of protection of species

2.4.1. General system of protection

Article 5

Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:

(a) deliberate killing or capture by any method;
(b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
(c) taking their eggs in the wild and keeping these eggs even if empty;
(d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
(e) keeping birds of species the hunting and capture of which is prohibited.

According to the case-law of the Court:

As indicated by the third recital of the preamble to the Directive[4], **the protection of migratory species** is typically a transfrontier environment problem entailing common responsibilities for the Member States. The importance of complete and effective protection of wild birds throughout the Community, irrespective of the areas they stay in or pass through, causes any national legislation which delimits the protection of wild birds by reference to the concept of national heritage to be incompatible with the Directive.

The prohibitions set out in Article 5(b) and (c) must apply **without any limitation in time**. An uninterrupted protection of the birds' habitat is necessary since many species re-use each year nests built in earlier years. To suspend that protection throughout a particular period of the year cannot be considered to be compatible with the abovementioned prohibition.

(C-252/85, Commission v. France)

Article 5 provides for general prohibitions on the deliberate killing or capture of the species of birds referred to in Article 1 and on the deliberate destruction of, or damage to their nests and eggs and the deliberate disturbance of those birds insofar as their disturbance would be significant having regard to the objectives of the Directive. If the national legislation permits derogation from the provisions for

[4] Whereas the species of wild birds naturally occurring in the European territory of the Member States are mainly migratory species; Whereas such species constitute a common heritage and whereas effective bird protection is typically a trans-frontier environment problem entailing common responsibilities;

protection of birds as long as the acts concerned are carried out 'in the course of **the normal use of the land for agricultural, forestry or fishing purposes**' than the reference to a particular use of the land does not provide a precise indication of the extent to which damage to the environment is permitted. The concept of the normal use of the land and the concept of an unintentional infringement of the provisions for the protection of the birds belong to two different legal planes. Since the national legislation does not define the concept 'normal use', unintentional damage to the life and habitat of birds is not excluded from the scope of the provision which constitutes a derogation from the prohibitions laid down in Article 5 in so far as such damage is necessary in the course of the normal use of the land. Thus, the argument equating the normal use of the land with acts involving no intention to infringe the rules for the protection of birds cannot be upheld. The provision which constitutes derogation from the prohibitions laid down in Article 5 must meet the criteria laid down in Article 9 in order to be justified.

(C-412/85, Commission v. Germany)

Article 5(b) requires the Member States to prohibit in particular **deliberate destruction of, or damage to, nests and eggs or removal of nests**. The reasons given to justify the national legislation which generally permits the removal and destruction of nests built against houses and adjoining buildings, namely the prevention of fires, floods and disease, are certainly of such a kind as to justify the removal and destruction of nests under Article 9. However, the removal or destruction of nests is necessary only in specific cases in which the higher-ranking interests of public health and security must override the protection of birds and their habitats but the national rules provide for a derogation which is not sufficiently delimited. It cannot be maintained that all nests built against houses and adjoining buildings always represent a danger to health. When a national legislation generally authorises the disturbance, removal or destruction of birds' nests built against houses and adjoining buildings, according to the criteria and conditions of Article 9(1), the derogation is not limited to specific situations in which there is no other satisfactory solution than the destruction or removal of nests and does not comply with the formal requirements of Article 9(2) because it does not specify the conditions of risk and the circumstances of time and place in which the derogations may be granted or the controls which will be carried out.

(C-247/85, Commission v. Belgium)

In determining whether derogation is compatible with Article 9 it should be noted that the national rules which do not specify the reasons set out in Article 9(1) or the criteria and conditions referred to in Article 9(2), particularly as regards the **circumstances of time and place in which a derogation may be granted**. Consequently, the national legislation is not in conformity with Article 5(b) and (c).

(C-252/85, Commission v. France)

See also Article 9.

2.4.2. Marketing of birds

Article 6

1. Without prejudice to the provisions of paragraphs 2 and 3, Member States shall prohibit, for all the bird species referred to in Article 1, the sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognizable parts or derivatives of such birds.

2. The activities referred to in paragraph 1 shall not be prohibited in respect of the species referred to in Annex III/1, provided that the birds have been legally killed or captured or otherwise legally acquired.

3. Member States may, for the species listed in Annex iii/2, allow within their territory the activities referred to in paragraph 1, making provision for certain restrictions, provided the birds have been legally killed or captured or otherwise legally acquired.

Member States wishing to grant such authorisation shall first of all consult the Commission with a view to examining jointly with the latter whether the marketing of specimens of such species would result or could reasonably be expected to result in the population levels, geographical distribution or reproductive rate of the species being endangered throughout the community. Should this examination prove that the intended authorisation will, in the view of the Commission, result in any one of the aforementioned species being thus endangered or in the possibility of their being thus endangered, the Commission shall forward a reasoned recommendation to the Member State concerned stating its opposition to the marketing of the species in question. Should the Commission consider that no such risk exists, it will inform the Member State concerned accordingly.

The Commission's recommendation shall be published in the official journal of the European Communities.

Member States granting authorisation pursuant to this paragraph shall verify at regular intervals that the conditions governing the granting of such authorisation continue to be fulfilled.

4. The Commission shall carry out studies on the biological status of the species listed in Annex III/3 and on the effects of marketing on such status.

It shall submit, at the latest four months before the time limit referred to in Article 18(1) of this Directive, a report and its proposals to the committee referred to in Article 16, with a view to a decision on the entry of such species in Annex III/2.

Pending this decision, the Member States may apply existing national rules to such species without prejudice to paragraph 3 hereof.

According to the case-law of the Court:

Article 6(1) requires the Member States to impose **a general prohibition on the marketing** of all the birds covered by the Directive, alive or dead, and of any readily recognizable parts or derivatives of such birds. It prohibits the marketing of all species of birds irrespective of their size.

Article 6(2) provides that marketing is not to be prohibited in respect of **the seven species** referred to in Annex III/1, provided that the birds have been legally killed or captured or otherwise legally acquired. Since the list in Annex III/1 concerns only seven bird species, whereas the list of birds which may be hunted according to the national legislation includes 72 species, it is plain that the provision of national law in question does not comply with the requirements of the Directive. It is intended to avoid a situation in which all the species that may be hunted may also be marketed because of the pressure which marketing may exert on hunting and consequently on the population level of the species in question.

(C-262/85, Commission v. Italy)

2.4.3. Hunting, capture or killing of birds

Article 7

1. Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation. Member States shall ensure that the hunting of these species does not jeopardize conservation efforts in their distribution area.

2. The species referred to in Annex II/1 may be hunted in the geographical sea and land area where this Directive applies.

3. The species referred to in Annex II/2 may be hunted only in the Member States in respect of which they are indicated.

4. Member States shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the

population of these species, in particular migratory species, with the measures resulting from Article 2. They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. Member States shall send the Commission all relevant information on the practical application of their hunting regulations.

According to the case-law of the Court:

Article 7(4) seeks in particular to impose a prohibition of hunting of all species of wild birds during the rearing periods and the various stages of reproduction and dependency and, in the case of migratory species, during their return to their rearing grounds. Article 7(4) is designed to secure **a complete system of protection** in the periods during which the survival of wild birds is particularly under threat. Accordingly, protection against hunting activities cannot be confined to the majority of the birds of a given species, as determined by average reproductive cycles and migratory movements.

(C-157/89, Commission v. Italy, C-38/99, Commission v. France)

The national legislation must guarantee that **the species of birds not listed in Annex II** may not be hunted. Under Article 7, it is permitted only to provide that, owing to their population level, geographical distribution and reproductive rate throughout the community, the species listed in Annex II to the Directive may be hunted.

(C-247/85, Commission v. Belgium)

Article 7 authorizes Member States to allow hunting of **the species listed in Annex II** under certain conditions and within certain limits. It is clear from the general scheme of protection provided for in the Directive that national legislation may not extend the list contained in Annex II indicating the bird species which may be hunted.

(C-262/85, Commission v. Italy)

Birds' reproductive cycles and migratory movements are subject to a degree of variability which, owing to meteorological circumstances, affects in particular the periods during which reproduction and migration take place. Number of birds of a given migratory species may begin their return journey to their rearing grounds comparatively early relative to average migratory flows. That is particularly true where the species concerned regularly travels between migration and rearing grounds which are sometimes at a considerable distance from each other, crossing numerous borders and affecting different countries and where, within one species, there are different populations whose routes sometimes diverge and pass through separate areas. Some young birds of a given species may still be in the nest or dependent on their parents for food after the end of the average reproduction period. The second and third sentences of Article 7(4) are designed to secure **a complete system of protection** in the periods during which the survival of wild birds is particularly under threat.

Protection against **hunting activities** cannot be confined to the majority of the birds of a given species, as determined by average reproductive cycles and migratory movements. It would be incompatible with the objectives of the Directive if, in situations characterised by prolonged dependence of the fledglings on the parents and early migration, part of the population of a given species should fall outside the protection laid down.

National legislation, which declares the hunting of certain species open in principle, without prejudice to provisions to the contrary laid down by **the regional authorities**, does not satisfy the requirements

of protection laid down by the Directive. In fact, it would be contrary to the principle of legal safety if a Member State could rely on the regional authorities' power to issue regulations in order to justify national legislation which does not comply with the prohibitions laid down in a directive.

Where is no specific literature available relating to the territory of the Member State concerned the applicant may refer to **ornithological works** dealing with a general area of distribution which includes that Member State.

(C-157/89, Commission v. Italy)

Any **hunting activity** is liable to disturb wildlife and that it may in many cases affect the state of conservation of the species concerned, independently of the extent to which it depletes numbers. The regular elimination of individuals keeps the hunted populations in a permanent state of alert which has disastrous consequences for numerous aspects of their living conditions. Those consequences are particularly serious for groups of birds which, during the season of migration and wintering, tend to gather together in flocks and rest in areas which are often very confined or even enclosed. Disturbances caused by hunting force these animals to devote most of their energy to moving to other spots and to fleeing, to the detriment of time spent feeding and resting for the purpose of the migration. Those disturbances are reported to have an adverse impact on the level of energy of each individual and the mortality rate of all the populations concerned. The effect of disruption caused by hunting birds of other species is particularly significant for those species whose return migration takes place earlier.

According to Article 7 (4) the Member States are to see in particular that the species to which **hunting laws** apply are not hunted during the rearing season or during the various stages of reproduction (second sentence) and in particular in the case of migratory species to which hunting regulations apply that they are not hunted during their period of reproduction or during their return to their rearing grounds (third sentence).

The third sentence of Article 7(4) is specifically intended to prevent species, for which hunting has already closed will be subject to indirect depletion owing to confusion with the species for which hunting is still open, from being exposed to the risk of depletion due to hunting during the period of **pre-mating migration**, requiring the Member States to take all necessary measures to prevent any hunting during that period.

It is no answer to the foregoing to argue that hunting is **a recreational activity** justifying an exception to Article 7(4). It is clear from Article 2, which requires the Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, that the protection of birds must be balanced against other requirements, such as those of an economic nature. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the Directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation. Article 7(4) contains a clear and specific requirement, independent of the general requirement laid down in Article 2.

Fixing one single date for all the species concerned for **the closing of hunting**, which is equivalent to that fixed for the species which is the earliest to migrate, guarantees in principle that the objective laid down in the third sentence of Article 7(4) is realized. However, it is possible that the Member State concerned may be able to adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering. The national authorities are not empowered by the Directive to fix closing dates for the hunting season which vary according to the species of bird, unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering.

The fact that **the closing dates for hunting** vary from region to another is in itself compatible with the third sentence of Article 7(4). That provision requires only that the closing date for hunting be set in such a way as to make possible complete protection of migratory birds during their pre-mating migration. If it appears that the pre-mating migration begins at different times in different parts of the territory of a Member State that Member State is permitted to set different closing dates for hunting. Similarly, nothing prevents a Member State from conferring on subordinate authorities the power to fix the closing date for the hunting of migratory birds, provided that it guarantees, by legislation which is general in scope and not limited in time, that that date will be fixed in such a way as to ensure complete protection of the species of bird referred to in the Directive during pre-mating migration. On condition that complete protection of the species is guaranteed, the fixing of closing dates which vary between the different parts of the territory of a Member State is compatible with the Directive. If the power to fix the closing date for the hunting of migratory birds is delegated to subordinate authorities, the provisions which confer that power must ensure that the closing date can be fixed only in such a way as to make possible complete protection of the birds during pre-mating migration.

The date of the commencement of pre-mating migration varies on the basis of several factors, namely the species of bird concerned, differences from year to year, geographical differences and the availability of feeding material. The method consisting in fixing **the closing date for hunting** by reference to the period during which migratory activity reaches its highest level cannot be considered to be compatible with Article 7(4). The same is true of those methods which take into account the moment at which a certain percentage of birds have started to migrate and of those which consist in ascertaining the average date of the commencement of pre-mating migration. Pursuant to Article 7(4) the closing date for the hunting of migratory birds and waterfowl must be fixed in accordance with a method which guarantees complete protection of those species during the period of pre-mating migration and that, as a result, methods whose object or effect is to allow a certain percentage of the birds of a species to escape such protection do not comply with that provision.

(C-435/92, "Association pour la Protection des Animaux Sauvages and others")

A method whose object or effect is to allow a certain percentage of the birds of a species to escape complete protection during the period of pre-mating migration does not comply with Article 7(4). As regards the staggering of **closing dates for hunting**, it must be borne in mind that the national authorities are not empowered by the Directive to lay down dates which vary according to species of bird unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of species of bird liable to be affected by such staggering.

(C-38/99, Commission v. France)

The third indent of Article 9(1) (a) does indeed allow Member States **to derogate** from the general scheme of protection in way which goes further than is provided for in Article 7. However, such a derogation must comply with the three conditions of Article 9: first, the Member State must restrict the derogation to cases in which there is no other satisfactory solution; secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9 (1) (a), (b) and (c); thirdly, the derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them.

(C-262/85, Commission v. Italy)

See also Article 9.

Article 8

1. In respect of the hunting, capture or killing of birds under this Directive, Member States shall prohibit the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV(a).

2. Moreover, Member States shall prohibit any hunting from the modes of transport and under the conditions mentioned in Annex IV (b).

According to the case-law of the Court:

Article 8(1), in conjunction with Annex IV (a) thereto, provides that Member States are to prohibit, in particular, **semi-automatic or automatic weapons** with a magazine capable of holding more than two rounds of ammunition. National legislation provides that "hunting with a repeating or semi-automatic rifle fitted with a device preventing more than three shots from being fired" is allowed. From a comparison of those provisions it may be concluded that national legislation does in fact prohibit weapons capable of discharging more than three rounds of ammunition. Moreover, it is undisputed that the Directive does not prohibit the insertion of a third round of ammunition into the gun's firing chamber. Therefore, legislation authorizing weapons capable of firing three consecutive rounds is not contrary to the Directive, provided that it is ensured that the magazines of those weapons can hold only two rounds of ammunition. The national legislation clearly restricts the use of weapons to those which can discharge only three consecutive rounds. Since a round of ammunition may be in the gun's firing chamber, the reference in national legislation to a device preventing more than three shots from being fired is sufficient to guarantee that the magazine cannot hold more than two rounds of ammunition. In those circumstances, national legislation must be regarded as providing a proper guarantee of the full implementation of Article 8(1).

A provision of national legislation allows the regions to authorise the use of migratory birds as **live decoys** in cover-shooting, another provision prohibits only the use of blinded live decoys. It therefore follows that these provisions in conjunction does not expressly prohibit the regions from authorizing the keeping and a fortiori the use of migratory species as mutilated live decoys in cover-shooting. Such use is prohibited by the Directive.

(C-262/85, Commission v. Italy)

See also:

Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds

http://www.europa.eu.int/comm/environment/nature/nature_conservation/focus_wild_birds/sustainable_hunting/pdf/hunting_guide_en.pdf

2.4.4. Derogations

Article 9

1. Member States may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution, for the following reasons:

(a) — in the interests of public health and safety,
— in the interests of air safety,
— to prevent serious damage to crops, livestock, forests, fisheries and water,
— for the protection of flora and fauna;

(b) for the purposes of research and teaching, of re-population, of reintroduction and for the breeding necessary for these purposes;

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogations must specify:

— the species which are subject to the derogations,
— the means, arrangements or methods authorized for capture or killing,
— the conditions of risk and the circumstances of time and place under which such derogations may be granted,
— the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom,
— the controls which will be carried out.

3. Each year the Member States shall send a report to the Commission on the implementation of this Article.

4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of these derogations are not incompatible with this Directive. It shall take appropriate steps to this end.

According to the case-law of the Court:

Article 9 authorises the Member States to derogate from the general prohibitions and from the provisions concerning marketing and hunting. However, this possibility is subject to **three conditions**: first, the Member State must restrict the derogation to cases in which there is no other satisfactory solution; secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9 (1) (a), (b) and (c); thirdly, the derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. Although Article 9 therefore authorizes wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations.

(C-247/85, Commission v. Belgium; C-262/85, Commission v. Italy)

Article 9(1)(c) authorizes Member States to derogate, inter alia, from Articles 7 and 8 in order to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers. The capture and sale of birds even outside the hunting season, with a view to keeping them for use as **live decoys** or for **recreational purposes in fairs and markets** may constitute judicious use authorized by Article 9(1) (c). However, it must be observed first of all that the provision concerned makes no reference to Article 9(1), which provides that derogation from Articles 7 and 8 may be granted only if there is no other satisfactory solution. Secondly, provision of national law, which authorizes the regions to permit the use of means and arrangements for capturing birds, to fix the periods in which capturing is permitted and to draw up the list of birds which may be hunted, does not, contrary to the requirements of Article 9(2), specify the means, arrangements or methods authorized for the capture or killing of birds, the circumstances of time and place under which the derogations may be granted or the species covered by the derogations. Such criteria and conditions are necessary to ensure that the derogation is applied in a strictly controlled and selective manner.

Since national legislation does not itself establish the criteria and conditions provided for in Article 9(2) or require **the regions to take account of those criteria and conditions**, it introduces an element of uncertainty as regards the obligations which the regions must observe when adopting their regulations. Therefore, there is no guarantee that the capture of certain species of birds will be limited to the strict minimum, that the period of capture will not coincide unnecessarily with periods in which the Directive aims to provide particular protection or that the means, arrangements or methods for capture are not large-scale, non-selective or capable of causing the local disappearance of a species.

(C-262/85, Commission v. Italy, C-118/94, Italy – “Regione Veneto”)

Even though the regions are obliged to consult **a scientific institute** before implementing their rules, the opinion of the institute is not binding and therefore that obligation does not guarantee that the requirements of the Directive will be respected.

(C-262/85, Commission v. Italy)

The first and third indents of Article 9(1) (a) authorize Member States to derogate inter alia from Articles 5, 6 and 7 in the interests of **public health and safety** and to prevent **serious damage to crops**. If a three species specified in national legislation cause serious damage to crops and orchards or are responsible for pollution and noise in towns or certain regions, the Member State is in principle authorized to provide for derogation from the general system of protection provided for in Articles 5, 6 and 7. Derogation under Article 9 must, according to Article 9(1), cover specific situations and, according to Article 9(2), comply with the requirements stated therein.

(C-247/85, Commission v. Belgium)

In order to establish whether national legislation complies with various criteria of Article 9(1)(c) it is necessary to examine whether the legislation guarantees that the derogation is applied on a strictly controlled and selective basis so that the birds in question are captured in only small numbers and in judicious manner. In this respect, it is apparent from Article 2, in conjunction with the 11th recital of the preamble to the Directive[5], that **the criterion of small quantities** is not an absolute criterion but rather refers to the maintenance of the level of total population and to the reproductive situation of the species concerned.

(C-252/85, Commission v. France)

If the capture and keeping of certain species may be authorized under Article 9(1)(c), their **transport** may be authorized as well. As well as the capture and keeping of such species, this provision allows any other judicious use. The transport of birds which have been lawfully captured or kept constitutes such judicious use. However, if the keeping of birds permitted by national legislation does not accord with Articles 5 and 6, the transport of these birds, which presupposes that they are kept, does not accord with those Articles either.

The aim of Article 9(1)(a) is not to prevent the threat of **minor damage**. The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive.

As far as the **concept of local interest** is concerned, it must be observed that this does not appear amongst the reasons, listed limitatively in Article 9(1), for which Member States may derogate from the protective provisions of the Directive. It follows that the Government may not justify national legislation dealing with the concept of local interest on the basis of Article 9(1).

(C-247/85, Commission v. Belgium)

The capture and sale of wild birds with a view to keeping them for use as live decoys or for recreational purposes in fairs and markets may constitute judicious use authorized by Article 9(1)(c). It cannot therefore be ruled out that the capture of certain protected species for recreational purposes, such as that intended to enable fanciers to stock their aviaries, may also constitute judicious use within the meaning of Article 9(1)(c). That said, it must, however, be pointed out that a derogation from the system of protection established by the Directive and, in particular, from the prohibition of killing or capturing protected species, as laid down in Article 5(a), can be accorded only if there is no other satisfactory solution. The **breeding and reproduction** of protected species in captivity may constitute such a solution if they prove to be possible. It should be observed in that regard that the breeding and reproduction in captivity of the species concerned in the main proceedings are not only scientifically

[5] Whereas, because of their high population level, geographical distribution and reproductive rate in the community as a whole, certain species may be hunted, which constitutes acceptable exploitation; Where certain limits are established and respected, such hunting must be compatible with maintenance of the population of these species at a satisfactory level;

and technically feasible, but those activities have also been successfully carried on by some breeders in one region and, on a larger scale, by breeders in another region. Breeding and reproduction in captivity could be regarded as not constituting an `other satisfactory solution' only if it was established that, were it not for the capture of birds in the wild, those activities could not prosper. Consequently, the fact that the breeding and reproduction in captivity of the species concerned are not yet feasible on a large scale by reason of the installations and the inveterate habits of bird fanciers, habits which, moreover, have been encouraged by domestic rules derogating from the general scheme of the Directive, is not in itself such as to cast doubt on the satisfactory nature of the alternative solution to capturing birds in the wild. The Directive, and in particular Article 9(1)(c) thereof, must be interpreted as meaning that a Member State may not, on a decreasing basis and for a limited period, authorize the capture of certain protected species in order to enable bird fanciers to stock their aviaries, where breeding and reproduction of those species in captivity are possible but are not yet practicable on a large scale by reason of the fact that many fanciers would be compelled to alter their installations and change their habits.

If the capture of protected species, in so far as it is intended to enable fanciers to stock their aviaries, may constitute judicious use within the meaning of Article 9(1)(c), the same must hold true as regards the capture of protected species for the purpose of obviating the problems of consanguinity in **bird breeding for recreational purposes**. A derogation from Article 5(a) may be accorded only if there is no other satisfactory solution. In particular, that condition would not be met if it were possible to obviate the problems of consanguinity by cooperation and exchanges of specimens between breeding establishments. It is for the competent authorities of the Member State concerned to fix the number of wild specimens which may be captured at the level of what proves to be objectively necessary in order to ensure sufficient genetic diversity of the species bred in captivity, subject always to observance of the maximum limit of `small numbers' referred to in Article 9(1)(c). National authorities are authorized under the Directive, and in particular under Article 9(1)(c) thereof, to permit the capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings, on condition that there is no other satisfactory solution, it being understood that the number of specimens which may be captured must be fixed at the level of what proves to be objectively necessary to provide a solution for those problems, subject always to observance of the maximum limit of `small numbers' referred to in that provision.

(C-10/96, "ASBL")

Article 9(1)(c) permits a Member State to derogate from **the opening and closing dates for hunting** which follow from consideration of the objectives set out in Article 7(4). Article 9(1)(c) provides that Member States may derogate from, inter alia, Article 7 where there is no other satisfactory solution, in order to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers. It therefore appears that Article 9(1)(c) permits authorisation, in compliance with the conditions set out in that provision, of the capture, keeping or other judicious use of certain birds during the periods mentioned in Article 7(4), during which the survival of wild birds is at particular risk.

Article 9 authorises Member States to derogate from provisions relating, inter alia, to hunting. There is also the possibility of derogating from the prohibition on hunting **species of birds not listed in Annex II** to the Directive, to which Article 7(1) refers, in particular for the reason set out in Article 9(1)(c).

The hunting of wild birds for **recreational purposes** during the periods mentioned in Article 7(4) may constitute a judicious use authorised by Article 9(1)(c), as do the capture and sale of wild birds even outside the hunting season with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets.

Article 9 authorises Member States **to derogate from the general prohibition on hunting** protected species which is laid down in Articles 5 and 7 only by measures which refer in sufficient detail to the factors mentioned in Article 9(1) and (2). As regards hunting in particular, that activity can be permitted pursuant to Article 9(1)(c) only if:

- there is no other satisfactory solution; this conditions cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection. There would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7.

- it is carried out under strictly supervised conditions and on a selective basis;

- it applies only to certain birds in small numbers; this condition cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level. If that condition is not fulfilled, the use of birds for recreational hunting cannot, in any event, be considered judicious and, accordingly, acceptable for the purposes of the 11th recital in the preamble to the Directive.

The measures under which hunting is authorised pursuant to Article 9(1)(c) must, in accordance with Article 9(2), specify the species which are subject to the derogations; the means, arrangements or methods authorised for capture or killing; the conditions of risk and the circumstances of time and place under which such derogations may be granted; the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom; the controls which will be carried out.

(C-182/02, "Ligue pour la protection des oiseaux and Others")

The requirement that there be no other satisfactory solution

According to Article 7(1) of the Directive, the species listed in Annex II thereto may be hunted under national legislation. Article 7(4), however, provides that Member States are to ensure in particular that the species to which hunting laws apply are not hunted during the rearing season or during the various stages of reproduction.

In this case, the species at issue in the present dispute, as referred to in paragraph 5 of this judgment, are covered by the two provisions referred to in the preceding paragraph. It is, moreover, common ground that the spring hunting periods in effect in Finland coincide with the rearing seasons of those species. Thus under Article 7(4) of the Directive, they should not be hunted during the periods in question.

However, Article 9(1)(c) of the Directive permits authorisation by way of derogation, in compliance with the conditions set out in that provision, of the hunting of the species listed in Annex II thereto during the periods referred to in Article 7(4) and thus in particular during the rearing season and during the various stages of reproduction (see, to that effect, Case C-182/02 *Ligue pour la protection des oiseaux and Others* [2003] ECR I-12105, paragraphs 9 to 11, and Case C-135/04 *Commission* v *Spain* [2005] ECR I-0000, paragraph 17).

The conditions which must be met for such hunting to be authorised under Article 9(1)(c) of the Directive include the absence of any other satisfactory solution (see *Ligue pour la protection des oiseaux and Others*, paragraph 15, and C-135/04 *Commission* v *Spain*, paragraph 18).

The Court notes in this connection that a measure consisting in authorising the hunting in the autumn, or in the spring, of other species of aquatic birds present in those areas by way of replacement for the spring hunting of long-tailed duck cannot be regarded as another satisfactory solution within the meaning of Article 9(1)(c) of the Directive. Such a solution would risk rendering that provision nugatory, at least partially, because it would allow in certain territories for prohibitions on hunting certain species of birds, even though hunting in small numbers might, in theory, not jeopardise the maintenance of their populations at a satisfactory level and, therefore, constitute judicious use of those species (see, to that effect, Ligue pour la protection des oiseaux and Others, paragraph 17). Moreover, unless all bird species are considered to be equivalent for the purposes of hunting, that solution would, in any event, be a source of legal uncertainty, because the basis on which it may be considered that the

hunting of a given species can replace the hunting of another species is not clear from the applicable legislation.

The requirement of small numbers

It must be borne in mind that hunting is not to be authorised under Article 9(1)(c) of the Directive unless it applies only to certain birds in small numbers (see Ligue pour la protection des oiseaux and Others, paragraph 15).

In this case, it is not disputed that the requirement that hunting must relate only to the taking of birds in small numbers was not complied with in respect of eider, goosander, red-breasted merganser and velvet scoter. It remains therefore to be determined whether that requirement was complied with in respect of golden-eye and tufted duck.

In that regard, the Commission's paper, entitled 'Second report on the application of Directive 79/409/EEC on the conservation of wild birds' (COM(93) 572 final of 24 November 1993), indicates that, according to the work of the ORNIS committee, 'small numbers' should be understood to mean any sample of less than 1% of the total annual mortality rate of the population in question (average value) for those species which are not to be hunted and a sample in the order of 1% for those species which may be hunted, with 'population in question' being understood, with regard to migratory species, to mean the population of those regions from which come the main contingents passing through the region to which the derogation applies during its period of application.

Although it is true that the criterion of small numbers as defined by the ORNIS committee is not legally binding, in this instance it can, by reason of the acknowledged scientific value of that committee's opinions and the failure to adduce any scientific evidence to the contrary, be used by the Court as a basis of reference for assessing whether the derogation granted by the defendant Member State under Article 9(1)(c) of the Directive fulfils the condition that the capture of the birds in question must be carried out in small numbers (see, inter alia, Case C-79/03 Commission v Spain [2004] ECR I-11619, paragraph 41).

It is established that, in the spring of 2001, 1 461 golden-eyes and 2 585 tufted ducks were caught on the islands of Åland. The case-file further shows that, according to the ORNIS committee, the taking in the spring of 1 758 golden-eyes and 2 208 tufted ducks corresponds to 1% of the total annual mortality rate of the populations in question and therefore meets the requirement that birds must be taken in small numbers as stated by that committee.

It is therefore apparent that, when the time-limit set in the supplementary reasoned opinion expired, the number of golden-eyes caught on the islands of Åland was below the small numbers threshold as fixed by the ORNIS committee.

As for tufted duck, the number of specimens caught corresponded to less than 1.2% of the total annual mortality rate of the population in question. Given that, according to the ORNIS committee, first, a 'small number' must be considered to be any sample in the order of 1% of the total annual mortality rate of the population in question for the species which may be hunted, such as tufted duck, and that, second, it is not disputed that the population of that species was on the increase, the Court finds that the number of tufted ducks caught on the islands of Åland did not exceed the small numbers threshold as fixed by that committee.

It follows that, on the date the time-limit set in the supplementary reasoned opinion expired, the spring hunting of golden-eye and tufted duck complied with the requirement that it must relate only to the taking of birds in small numbers. It follows from the foregoing that the Commission's complaint, that the spring hunting of eider, goosander, red-breasted merganser and velvet scoter does not comply with the requirement relating to the capture of birds in small numbers, as referred to in Article 9(1)(c) of the Directive, must be upheld.

Consequently, the Court finds that, since it has failed to establish that, in the context of the spring hunting of aquatic birds in mainland Finland and the province of Åland:

– the condition laid down in Article 9(1)(c) of the Directive for the purpose of a derogation, that there be no satisfactory solution other than spring hunting, was fulfilled in respect of eider, golden-eye, red-breasted merganser, goosander, velvet scoter and tufted duck; and that

– the condition laid down in that same provision for the purpose of a derogation, relating to the fact that hunting must concern only the taking of birds in small numbers, was fulfilled in respect of eider, goosander, red-breasted merganser and velvet scoter;

– the Republic of Finland has failed to fulfil its obligations under that directive.

(C- 344/03, Commission v Finlande)

Article 9(1)(c) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds requires the Member States, irrespective of the internal allocation of powers prescribed by the national legal system, upon adoption of measures implementing that provision to ensure that, in all cases of application of the derogation provided for therein and for all the protected species, authorised hunting does not exceed a ceiling consistent with the restriction on that hunting to small numbers imposed by that provision, and that ceiling must be determined on the basis of strict scientific data.

National implementing provisions concerning the ‘small numbers’ referred to in Article 9(1)(c) of Directive 79/409 must enable the authorities responsible for authorising hunting derogations in respect of birds of a given species to rely on criteria which are sufficiently precise as to the quantitative ceilings to be complied with.

Upon implementation of Article 9(1)(c) of Directive 79/409, the Member States are required to ensure that, irrespective of the number and identity of the authorities within their territory responsible for applying that provision, the amount of authorised hunting derogations in respect of each protected species by each of those authorities does not exceed the ceiling compatible with the restriction on that hunting to ‘small numbers’, fixed for that species for the entire national territory.

The obligation on the Member States to ensure that hunting of birds is carried out only in ‘small numbers’, in accordance with Article 9(1)(c) of Directive 79/409, requires that the administrative procedures provided for are organised in such a way that both the decisions of the competent authorities authorising hunting derogations and the manner in which those decisions are applied are subject to effective control exercised in a timely manner.

(C-60/05, WWF Italia)

3. The Habitats Directive

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7)[6]

3.1. The method of transposing the Habitats Directive

According to the case-law of the Court:

Under the third paragraph of Article 249 EC, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods for implementing the Directive in question in domestic law. However, in accordance with settled case-law, while the transposition of a directive into domestic law does not necessarily require that the content of the Directive be incorporated formally and verbatim in express, specific legislation and, depending on its content, a general legal context may be adequate for the purpose, that is on condition that that context does indeed guarantee the full application of the Directive in a sufficiently clear and precise manner. In that regard, it is important in each individual case to determine the nature of the provision, laid down in a directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States.

The argument that the most appropriate way of implementing the Habitats Directive is to confer specific powers on nature conservation bodies and to impose on them the general duty to exercise their functions so as to secure compliance with the requirements of that Directive cannot be upheld. First, it is to be remembered that the existence of national rules may render transposition by specific legislative or regulatory measures superfluous only if those rules actually ensure the full application of the Directive in question by the national authorities. Second, it is apparent from the 4th[7] and 11th[8] recitals in the preamble to the Habitats Directive that threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Consequently, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories. It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that Directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by Articles 11, 12(4) and 14(2). However, it is apparent on examination of the national legislation that it is so general that it does not give effect to the Habitats Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty and that it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the Directive and allow harmonised and effective implementation of the rules which it lays down. The general duties laid down by the national legislation cannot ensure that the provisions of the Habitats Directive referred to in the Commission's application are transposed satisfactorily and are not capable of filling any gaps in the specific provisions intended to achieve such transposition. Consequently,

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[6] http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML

[7] Whereas, in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;

[8] Whereas it is recognized that the adoption of measures intended to promote the conservation of priority natural habitats and priority species of Community interest is a common responsibility of all Member States; whereas this may, however, impose an excessive financial burden on certain Member States given, on the one hand, the uneven distribution of such habitats and species throughout the Community and, on the other hand, the fact that the "polluter pays" principle can have only limited application in the special case of nature conservation;

there remains no need to consider the Member State's arguments based on the general duties contained in that legislation when analysing the specific complaints relied upon by the Commission.

(C-6/04, Commission v. United Kingdom)

3.2. Obligations of conservation of habitats: legal protection regime of proposed sites of Community importance (pSCI), sites of Community importance (SCI) and special areas of conservation (SAC)

3.2.1. pSCI – SCI – SAC

Article 4

1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II are native to its territory the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. For aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction. Where appropriate, Member States shall propose adaptation of the list in the light of the results of the surveillance referred to in Article 11.

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. That information shall include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21.

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the biogeographical regions referred to in Article 1 (c) (iii) and of the whole of the territory referred to in Article 2 (1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5 % of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. 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).

According to the case-law of the Court:

The Commission:

With regard to the obligation to transmit the site list referred to in Article 4(1), first subparagraph, each Member State's contribution to the setting up of a coherent European ecological network depends on the representation on its territory of the natural habitat types and species' habitats listed in Annexes I and II to the Directive respectively. It is clear from a combined reading of Article 4(1) of and Annex

III to the Directive that Member States enjoy a certain margin of **discretion when selecting sites for inclusion in the list**. The exercise of that discretion is, however, subject to compliance with the following three conditions:

- only criteria of a scientific nature may guide the choice of the sites to be proposed;

- the sites proposed must provide a geographical cover which is homogeneous and representative of the entire territory of each Member State, with a view to ensuring the coherence and balance of the resulting network. The list to be submitted by each Member State must therefore reflect the ecological variety (and, in the case of species, the genetic variety) of the natural habitats and species present within its territory;

- the list must be complete, that is to say, each Member State must propose a number of sites which will ensure sufficient representation of all the natural habitat types listed in Annex I and all the species' habitats listed in Annex II to the Directive which exist on its territory.

The Court:

Although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1), that Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the Directive.

(C-67/99, Commission v. Ireland; C-71/99, Commission v. Germany; C-220/99, Commission v. France)

The obligation to forward **the list of sites** mentioned in the first subparagraph of Article 4(1) was not conditional on adoption of the format. The format is not the first text to have defined the information allowing Member States to select the relevant sites. Once the Directive had been notified, the Member States were aware of all the selection criteria to be taken into consideration. Article 4(1) requires each Member State to propose, on the basis of the criteria set out in Annex III (Stage 1) to the Directive and relevant scientific information, a list of sites indicating which types of natural habitat under Annex I and which native species under Annex II they host. It follows from Annex III (Stage 1) that the relevant criteria are the degree of representativity of the natural habitat type on the site, the area of the site covered by the natural habitat type and its degree of conservation, the size and density of the population of the species present on the site, their degree of isolation, the degree of conservation of their habitats and, finally, the comparative value of the sites. Although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1), that Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the Directive. In order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1). Only in that way, moreover, is it possible to realise the objective, set out in the first subparagraph of Article 3(1), of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community.

(C-71/99, Commission v. Germany; C-220/99, Commission v. France)

On a proper construction of Article 4(1) of the Habitats Directive, a Member State may not take account of **economic, social and cultural requirements or regional and local characteristics**, as

mentioned in Article 2(3)[9], when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance. The first subparagraph of Article 3(1) provides for the setting up of a coherent European ecological network of SACs to be known as Natura 2000, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, to enable them to be maintained or, where appropriate, restored at a favourable conservation status in their natural range. Article 4 sets out the procedure for classifying natural sites as SACs, divided into several stages with corresponding legal effects, which is intended in particular to enable the Natura 2000 network to be realised, as provided for by Article 3(2). It follows from Article 1(e)[10] and (i)[11], read in conjunction with Article 2(1)[12], that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies. Having regard to the fact that, when a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States, it cannot of its own accord, whether because of economic, social or cultural requirements or because of regional or local characteristics, delete sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level. In particular, if the Member States could take account of economic, social and cultural requirements and regional and local characteristics when selecting and defining the boundaries of the sites to be included in the list which, pursuant to Article 4(1), they must draw up and transmit to the Commission, the Commission could not be sure of having available an exhaustive list of sites eligible as SACs, with the risk that the objective of bringing them together into a coherent European ecological network might not be achieved.

(C-371/98, United Kingdom – “First Corporate Shipping”; C-67/99, Commission v. Ireland)

On a proper construction of Article 4(5), **the protective measures** prescribed in Article 6(2), (3) and (4) are required only as regards sites which, in accordance with the third subparagraph of Article 4(2), are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21.

This does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1), as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission. If those sites are not appropriately protected from that moment, achievement of the objectives seeking the conservation of natural habitats and wild fauna and flora, as set out in particular in the sixth recital in the preamble to the Directive and Article 3(1) thereof, could well be jeopardised. Such a situation would be particularly serious as priority natural habitat types or priority species would be affected, for which, because of the threats to them, early implementation of conservation measures would be appropriate, as recommended in the fifth recital in the preamble to the Directive. The national lists of sites eligible for identification as sites of Community importance must contain sites which, at national level, have an ecological interest that is relevant from the point of view of the Directive’s objective of conservation of natural habitats and wild fauna and flora. It is

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

[10] conservation status of a natural habitat means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2. The conservative status of a natural habitat will be taken as "favourable" when: - its natural range and areas it covers within that range are stable or increasing, and - the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and - the conservation status of its typical species is favourable as defined in (i);

[11] conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2; The conservation status will be taken as "favourable" when: - population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and - the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and - there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

[12] 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.

apparent, therefore, that in the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of he Directive, required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.

(C-117/03, Italy – "Dragaggi")

3.2.2. Avoidance of deterioration

Article 6.2

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.

According to the case-law of the Court:

Article 6(2) of the Habitats Directive obliges the Member States to avoid the deterioration of natural habitats and the habitats of species. It is clear that, in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt **both** measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate.

(C-6/04, Commission v. United Kingdom)

Article 6(2) of the Habitats Directive, in conjunction with Article 7 thereof, requires Member States to take appropriate steps to avoid, in SPAs**, the deterioration of habitats and significant disturbance of the species** for which the areas have been designated. Article 6(3) of the Habitats Directive provides that the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of that plan or project for the site, that it will not adversely affect the integrity of the site. That provision thus establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site. The fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2). Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2). Nevertheless, it cannot be precluded that such a plan 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. Under those conditions, 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[13] to that Directive.

[13] Whereas the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community, as stated in Article 130r of the Treaty;

(C-127/02– “Waddenvereniging and Vogelbeschermingsvereniging”)

See also:

Article 7

Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC

http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf

Assessment of Plans and Projects Significantly Affecting Natura 2000 sites

http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/natura_2000_assess_en.pdf

3.2.3. Assessment of plans and projects and compensatory measures

Article 6.3 and 6.4

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.

According to the case-law of the Court:

Article 6(3) of the Habitats Directive establishes **a procedure** intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).

The 10th recital in the preamble to the Habitats Directive states that an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future. That recital finds expression in Article 6(3), which provides inter alia that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its effects. The Habitats Directive does not define **the terms plan and project**. By contrast, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment[14], the sixth recital in the preamble to which states that development consent for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely

[14] http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31985L0337:EN:HTML

significant environmental effects of these projects has been carried out, defines project as follows in Article 1(2): - the execution of construction works or of other installations or schemes, - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. Such a definition of project is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment.

The fact that the activity has been carried on **periodically for several years** on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.

(C-127/02 – "Waddenvereniging and Vogelbeschermingsvereniging")

The Directive does not distinguish between measures taken **outside or inside a protected site**. Therefore the definition of 'project' in national legislation which refers to acts carried out outside a protected site cannot be narrower than that which concerns projects carried out within a protected site.

(C-98/03, Commission v. Germany)

The first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its **being likely to have a significant effect** on the site. Therefore, the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume - as is, moreover, clear from the guidelines for interpreting that Article drawn up by the Commission, entitled "Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive (92/43/EEC)" - that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project. As regards Article 2(1) of Directive 85/337, the text of which, essentially similar to Article 6(3) of the Habitats Directive, provides that Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to an assessment with regard to their effects, the Court has held that these are projects which are likely to have significant effects on the environment. It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC[15], and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance

[15] Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

with the third recital in the preamble[16] to the Habitats Directive and Article 2(1)[9] thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.

Pursuant to the first sentence of Article 6(3) of the Habitats Directive, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have **a significant effect** on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project. As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble (see above), the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned. Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. In assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.

Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, **all the aspects** of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field.

(C-127/02 – "Waddenvereniging and Vogelbeschermingsvereniging")

The condition, to which the assessment of the implications of a plan or a project on a particular site is subject, which requires such an assessment to be carried out where there are doubts as to the existence of significant effects**, does not permit that assessment to be avoided in respect of certain categories of projects**, on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected sites:

"Projects consisting of acts affecting nature and the countryside other than changes of form or use of surface areas or changes to the level of the water table connected to the surface soil stratum" - the fact that that national legislation requires verification, that serious environmental damage which may be prevented by current technology is in fact prevented, and that damage which cannot be prevented by current technology is reduced to the minimum, cannot be sufficient to ensure compliance with the duty laid down in Article 6(3). The duty of verification laid down by the national legislation is not, in any event, capable of ensuring that a project relating to such an installation does not adversely affect the integrity of the protected site. In particular, the duty to verify whether serious environmental damage, which cannot be prevented by current technology, is reduced to the minimum, does not ensure that such a project will not give rise to such damage.

"Projects relating to installations or to use of water, on account of the fact that they are not subject to authorisation" - the fact that it concerns the use of small quantities of water does not in itself preclude the possibility that some of those uses are likely to have a significant effect on a protected site. Even assuming that such uses of water are not likely to have a significant effect on the status of a body of water, it does not follow that they are not likely to have a significant effect on neighbouring protected sites.

System when the authorisation of "installations causing emissions" is refused only where they appear likely to affect a protected site situated in the area of impact particularly of those installations, installations whose emissions affect a protected site situated outside such an area may be authorised without taking account of the effects of those emissions on such a site. That the system, so far as it

[16] Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities;

covers emissions within an area of impact, as defined in technical circulars in accordance with general criteria on installations, do not appear to be capable of ensuring compliance with Article 6(3) and (4). In the absence of established scientific criteria which would a priori rule out emissions affecting a protected site situated outside the area of impact of the installation concerned having a significant effect on that site, the system put in place by national law in the field in question is not, in any event, capable of ensuring that the projects or plans relating to installations causing emissions which affect protected sites situated outside their area of impact do not adversely affect the integrity of those sites, within the meaning of Article 6(3).

(C-98/03, Commission v. Germany)

“Water abstraction plans and projects” - no legal provision expressly required water abstraction plans and projects to be subject to such an assessment. The system essentially provides that all water abstraction plans and projects which fall within the conditions laid down in Article 6(3) of the Habitats Directive are deemed in advance to be potentially damaging for the site concerned, does not appear to be capable of ensuring compliance with the requirements of that provision. While this kind of advance assessment of potential risks can be based on concrete facts with regard to the site, which is not the case with regard to the projects themselves, contrary to the requirements of Article 6(3) of the Habitats Directive. In merely defining potentially damaging operations for each site concerned, the risk is run that certain projects which on the basis of their specific characteristics are likely to have an effect on the site are not covered.

“Land use plans” - national legislation does not clearly require land use plans to be subject to appropriate assessment of their implications for SACs in accordance with Article 6(3) and (4) of the Habitats Directive. Although land use plans do not as such authorise development and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land use plans must also be subject to appropriate assessment of their implications for the site concerned.

(C-6/04, Commission v. United Kingdom)

With regard to **the concept of appropriate assessment** within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that Directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

With regard to the **conditions under which an activity may be authorised**, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site. It is therefore apparent that a plan or project may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation. The authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result

of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.

Where a national court is called on to ascertain **the lawfulness of an authorisation** for a plan or project within the meaning of Article 6(3) of the Habitats Directive, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose. The obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 249 EC and by the Directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.

With regard to **the right of an individual** to rely on a directive and of the national court to take it into consideration, it would be incompatible with the binding effect attributed to a directive by Article 249 EC to exclude, in principle, the possibility that the obligation which it imposes may be relied on by those concerned. In particular, where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set by the Directive. That also applies to ascertaining whether, failing transposition into national law of the relevant provision of the Directive concerned, the national authority which has adopted the contested measure has kept within the limits of its discretion set by that provision.

More particularly, regarding **the limits of discretion** set by Article 6(3) of the Habitats Directive, it follows from that provision that the competent national authorities, taking account of the conclusions of the appropriate assessment of a plan or project for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site, that being the case if there remains no reasonable scientific doubt as to the absence of such effects. Such a condition would therefore not be observed were the national authorities to authorise that activity in the face of uncertainty as to the absence of adverse effects for the site concerned. It follows that Article 6(3) of the Habitats Directive may be taken into account by the national court in determining whether a national authority which has granted an authorisation relating to a plan or project has kept within the limits of the discretion set by the provision in question.

(C-127/02– “Waddenvereniging and Vogelbeschermingsvereniging”)

According to the Court’s settled case-law, the principle that projects likely to have significant effects on the environment must be subjected to an environmental assessment does not apply where the application for authorisation for a project was formally lodged before the expiry of the time-limit for transposition of a directive (see, with respect to 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), Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraphs 29 and 32, and Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23).

The Court has held that that formal criterion is the only one which accords with the principle of legal certainty and preserves a directive’s effectiveness. The reason for that is that a directive such as the Habitats Directive is primarily designed to cover large-scale projects which will most often require a long time to complete. 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 cumbersome and time-consuming by the specific requirements imposed by the directive and for situations already established to be affected by it (see, by analogy, *Gedeputeerde Staten van Noord-Holland*, paragraphs 23 and 24).

Both Directive 85/337 and the Habitats Directive pertain to the assessment of the effects of certain public and private projects on the environment. In both cases, the assessment procedure takes place before the project is finally decided upon. The results of that assessment must be taken into consideration when the decision on the project is made, and the decision may be amended depending on the results. The various phases of examination of a project are so closely connected that they represent a complex operation. The fact that the content of some requirements differs does not affect this assessment. It follows that this complaint must be considered as at the date on which the project was formally presented, namely the date referred to in paragraph 54 of this judgment.

Next, it should be borne in mind that, in accordance with the provisions of acts of accession, the rights and obligations resulting from Community law are, save where otherwise provided, immediately applicable in the new Member States (see, to that effect, Case C-179/00 *Weidacher* [2002] ECR I-501, paragraph 18).It follows from the Act of Accession that the obligations under the Birds Directive and the Habitats Directive entered into force with respect to the Republic of Austria on 1 January 1995 and that no derogation or transitional period was granted to it.

Accordingly, the procedure for authorisation of the project for the construction of the S 18 carriageway was formally initiated prior to the date of accession of the Republic of Austria to the European Union. It follows that, in the present case, in accordance with the case-law referred to in paragraph 56 of this judgment, the obligations under the Habitats Directive did not bind the Republic of Austria and that the project for the construction of the S 18 carriageway was not subject to the requirements laid down in that directive.

(C-209/04 Commission v Austria)

See also:

Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC

http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf

Assessment of Plans and Projects Significantly Affecting Natura 2000 sites

http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/natura_2000_assess_en.pdf

3.2.4. Assessment of plans and projects and compensatory measures in SPA

Article 7

Obligations arising under Article 6 (2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4 (4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4 (1) or similarly recognized under Article 4 (2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.

According to the case-law of the Court:

The text of Article 7 of the Habitats Directive expressly states that Article 6(2) to (4) of that Directive apply, in substitution for the first sentence of Article 4(4) of the Birds Directive, to the areas classified under Article 4(1) or (2) of the latter Directive. It follows that, on a literal interpretation of that passage of Article 7 of the Habitats Directive, only **areas classified as special protection areas** fall under the influence of Article 6(2) to (4) of that Directive.

The fact that the protection regime under the first sentence of Article 4(4) of the Birds Directive applies to **areas that have not been classified as special protection areas** but should have been so classified does not in itself imply that the protection regime referred to in Article 6(2) to (4) of the Habitats Directive replaces the first regime referred to in relation to those areas.

(C-374/98, Commission v. France - “Basses Corbières”)

Since Article 7 of the Habitats Directive on habitats provides that the obligations which arise, among others, under Article 6(2) of that Directive are to replace those arising under the first sentence of Article 4(4) on birds in respect of SPAs, **the legal status of protection** of those areas must also guarantee the avoidance therein of the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been designated.

(C-415/01, Commission v. Belgium)

As far as land classified as an SPA is concerned, Article 7 of the Habitats Directive provides that the obligations arising under the first sentence of Article 4(4) of the Birds Directive are replaced, inter alia, by the obligations arising under Article 6(2) of the Habitats Directive as from the date of implementation of the Habitats Directive or the date of classification under the Birds Directive, where the latter date is later. Article 6(2) of the Habitats Directive, like the first sentence of Article 4(4) of the Birds Directive, requires Member States to take appropriate steps to avoid, inter alia, **deterioration of habitats** in the SPAs classified pursuant to Article 4(1).

(C-117/00, Commission v. Ireland – "Owenduff-Nephin Beg Complex")

It can be seen from Article 6(3) of the Habitats Directive, read in conjunction with Article 7, that any plan or project not directly connected with or necessary to the management of a SPA classified under Article 4 of the Birds Directive but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the SPA in view of the SPA's conservation objectives. In the light of the conclusions of the assessment of the implications for the SPA, the competent national authorities are to agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the SPA concerned and, if appropriate, after having obtained the opinion of the general public.

(C-209/02, Commission v. Austria – „Wörschacher Moos")

See also:

Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC

http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf

Assessment of Plans and Projects Significantly Affecting Natura 2000 sites

http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/natura_2000_assess_en.pdf

3.2.5. Surveillance of the conservation status

Article 11

Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.

Article 14

1. If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status.

2. Where such measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11. Such measures may also include in particular:

- regulations regarding access to certain property,
- temporary or local prohibition of the taking of specimens in the wild and exploitation of certain populations,

- regulation of the periods and/or methods of taking specimens,
- application, when specimens are taken, of hunting and fishing rules which take account of the conservation of such populations,
- establishment of a system of licences for taking specimens or of quotas,
- regulation of the purchase, sale, offering for sale, keeping for sale or transport for sale of specimens,
- breeding in captivity of animal species as well as artificial propagation of plant species, under strictly controlled conditions, with a view to reducing the taking of specimens of the wild,
- assessment of the effect of the measures adopted.

According to the case-law of the Court:

The surveillance obligation is fundamental to the effectiveness of the Habitats Directive and it must be transposed in a detailed, clear and precise manner. At the end of the period laid down in the reasoned opinion, no provision of domestic law imposed an obligation on the national authorities requiring the surveillance of natural habitats and species. The argument that the list of surveillance activities carried out proves that surveillance is undertaken effectively cannot be upheld. The fact, should it be established, that a practice is in conformity with the requirements of a directive which concern protection cannot constitute a reason for not transposing that Directive into the domestic law of the Member State concerned. Accordingly, inasmuch as it is common ground that domestic law does not contain any statutory duty requiring the national authorities to undertake surveillance of the conservation status of natural habitats and species, that domestic law involves an element of legal uncertainty. Hence, it is not guaranteed that surveillance of their conservation status is undertaken systematically and on a permanent basis.

(C-6/04, Commission v. United Kingdom)

3.3. Obligations of protection of species

3.3.1. System of strict protection

Article 12

1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV

(a) in their natural range, prohibiting:
(a) all forms of deliberate capture or killing of specimens of these species in the wild;
(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
(c) deliberate destruction or taking of eggs from the wild;
(d) deterioration or destruction of breeding sites or resting places.

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.

3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.

4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

According to the case-law of the Court:

Article 12(1)(b) and (d) require that the requisite measures be taken to establish **a system of strict protection** for the animal species listed in Annex IV(a) of that Directive in their natural habitats, prohibiting the deliberate disturbance of those species, particularly during the period of breeding,

rearing, hibernation and migration, and the deterioration or destruction of breeding sites or resting places. The provisions in force establishing the marine park of Zakinthos did not ensure, to the extent necessary, the effective protection of the sea and land areas. In particular, given the pressure and the erosion caused to the breeding beaches by the construction of access routes to those beaches and given the noise resulting from human activity, it was recommended the prohibition not only of the opening of new access routes to those beaches, but also of the creation of infrastructure such as kiosks, tents or parking facilities. This legal framework was not capable of ensuring strict protection for the sea turtle *Caretta caretta* against any deliberate disturbance during the breeding period and against any deterioration or destruction of its breeding sites. The fact that it does not appear that the number of nests of that species has decreased over the last 15 years does not, of itself, call this finding into question.

All the requisite **specific measures** were not taken to prevent the deliberate disturbance of the sea turtle *Caretta caretta* during its breeding period and the deterioration or destruction of its breeding sites. Usage of mopeds on the sand beach, the presence of pedalos and small boats in the sea and the presence of illegal buildings on the beach was reported by Commission officials on the breeding beaches of the sea turtle *Caretta caretta* on the island of Zakinthos. Moreover, the acts were not isolated occurrences. These activities constitute the deliberate disturbance of the species in question during its breeding period for the purposes of Article 12(1)(b).

(C-103/00, Commission v. Greece – "*Caretta caretta* on Zakinthos")

A strict protection system, within the meaning of Article 12(1)(b) and (d) of the Directive, supposes the adoption of coherent and coordinated measures, of a preventive nature, as stated by the Advocate General Léger in his conclusions in the aforementioned case Commission v. Greece (paragraphs 43 and 44).

(C-518/04, Commission v. Greece)

The acts referred to in Article 12(1)(d) include **non-deliberate acts**. By not limiting the prohibition laid down in Article 12(1)(d) to deliberate acts, which it has done in respect of acts referred to in Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding grounds or resting places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts.

(C-98/03, Commission v. Germany, C-6/04, Commission v. United Kingdom)

For the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.

(C-221/04, Commission v. Spain)

Member State's implementing measures contain no provision requiring the establishment of **a monitoring system** such as that required in Article 12(4), in respect of the incidental capture and killing of certain animal species. In the absence of further information the Commission is unable to establish whether such monitoring is in fact carried out. Accordingly, the complaint alleging that Article 12(4) of the Habitats Directive has been transposed incorrectly must be held to be well founded.

(C-6/04, Commission v. United Kingdom)

See also:

Habitats Directive: Article 12 – Strict Protection of Animal species (in preparation)

http://europa.eu.int/comm/environment/nature/nature_conservation/species_protection/specific_articles/art12/index_en.htm

Article 13

1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV (b), prohibiting:

(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;
(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.

2. The prohibitions referred to in paragraph 1 (a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.

The national measures intended to transpose the prohibition on the keeping, transport, sale or exchange of specimens of animal and plant species fail to comply with the temporal limitation laid down in Articles 12(2) and 13(1) when **the derogations** in force in its domestic law are broader than those envisaged by the Habitats Directive.

(C-6/04, Commission v. United Kingdom)

Article 15

In respect of the capture or killing of species of wild fauna listed in Annex V (a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV (a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI (a);
(b) any form of capture and killing from the modes of transport referred to in Annex VI (b).

According to the case-law of the Court:

Article 15, as is apparent from its very wording, imposes a general obligation designed to prohibit the use of all indiscriminate means of capture or killing of the species of wild fauna concerned. National legislation which establishes lists of indiscriminate means of capture and killing of the protected species that is currently recorded in that Member State and the lists are kept under review in order to be updated if necessary but contains no **general prohibition** on the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the relevant species of wild fauna does not therefore preclude the emergence of as yet unknown means of indiscriminate capture and killing. The possibility of updating a list of prohibited methods is less effective than a general prohibition. Delay in updating the aforementioned lists would necessarily lead to lacunae in protection which are specifically intended to be prevented by means of the general prohibition in Article 15 of the Habitats Directive. This interpretation is all the more justified because domestic law contains no statutory duty to review the lists. In those circumstances, it is not in any way guaranteed that all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the protected species are prohibited.

Prohibiting only two **methods of killing** seals and allowing licences to be granted on conditions which go beyond the derogations provided for by the Habitats Directive, the national legislation does not comply with Article 15.

(C-6/04, Commission v. United Kingdom)

3.3.2. Derogations

Article 16

1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;
(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
(d) for the purpose of research and education, of repopulating and reintroducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;
(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

2. Member States shall forward to the Commission every two years a report in accordance with the format established by the Committee on the derogations applied under paragraph 1. The Commission shall give its opinion on these derogations within a maximum time limit of 12 months following receipt of the report and shall give an account to the Committee.

3. The reports shall specify:

(a) the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used;
(b) the means, devices or methods authorized for the capture or killing of animal species and the reasons for their use;
(c) the circumstances of when and where such derogations are granted;
(d) the authority empowered to declare and check that the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons are to carry out the task;
(e) the supervisory measures used and the results obtained.

According to the case-law of the Court:

It is clear from the 4th[5] and 11th[3] recitals in the preamble to the Directive that the threatened habitats and species form part of the European Community's **natural heritage** and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Accordingly, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories. It follows that, in the context of the Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that Directive is clear and precise.

Accordingly, even assuming that the two derogations must be the subject of administrative decisions, on the issuing of which the competent authorities do in fact comply with the conditions to which Article 16 subjects the authorisation of derogations, the fact remains that national legislation does not provide a legal framework consistent with **the derogatory regime** established by Article 16. The provision of national law does not submit the grant of the two derogations in question to all of the conditions laid down in Article 16. The national legislation provides as the sole condition for authorisation for those derogations that animals, including their nesting or incubation sites, habitat or resting places and plant species which are particularly protected must not be subject to deliberate harm.

Member States are, in the context of the Directive, under a particular duty to ensure that their legislation intended to transpose that Directive is clear and precise. **Articles 12, 13 and 16** form a

coherent body of provisions. Articles 12 and 13 require Member States to establish a system of strict protection for animal and plant species.

National legislation prohibits **the use of pesticides** if it is foreseeable that they will produce effects harmful to human or animal health or the water table, or has other seriously harmful effects, in particular, on the balance of nature, the latter also covering plant and animal species within a provision of national legislation. National legislation, by listing the situations in which the use of pesticides is prohibited, does not express in a clear, specific and strict manner the measures laid down in Articles 12 and 13 which prohibit protected species from being adversely affected. It does not appear that the prohibition on using pesticides, where it is foreseeable that it will produce seriously harmful effects on the balance of nature, is as clear, precise and strict as the prohibition on the deterioration of breeding sites or resting places of protected animals laid down in Article 12(1)(d) or the prohibition of the deliberate destruction in the wild of protected plants laid down in Article 13(1)(a).

Species *coregonus oxyrhynchus*, *unio crassus* and *acipenser sturio*, which feature in Annex IV(a) to the Directive, are found in Germany. Those species must therefore be subject, in accordance with Article 12(1)(a), to a system of strict protection prohibiting all forms of deliberate capture or killing of members of those species in the wild. The legislative framework, in which **regional provisions** which infringe Community law coexist with a Federal law which complies with it, does not ensure effectively, and in a clear and precise manner, in respect of the three animal species, the strict protection required by Article 12(1)(a), with respect to the prohibition of all forms of deliberate capture and killing of specimens of those species in the wild.

(C-98/03, Commission v. Germany)

Article 16 of the Habitats Directive defines in a precise manner the circumstances in which Member States may derogate from Articles 12, 13, 14 and 15(a) and (b) thereof, so that Article 16 must be interpreted restrictively. Furthermore, Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the Directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16.

The derogation which authorises acts which lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, where those acts are as such lawful. Therefore such a derogation, founded on the legality of the act, is contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16 thereof.

(C-6/04, Commission v. United Kingdom)

PART II.

C-247/85, Commission v. Belgium

Judgment of the Court of 8 July 1987. - Commission of the European Communities v Kingdom of Belgium. - Failure to comply with a directive - Conservation of wild birds.

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61985J0247

The list of birds which may be hunted

The Commission points out that, under national law, certain species of wild birds may in principle be hunted, although those birds are not listed in Annex II to the Directive and cannot therefore be hunted under Article 7. As regards the practical application of this provision, the Commission observes that, under several ministerial orders, the hunting of blackbirds, jackdaws and magpies which are not listed in Annex II, was authorized in the years 1981 to 1984. At the hearing, the Commission conceded that, as regards the Flemish Region, the Order of 27 June 1985 amending the Law on hunting of 28 February 1982 did comply with the requirements of the Directive. However, that order was adopted after the present case had been brought before the Court .

In the view of the Belgian Government, there is no provision in the Directive requiring certain species of birds to be classified in a category of birds which may not be hunted. The fact that certain birds not listed in Annex II have been classified as "gibier" (game) under the Belgian rules is not an infringement of the Directive. Only an express decision of the competent authority could authorize the hunting of the species concerned so that only such a decision could come into conflict with the provisions of Article 7.

In this regard, it must be stated that the national legislation must guarantee that the species of birds not listed in Annex II may not be hunted. Under Article 7, it is permitted only to provide that, owing to their population level, geographical distribution and reproductive rate throughout the community, the species listed in Annex II to the Directive may be hunted. In the national law species of birds not listed in Annex II to the Directive are classified as "game" so that in principle they may be hunted. Even if those species may in fact be hunted only if the competent authorities lay down each year, for each species and for a defined area, the opening and closing dates of the hunting season, the competent authorities still have the power to authorize the commencement of hunting of species which are not listed in Annex II to the Directive but which are listed in the national law. In those circumstances, it is impossible to accept the argument of the Belgian Government which maintains in essence that the intended result of the Directive has been attained. National law creates a legally ambiguous situation by not excluding the possibility that species other than those listed in Annex II to the Directive may be hunted in Belgium. The orders mentioned by the Commission also demonstrate that the practical application of the contested provision does not comply with the requirements of Article 7.

The list of protected birds

The Commission points out that, according to the Royal Decrees, they are only concerned with the protection of birds living in the wild state in the Benelux countries, whereas the protection should be extended to all species of birds living naturally in the wild state in the European territory of Member States in accordance with Article 1(1). At the hearing, the Commission admitted that its complaint no longer concerned the Flemish Region since the Order of the Flemish Executive of 20 November 1985 had harmonized the Royal Decree of 9 September 1981 with the Directive.

In reply the Belgian Government states first that, as regards the Walloon and Brussels regions, the Belgian authorities use the Avifaune de Belgique, a scientific work in which almost all bird species covered by the Directive appear, to define the population of the bird species living naturally in the wild state in their territory. Secondly, a Member State can only take specific measures to protect birds within its territory. Finally, the Commission itself had not been able to present a complete list of bird species living naturally in the wild state in the Member States.

As regards Article 1 of the Royal Decree of 20 July 1972, it must be stated that it limits the protection required by the Directive to the species of birds living in the wild state in the Benelux countries. Such a provision is in accordance with the requirements of the Directive if it also covers bird species living naturally or usually in the European territory of the Member States. In this regard it should be noted that the wording of the provision in question also covers birds which are only passing through the Benelux countries. These birds must be regarded as living naturally in the wild state in the Benelux countries albeit for a limited period. The Commission' s observation that there are species of birds covered by the Directive which do not live permanently in the territory of the Benelux countries and which do not appear in the Avifaune de Belgique is therefore irrelevant. However, the protective effect of the Directive also covers species of naturally occurring birds in the wild state in the

European territory of another Member State which are not naturally or usually to be found in the territory of the Benelux countries but which are transported there, kept there or marketed there, whether alive or dead . The provision in question does not extend the protection provided for by the Directive to those groups of birds. Article 1 of the Royal Decree does not, therefore, transpose the wider protection required by the Directive completely into the Belgian legal order.

Protection of nests

The Commission points out that Article 3(2) of the Royal Decrees allows birds' nests built against houses and adjoining buildings to be disturbed, removed or destroyed in contravention of Article 5(b).

The Belgian Government, on the other hand, takes the view that the provision in question is justified by reasons of public health and safety within the meaning of the first indent of Article 9(1)(a). The presence of nests in chimneys and pipes has led on many occasions to fires and floods and they have also caused problems of hygiene, for example in the food industry.

In this regard it must be stated that Article 5(b) requires the Member States to prohibit in particular deliberate destruction of, or damage to, nests and eggs or removal of nests, whereas Article 3(2) of the Royal Decrees generally permits the removal and destruction of nests built against houses and adjoining buildings.

The reasons given by the Belgian Government to justify the contested provision, namely the prevention of fires, floods and disease, are certainly of such a kind as to justify the removal and destruction of nests under Article 9. However, it is clear from the Belgian Government's own argument that the removal or destruction of nests is necessary only in specific cases in which the higher-ranking interests of public health and security must override the protection of birds and their habitats.

The Belgian rules provide for a derogation which is not sufficiently delimited. As regards the criteria and conditions of Article 9(1), the derogation is not limited to specific situations in which there is no other satisfactory solution than the destruction or removal of nests. The provision in question generally authorizes the disturbance, removal or destruction of birds' nests built against houses and adjoining buildings. However, it cannot be maintained that all nests built against houses and adjoining buildings always represent a danger to health. Furthermore, the derogation does not comply with the formal requirements of Article 9(2) either. The provision does not specify the conditions of risk and the circumstances of time and place in which the derogations may be granted or the controls which will be carried out. In those circumstances it must be stated that the derogation provided for in Article 3(2) of the Royal Decrees does not comply with the prohibition contained in Article 5 and is too general in nature to be justified by Article 9.

The derogations regarding certain species of birds

The Commission's objection to the Belgian Government is that Articles 4 and 6 of the Royal Decrees allow certain persons to capture, kill, destroy or drive away house sparrows, tree sparrows and starlings and to destroy their eggs, nests and broods and therefore derogate from Articles 5, 6 and 7. Such a derogation is not covered by Article 9.

On the other hand, the Belgian Government maintains that the provisions complained of are justified under Article 9. Serious damage is caused to crops and orchards by the bird species concerned. Moreover, the derogation concerning the starling is justified by reasons of public health since this species is responsible for pollution and noise in a large number of towns and on the coast.

In this regard it is appropriate to recall the wording of Articles 4 and 6 of the Royal Decrees. Article 4(1) provides that: "occupants and hunting-right owners, their attorneys or sworn wardens and officials and servants of the water and forestry authorities shall be permitted at any time to capture, kill, destroy or drive away the birds, as well as their eggs and broods, mentioned in Annex 1 to this decree". Annex 1 to the decree lists the house sparrow, the tree sparrow and the starling. The third subparagraph of Article 4(1) provides that: "the nests of these birds may be disturbed, destroyed or removed at any time ". Finally, the fourth subparagraph of Article 4(1) provides that : "it shall be permitted at any time to transport these birds and their eggs, broods and feathers". Article 6(1) of the decrees allows birds listed inter alia in Annex 1 to the decrees to be kept and exchanged and under Article 6(2) "the birds specified in Annex 1 of the present decree may be bought and sold throughout the year". Although the Commission does not object to the fact that the persons specified are allowed to capture, kill, destroy or drive away the aforesaid birds, it is clear from those provisions that for the birds listed in Annex 1 to the decrees there exists throughout Belgium a permanent derogation from the protection provided for in Articles 5, 6 and 7. As far as concerns the argument put forward by the Belgian Government in this regard, it must be

observed that the first and third indents of Article 9(1)(a) authorize Member States to derogate inter alia from Articles 5, 6 and 7 in the interests of public health and safety and to prevent serious damage to crops. If the three species specified in Annex 1 to the Royal Decrees cause serious damage to crops and orchards or are responsible for pollution and noise in towns or certain regions, Belgium is in principle authorized to provide for a derogation from the general system of protection provided for in Articles 5, 6 and 7. However, as was stated above, a derogation under Article 9 must, according to Article 9(1), cover specific situations and, according to Article 9(2), comply with the requirements stated therein. The general derogations provided for in Articles 4 and 6 of the Royal Decrees do not comply with those criteria and conditions. The Belgian rules do not indicate the reasons regarding the protection of public health or the prevention of serious damage to crops or other fields mentioned in Article 9(1)(a) which might necessitate the granting to such a wide category of persons of a permanent derogation, applying throughout Belgium, from the protection provided for by the Directive. Furthermore, the derogations do not comply with the criteria and conditions of Article 9(2) in so far as they mention neither the circumstances of time and place in which they may be granted nor the controls which will be carried out. Consequently, it must be stated that owing to their generality, the derogations exceed the limits set by Article 9.

The list of birds which may be kept and the capture of birds in small quantities

The Commission maintains that it is permitted under Article 6(1) of the Royal Decrees to keep or exchange the bird species listed in Annex 2 to the decrees. However, none of the species listed in Annex 2 to the Royal Decrees appear in Annex III to the Directive.

The Belgian Government does not deny that the list of birds set out in Annex 2 to the Royal Decrees does not correspond to the list of birds specified in Annex III to the Directive. However, it points out that, as regards the Flemish region, only four species may be captured and kept. As for the Walloon region, the list of species set out in Annex 2 to the Royal Decree of 20 July 1972 was reduced to 16 by the Order of the Walloon Regional Executive of 1 July 1982. Moreover, the Belgian Government considers that capture is not a threat to the Belgian bird population and is justified by Article 9(1)(c). As for the policy of granting permits to capture and keep birds, the Belgian Government refers to the Ministerial Order of 14 September 1981 and the Order of the Walloon Regional Executive of 28 July 1982 which impose very restrictive conditions for the grant of such permits. Finally, capture is justified by recreational requirements mentioned in Article 2.

As regards Article 6(1) of the Royal Decrees concerning the list of bird species which may be captured, kept or exchanged, it must be stated at the outset that, under Article 6, keeping for sale is permitted only under certain conditions and then only for the species mentioned in Annex III. Moreover, that list does not correspond to Annex II to the Directive, in which the species which may be hunted and kept under Article 5(e) are set out. As regards the argument of the Belgian Government based on Article 9(1)(c), it must be stated that the Orders of 14 September 1981 and 28 July 1982, implementing Article 6 of the Royal Decrees, subject the people authorized to capture and keep birds and the capture and keeping itself to strict rules and controls. According to Articles 4 and 5 of the Order of 14 September 1981 and Article 5 of the Order of 28 July 1982, the competent authorities are to determine each year the bird species which may be captured, the number of birds which may be captured and the period during which capture may take place. As regards the application of Article 9(1)(c), it must therefore be observed first of all that Article 6(1) of the Royal Decrees gives rise to an uncertain and ambiguous legal situation by allowing the list of birds which may be hunted and kept to be changed as and when the competent administration considers fit. The general and permanent rules laid down in the decrees do not guarantee that the number of birds which may be captured is limited to small quantities, that the period during which their capture is allowed does not coincide with periods in which the Directive seeks to provide particular protection for birds (the nesting period and the various stages of breeding and rearing) or that capture and keeping are restricted to cases in which there is no other satisfactory solution, in particular the possibility that the bird species concerned may reproduce in captivity. The criteria and conditions laid down in Article 9 are not therefore fully transposed into the rules concerned. Consequently, the Belgian Government may not rely on Article 9(1)(c). As regards the argument of the Belgian Government based on Article 2, it must be recalled, as has already been pointed out, that this provision does not authorize the Member States to derogate from the requirements of the Directive .

The transport of birds

The Commission maintains that Article 7 of the Royal Decrees allows birds belonging to the species specified in Annexes 2 and 3 to the decrees to be transported provided that certain conditions are fulfilled. Since birds cannot be transported without being kept, the species of birds listed in the Annexes to the decrees ought to correspond, in accordance with Articles 5(e) and 6(1), to the species listed in Annex III to the Directive . However, this is not the case for any of the species in question.

The Belgian Government maintains that this complaint applies only to the regions of Wallonia and Brussels. As regards the substance of the complaint, it observes that in so far as the capture and keeping of certain species is authorized under Article 9(1)(c) the transport of those species is also authorized.

As regards the question whether the complaint also applies to the Flemish region which the Commission maintained at the hearing, it must be stated that this question is irrelevant since it undoubtedly applies to the rules in force in the regions of Wallonia and Brussels and the complaint is directed against the Kingdom of Belgium which is responsible for ensuring that all its national rules are in conformity with community law. As already stated above, the list of birds specified in Annexes 2 and 3 to the Royal Decrees does not correspond to the list of birds appearing in Annex III to the Directive. The Belgian Government may not therefore rely on the provisions of Article 6(2), (3) and (4). The aforesaid list does not correspond with Annex II to the Directive either. The keeping of these birds is not therefore allowed under Article 5(e). As regards the argument based on Article 9(1)(c), the Belgian Government is right to point out that if the capture and keeping of certain species may be authorized under Article 9(1)(c), their transport may be authorized as well. As well as the capture and keeping of such species, this provision allows any other judicious use. The transport of birds which have been lawfully captured or kept constitutes such judicious use. However, the Commission correctly objects that Article 7 of the Royal Decrees permits the transport of birds which have not been lawfully captured or kept . If the keeping of birds permitted by Article 6(1) of the Royal Decrees does not accord with Articles 5 and 6, the transport of these birds, which presupposes that they are kept, does not accord with those Articles either. Since Article 6 of the Royal Decrees does not comply with the requirements of the Directive, Article 7 does not accord with the provisions of the Directive either.

Derogation for birds of a particular colour

The Commission has noted that Article 7(2) of the Royal Decree of 20 July 1972 and Article 6(4) of the Royal Decree of 9 September 1981 allow birds of a markedly different colour from birds of the same species, subspecies or variety living in the wild to be kept, transported and bought and sold throughout the year. The Commission maintains that this provision is incompatible with Article 5(e) and Article 6(1).

The Belgian Government argues that the majority of the birds affected by the aforementioned provisions are not naturally occurring birds in the wild state within the meaning of Article 1. Furthermore, those provisions meet the concern to limit the possibility of obtaining birds in the wild state in order to put them in cages. However, the Belgian Government admits that the provision may also apply to "rare mutants ".

In this regard it must be noted that the decrees apply, according to Article 1 thereof, "to all birds belonging to one of the species ... Occurring in the wild state ". The Commission has pointed out, without being challenged on this point by the Belgian Government that chromatic aberrations whereby the colours of birds differ from those of "normal" species occur in nature. It must also be borne in mind that the general system of protection which the Directive seeks to establish concerns all bird species, including those with chromatic aberrations, even if such species are rare. However, as far as those birds are concerned, the provisions in question derogate from the protection afforded by Article 5 (e) and Article 6(1). The complaint must therefore be upheld.

Derogation for the prevention of damage

The Commission bases this complaint on the fact that for the regions of Wallonia and Brussels, Article 9(1) of the Royal Decree of 20 July 1972 allows the Minister concerned inter alia to authorize temporary derogations from the general provisions concerning the protection of birds in order to prevent damage or for a purpose of local interest. In the Commission's view, it is essential that the expression "serious damage", which appears in the third indent of Article 9(1)(a), should be used in the Belgian legislation. Moreover, that Article does not recognize local interest as a valid reason for a derogation .

The Belgian Government argues that the concept of serious damage is not defined in the Directive so that interpretations other than those of the Commission are possible. Furthermore, the general scheme of the Royal Decree of 20 July 1972 meets the requirements of Article 9(2).

In this regard it must be noted that the aim of this provision of the Directive is not to prevent the threat of minor damage. The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive. It must, however, be noted that the Commission has not proved that the concept of "damage" in the Belgian rules is not interpreted and applied in the same way as the concept of "serious damage" in the third indent of Article 9(1)(a). This part of the complaint cannot therefore be upheld. As regards the concept of local interest, it must be observed that this does not appear amongst the reasons, listed limitatively in Article 9(1), for which Member States may derogate from the

protective provisions of the Directive. It follows that the Belgian Government may not justify Article 9(1) of the Royal Decree of 20 July 1972 on the basis of Article 9(1). In those circumstances, it is not necessary to examine whether the Royal Decree in question also satisfies the requirements of Article 9(2). The complaint must therefore be upheld in part.

C-252/85, Commission v. France

Judgment of the Court of 27 April 1988. Commission of the European Communities v French Republic. Failure to comply with a directive - Conservation of wild birds.

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61985J0252

Failure to transpose Article 5(b) and (c)

The Commission considers that the French legislation is not in conformity with the abovementioned provisions in two respects. First the Commission alleges that, in the 10th paragraph of Article 372 and Article 374(4) of the Rural Code, the French Government has only provided for the protection of nests and eggs during the close season. Secondly, it complaints that the nests and eggs of a certain number of birds are not protected since the provisions of Articles 1, 2 and 3 of the Ministerial Decree of 17th April 1981 taken in conjunction, exclude certain species from the scope of that decree.

The French Government considers that the objective set out in Article 5 is achieved by the abovementioned provisions of the Rural Code. The protected species of birds in question do not nest during the hunting season and there would therefore be no real purpose in protecting their nests and eggs throughout the year. The possibility of destroying nests under Article 2 of the abovementioned decree is justified by the threat which the birds represent to mussel farming, other species of sea birds and air safety. The French Government states that the Article 3 of that decree was replaced by a decree of 20th December 1983.

As regards the first aspect of this complaint, it must be stressed that the prohibitions set out in Article 5(b) and (c) must apply without any limitation in time. An uninterrupted protection of the birds' habitat is necessary since many species re-use each year nests built in earlier years. To suspend that protection throughout a particular period of the year cannot be considered to be compatible with the abovementioned prohibition.

As regards to the second aspect of the Commissions' first complaint, it must be stated that even after Article 3 of the decree of 17th April 1981 was repealed in 1983, the decree nonetheless excludes a certain number of protected birds from the scope of the prohibition on destruction of nests and eggs. In determining whether this derogation is compatible with Article 9 it should be noted that, as the Court held with regard to the Belgian rules in this field in its Judgement of 8 July 1987 in Case 247/85 Commission v Belgium, the French rules in question do not specify the reasons set out in Article 9(1) or the criteria and conditions referred to in Article 9(2), particularly as regards the circumstances of time and place in which a derogation may be granted. Consequently, the French legislation is not in conformity with Article 5(b) and (c).

The term "national biological heritage"

The Commission stresses that the protection provided by French legislation is limited to the preservation of the national biological heritage whereas Article 1 extends the protection of the Directive to all species of naturally occurring birds in the wild state in the European territory of the Member States.

The French Government contends that the list of species protected by virtue of the national rules contains numerous migratory species which nest in the other Member States but not in France.

In this respect it should be recalled, as the Court has already stated, that, as indicated by the third recital of the preamble to the Directive, the protection of migratory species is typically a transfrontier environment problem entailing common responsibilities for the Member States. The importance of complete and effective protection of wild birds throughout the Community, irrespective of the areas they stay in or pass through, causes any national legislation which delimits the protection of wild birds by reference to the concept of national heritage to be incompatible with the Directive. The second complaint must therefore be upheld.

Failure to transpose Article 5(e)

The Commission points out that French Law No 76/629 contains a general authorization concerning the keeping of protected birds. However, under Article 5(e) Member States are obliged to prohibit the keeping of species of birds the hunting and capture of which is prohibited. Such a general prohibition on keeping of birds other than species referred to in Annex III to the Directive, pursuant to Article 6(2) and (3), is not to be found in the French legislation which limits such protection to a restricted number of birds.

While stating that the list of species protected by virtue of the Decree of 17th April 1981 is to be extended, the French Government considers that the French rules allow the result sought by the Directive to be achieved. The abovementioned decree prohibits the capture, removal, use and in particular the offering for sale or the purchase of those birds, taken in conjunction, those prohibitions make the keeping of those protected species impossible.

In this respect, it should be noted that in order to guarantee complete and effective protection of birds on the territory of all Member States it is vital that the prohibitions set out in the Directive be expressly embodied in national law. However, the French rules contain no prohibition relating to keeping of protected birds, and thus allow the keeping of birds captured or obtained illegally, in particular those captured or obtained outside French territory. The complaint must be upheld.

Failure to comply with Article 8(1)

The Commission points out that, as regards certain French departments, the decree of 27 July 1982 authorises the use of limes for the capture of thrushes and that decrees of 7 September 1982 and 15 October 1982 allow the capture of skylarks by means of horizontal nets known as "pantes" or "matoles". However, the use of limes and horizontal nets is expressly forbidden by Article 8(1) in conjunction with Annex IV(a) thereto. The Commission takes the view that the use of limes and horizontal nets cannot be justified on the basis of Article 9(1)(c) since those means of capture do not constitute selective methods and do not therefore allow "*judicious use of certain birds in small numbers*" within the meaning of the Directive.

The French Government considers that those measures, which were notified to the Commission, are justified under Article 9(1)(c) because such capture is subject to strict territorial, temporal and personal controls in order to guarantee the selective nature of the capture. The French Government contends that the capture of birds with limes and horizontal nets is subject to an extremely strict and controlled system of individual authorisations. The decrees in question do not merely specify the places where and the period when such capture is permitted but also limit the number and the surface area of the means of capture as well as the maximum number of birds which may be captured. Furthermore, the competent authorities ensure that those conditions applying to such capture are complied with.

It must be observed at the outset that under Article 9, in particular on the basis of Article 9(1)(c), Member States are authorized to provide for derogations from prohibitions set out in Article 8(1). In order to establish whether national legislation complies with various criteria of Article 9(1)(c) it is necessary to examine whether the legislation guarantees that the derogation is applied on a strictly controlled and selective basis so that the birds in question are captured in only small numbers and in judicious manner. In this respect, it is apparent from Article 2, in conjunction with the 11th recital of the preamble to the Directive, that the criterion of small quantities is not an absolute criterion but rather refers to the maintenance of the level of total population and to the reproductive situation of the species concerned. The French rules concerning the capture of thrushes and skylarks in certain departments are very precise. The abovementioned decrees make the grant of authorisations to capture such birds subject to a considerable number of restrictive conditions. The Commission has not shown that the French rules permit the capture of birds in a manner incompatible with a judicious use of certain birds in small numbers. The Commission has not contested the defendant’s argument that the number of birds captured constitutes a very small percentage of the population concerned. The defendant notified the Commission of those derogations in accordance with Article 9(4) and showed its willingness to reach agreement with the Commission regarding the detailed rules concerning those two hunting methods. However, the Commission did not respond to that initiative. In the light of foregoing, the French provisions in question cannot, on the basis of the documents before the Court, be considered to be incompatible with the requirements of Article 9(1)(c) and therefore the complaint must be dismissed.

C-262/85, Commission v. Italy

Judgment of the Court of 8 July 1987. Commission of the European Communities v Italian Republic. Failure to comply with a directive - Conservation of wild birds.

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61985J0262

The list of birds which may be hunted

The Commission notes that Italian legislation mentions 11 bird species, not listed in Annex II to the Birds Directive, which may be hunted. However, according to Article 7 of the Birds Directive, only the species listed in Annex II may be hunted.

The Italian Government does not dispute that this complaint is well founded. It observes, however, that 2 of the 11 species in question (jay and magpie) were included in the list of birds which may be hunted because of their potentially harmful character. This derogation is therefore justified under the third indent of Article 9(1)(a) of the Birds Directive.

In this regard, it should be stated that Article 7 authorizes Member States to allow hunting of the species listed in Annex II under certain conditions and within certain limits. It is clear from the general scheme of protection provided for in the Directive that national legislation may not extend the list contained in Annex II indicating the bird species which may be hunted. As regards the argument of the Italian Government concerning the third indent of Article 9(1)(a), it should be noted that that provision does indeed allow Member States to derogate from the general scheme of protection in way which goes further than is provided for in Article 7. However, as stated above, such a derogation must comply with the three conditions of Article 9: first, the Member State must restrict the derogation to cases in which there is no other satisfactory solution; secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9 (1) (a), (b) and (c); thirdly, the derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. In this regard the Italian government has not put forward any evidence proving that it was necessary to include jay and magpie on the Italian list of birds which may be hunted in order to prevent serious damage to crops, livestock, forests, fisheries or water and that no other satisfactory solution existed. Neither has it indicated the reasons for which the listing of those species was, in its view, the only satisfactory solution to prevent serious damage. Finally, the provision in question does not specify the conditions of risk and the circumstances of time and place under which the derogation may be granted or the controls which will be carried out. Therefore, the inclusion of jay and magpie amongst the birds which may be hunted cannot be justified by the third indent of Article 9(1)(a). The first complaint is well founded.

The marketing of birds

The Commission points out that Italian legislation allows the marketing of all the species of birds which may be hunted. However, Article 6 prohibits trade in all live or dead birds or parts of such birds with the exception of the species listed in Annex III to the Directive. Finally, the provisions of Article 6(2) to (4) are not to be found in the Italian legislation.

The Italian Government does not dispute that the Italian rules are not entirely in accordance with the Directive in this regard. It points out, however, that they prohibit the sale of woodcock and of dead birds smaller than thrushes, except starlings, sparrows and skylarks, during the period when the hunting of those birds is allowed.

It should be borne in mind in this regard that Article 6(1) requires the Member States to impose a general prohibition on the marketing of all the birds covered by the Directive, alive or dead, and of any readily recognizable parts or derivatives of such birds. Article 6(2) provides that marketing is not to be prohibited in respect of the seven species referred to in Annex III/1, provided that the birds have been legally killed or captured or otherwise legally acquired. Since the list in Annex III/1 concerns only seven bird species, whereas the list of birds which may be hunted according to the national legislation includes 72 species, it is plain that the provision of Italian law in question does not comply with the requirements of the Directive. Furthermore, it is clear from the protection to be afforded under the Directive that it is intended to avoid a situation in which all the species that may be hunted may also be marketed because of the pressure which marketing may exert on hunting and consequently on the population level of the species in question. As regards the 10 species specified in Annex III/2, it is not disputed that the Italian legislation does not comply with the obligations arising under Article 6(3). As far as concerns the reference by the Italian Government to Article 20(t) of the national law, the Commission correctly notes that Article 6(1) prohibits the marketing of all species of birds irrespective of their size. Even if the Italian legislation does not therefore permit the marketing of all bird species which may be hunted, it must be

held that Article 11, even in conjunction with Article 20(t) of the national law, does not constitute a complete transposition of the Directive. The second complaint must therefore be upheld.

Hunting seasons

The Commission complains that in national legislation the Italian Government fixes the dates when hunting may begin without taking account of the rearing season, the various stages of reproduction and, in the case of migratory species, the return to their rearing grounds, as required by Article 7(4). In its reply to the defence the Commission has pointed out that the Italian legislation does not expressly prohibit hunting during the abovementioned periods. The hunting season begins on 18 August, a time when various species of nesting birds are either still in Italy or are traversing the Italian Peninsula. In this respect the scientific community has proposed that the beginning of the hunting season should be fixed at a single date not earlier than the third Sunday in September. Hunting finishes on 10 March whereas migratory birds are still on their way to their rearing grounds from the first days of February. It has been requested that the closing of the hunting season should be fixed at a date not later than 31 January.

The Italian Government has stated in reply that Article 7(4) does not specify particular dates on which the hunting season should begin or end. National legislation provides for different dates for the opening and closing of the hunting season for the various species precisely because their rearing seasons and stages of reproduction differ. As regards the birds' return to their rearing grounds, the Decree of 20 September 1979 provided that the hunting of certain species of migratory birds was to end on 28 February and for other species on 10 March. The complaint is ill-founded because it does not address itself to the question whether the dates chosen for the opening and closing of the hunting season are appropriate .

As regards the question whether the complaint made in the pre-litigation procedure and set out in the application is well founded, it must be noted first of all that, contrary to the Commission' s contention, the Italian legislation takes account of the various periods mentioned in Article 7(4) in which birds are to be protected. The Italian legislation does fix different dates for the opening and closing of the hunting season for the various species of birds having regard to their different rearing seasons and their different stages of reproduction and, in the case of migratory birds, their return to their rearing grounds. In this regard the Commission' s complaint cannot be upheld. As regards the complaint that the dates chosen in the Italian legislation for the opening and closing of the hunting season for certain species of birds are not appropriate, it must be noted that the Commission raised this point for the first time in its reply. Since this point extends the scope of the complaint made in the pre-litigation procedure and in the application, the question concerning the appropriateness of the dates chosen for the different hunting seasons must be disregarded. In those circumstances the Commission's third complaint must be dismissed.

Use of automatic and semi-automatic weapons

The Commission states that national legislation authorizes the use of repeating and semi-automatic weapons capable of firing three shots and that this provision of Italian law is not a correct application of Article 8(1) and Annex IV thereto.

The Italian Government, on the other hand, contends that the provision in question provides for the fitting of a technical device in order to reduce the number of shots. That mechanism is intended to make it impossible to introduce more than two rounds of ammunition into the magazine whilst a third may be introduced directly into the firing chamber. The Italian rules are therefore not contrary to the provision in the Directive.

Given those two diverging views, the wording of the Italian provision and of the provision in the Directive must first be recalled. National legislation provides that "hunting with a repeating or semi-automatic rifle fitted with a device preventing more than three shots from being fired" is allowed. However, Article 8(1), in conjunction with Annex IV (a) thereto, provides that Member States are to prohibit, in particular, semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition. From a comparison of those provisions it may be concluded that national legislation does in fact prohibit weapons capable of discharging more than three rounds of ammunition. Moreover, it is undisputed that the Directive does not prohibit the insertion of a third round of ammunition into the gun's firing chamber. Therefore, legislation authorizing weapons capable of firing three consecutive rounds is not contrary to the Directive, provided that it is ensured that the magazines of those weapons can hold only two rounds of ammunition. It must be noted in this regard that the Italian provision clearly restricts the use of weapons to those which can discharge only three consecutive rounds. Since a round of ammunition may be in the gun's firing chamber, the reference in the Italian provision in question to a device preventing more than three shots from being fired is sufficient to guarantee that the

magazine cannot hold more than two rounds of ammunition. In those circumstances, national legislation must be regarded as providing a proper guarantee of the full implementation of Article 8(1). The fourth complaint of the Commission is therefore unfounded.

The powers given to the regions to permit the capture and sale of migratory birds

According to the Commission, national legislation is incompatible with Articles 7 and 8 in so far as it confers on the Italian regions a wide power to authorize the capture by any method and the sale of migratory birds even in the close season.

The Italian Government denies that the provision in question confers a wide discretion on the regions and maintains that the regions may not depart from the wording of the law and of the Directive. They must lay down precise rules governing arrangements for capturing migratory birds. The use of birds for recreational purposes at fairs and traditional markets is possible under Article 2. Finally, migratory species may be captured only in limited numbers fixed in advance for each species. This provision is therefore a derogation provided for by Article 9(1).

That difference of view necessitates an initial clarification of the scope of the complaint, which must be understood as not objecting to the power to regulate hunting conferred on the regions or to the legislative and administrative provisions adopted by the regions. The complaint only concerns the fact that national legislation does not transpose, or require the regions to take into account, the obligations and requirements of the Directive concerning methods of hunting migratory birds, the sale of migratory birds and hunting seasons for such birds. National legislation provides that, after consulting a particular scientific institute, the regions may operate, or authorize the operation, by means of specific regulations, of arrangements for capturing and selling migratory birds with a view to their being kept. To that end, they may authorize the use of means and arrangements for capturing birds, fix their own trapping seasons and draw up a list of birds which may be hunted even outside the periods when hunting is allowed under national legislation. However, another provision of national legislation states that migratory birds may only be captured with a view to their being kept for use as live decoys in cover-shooting or for recreational purposes in traditional fairs and markets. Such species may be trapped in limited numbers previously fixed for each species. In this regard it must be noted that national legislation gives the regions the power to regulate the hunting seasons for migratory birds and the means, arrangements or methods for their capture without taking into account the requirements of Articles 7 and 8. The Italian Government puts forward three arguments on this point; first, that the rule-making power may only be exercised in consultation with a scientific institute; secondly, that the provisions of national legislation are justified under Article 2; and thirdly that that provision could be authorized under Article 9(1)(c). As regards the first argument, it must be stated that, even though the regions are obliged to consult a scientific institute before implementing their rules, the opinion of the institute is not binding and therefore that obligation does not guarantee that the requirements of the Directive will be respected. As regards the second argument, it must be stressed that Article 2, as observed above, is not an independent derogation from the obligations and requirements of the Directive. As regards the third argument concerning Article 9(1)(c), that provision authorizes Member States to derogate, inter alia, from Articles 7 and 8 in order to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers. It is clear that the capture and sale of birds, even outside the hunting season, with a view to keeping them for use as live decoys or for recreational purposes in fairs and markets may constitute judicious use authorized by Article 9(1)(c). However, it must be observed first of all that the provision concerned makes no reference to Article 9(1), which provides that a derogation from Articles 7 and 8 may be granted only if there is no other satisfactory solution. Secondly, provision of national law, which authorizes the regions to permit the use of means and arrangements for capturing birds, to fix the periods in which capturing is permitted and to draw up the list of birds which may be hunted, does not, contrary to the requirements of Article 9(2), specify the means, arrangements or methods authorized for the capture or killing of birds, the circumstances of time and place under which the derogations may be granted or the species covered by the derogations. Such criteria and conditions are necessary to ensure that the derogation is applied in a strictly controlled and selective manner. Since national legislation does not itself establish the criteria and conditions provided for in Article 9(2) or require the regions to take account of those criteria and conditions, it introduces an element of uncertainty as regards the obligations which the regions must observe when adopting their regulations. Therefore, there is no guarantee that the capture of certain species of birds will be limited to the strict minimum, that the period of capture will not coincide unnecessarily with periods in which the Directive aims to provide particular protection or that the means, arrangements or methods for capture are not large-scale, non-selective or capable of causing the local disappearance of a species. It follows that the essential elements of Article 9 have not been transposed completely, clearly and unequivocally into the Italian rules. Therefore, the Commission' s fifth complaint must be upheld.

The use of migratory birds as live decoys

The Commission complains that national legislation authorizes the use of migratory birds as live decoys for hunting, in breach of Article 8. In its reply it explained that the complaint was not that national legislation authorizes the use of live decoys but that national legislation does not prohibit the blinding and mutilation of birds used as decoys.

In reply to that point the Italian Government has stated that national legislation only authorizes the use of migratory birds as live decoys but does not authorize the blinding or mutilation of those birds. Another provision expressly prohibits the use of blinded live decoys. The point made in the reply is, in its view, an inadmissible extension of the original complaint.

As regards the argument of the Italian Government alleging an inadmissible extension of the complaint, it must be stated that, in its application, the Commission repeated verbatim the complaint which it had already made in the pre-litigation procedure, namely that Article 8 had not been transposed into the Italian rules. In its reply the Commission pointed out that, through its reference to Annex IV to the Directive, Article 8 prohibits the use not only of blinded live decoys but also of mutilated live decoys. Although the complaint formulated by the Commission in the pre-litigation procedure and in the application was unfortunately very brief, it nevertheless contains all the information which the Italian government needed to understand the complaint made against it and to defend itself. All the information needed to assess the scope of the complaint is given: the provision infringed, namely Article 8, the rule of national law considered to be contrary to that provision, namely Article 18 of the national law, and the basis of the complaint, namely the granting of authorization contrary to the provisions of Article 8. The objection of inadmissibility raised by the Italian government cannot therefore be upheld. As regards the substance of the complaint, it must be noted that Article 18(2) of the law allows the regions to authorize the use of migratory birds as live decoys in cover-shooting and Article 20(o) prohibits only the use of blinded live decoys. It therefore follows that Article 18(2) in conjunction with Article 20(o) of the law does not expressly prohibit the regions from authorizing the keeping and a fortiori the use of migratory species as mutilated live decoys in cover-shooting. Such use is prohibited by the Directive. The Commission' s complaint must therefore be upheld.

C-412/85, Commission v. Germany

Judgment of the Court of 17 September 1987. Commission of the European Communities v Federal Republic of Germany. Failure to comply with a directive - Conservation of wild birds.

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61985J0412

The Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by authorising derogation from the measures for the protection of birds without providing for the restrictions prescribed by the Birds Directive, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty. Originally, the Commission's action concerned three provisions of the German Federal Law on the protection of nature (hereinafter the “Federal law”) authorising derogation from the legislation concerning the protection of birds. Following an amendment made to the Federal law after the written procedure had ended, the Commission considered the case settled in regard to the second and third complaints and only one point remained in disagreement, namely the conformity of the first sentence of paragraph 22(3) of the Federal law with Article 5 of the Birds Directive read in conjunction with Article 9 thereof.

Article 5 of the Birds Directive provides for general prohibitions on the deliberate killing or capture of the species of birds referred to in Article 1 of the Birds Directive and on the deliberate destruction of, or damage to their nests and eggs and the deliberate disturbance of those birds insofar as their disturbance would be significant having regard to the objectives of the Birds Directive.

Those general prohibitions laid down in the Directive were transposed into German law by paragraph 22(2) of the Federal law. That provision prohibits, *inter alia*, the deliberate Commission of the acts set out in Article 5 of the Birds Directive. The first sentence of paragraph 22(3) of the Federal law provides that the prohibitions contained in subparagraph (2) do not apply where the acts concerned take place in the course of '*the normal use of the land for agricultural, forestry or fishing purposes*' or in the context of the '*exploitation of the products obtained from such activities*'.

The Commission complaints that paragraph 22(3) of the Federal law derogates from the prohibition contained in Article 5, as transposed in paragraph 22(2) of the Federal law, without complying with the restriction imposed by Article 9 on national legislatures wishing to adopt derogations from the general prohibitions concerning the protection of birds. The Commission claims that Article 9 of the Birds Directive authorises Member States to provide for derogation only if the protective criteria laid down in Article 9 are met. Thus, the Commission finds that there is no reference in the German legislation to the fact that derogation may be granted only, where there is no other satisfactory solution or to one of the reasons set out in Article 9(1) of the Birds Directive.

The Government of the Federal Republic of Germany replies that paragraph 22(3) of the Federal law does not constitute a derogation from the prohibitions laid down in subparagraph (2). The derogation provided for in paragraph 22(3) presuppose the absence of any intentional acts. The activities defined in the before-mentioned paragraph, such as the normal use of land, can never be regarded as constituting a deliberate failure to protect birds, because actions performed with the intention of killing, capturing, disturbing, keeping or selling wild birds cannot be described as forming part of normal agricultural, forestry or fishing activities.

It is necessary to consider first the question whether paragraph 22(3) of the Federal law constitutes a derogation from the prohibitions laid down in subparagraph (2) of the same provision. More precisely, it must be determined whether paragraph 22(3) concerns intentional acts inimical to the protection of birds. With regard to paragraph 22(3) of the Federal law, the terms of that provision refer expressly to the previous subparagraph, which contains the general prohibitions provided for in Article 5 of the Birds Directive. Since those prohibitions concern intentional acts, the exception necessarily covers the same acts. It should also be noted that paragraph 22 (3) of the Federal law does not define its scope by defining the activities harmful to the environment which are to be permissible on the basis of a subjective criterion. In fact, the German legislation permits derogation from the provisions for protection of birds as long as the acts concerned are carried out '*in the course of the normal use of the land for agricultural, forestry or fishing purposes*'. That reference to a particular use of the land does not provide a precise indication of the extent to which damage to the environment is permitted. The concept of the normal use of the land and the concept of an unintentional infringement of the provisions for the protection of the birds belong to two different legal planes. Since the German legislation does not define the concept '*normal use*', unintentional damage to the life and habitat of birds is not excluded from the scope of paragraph 22(3) of the Federal law in so far as such damage is necessary in the course of the normal use of the land. Thus, the argument of the Federal German Government equating the normal use of the land with acts involving no intention to infringe the rules for the protection of birds cannot be upheld. Consequently, since paragraph 22(3) of the Federal law constitutes a derogation from the prohibitions laid down in Article 5 of the Birds Directive, the German rules must meet the criteria laid down in Article 9 of the Birds Directive in order to be justified. According to that provision, Member States must restrict the derogation to cases in which there is no other satisfactory solution. The derogation must be based on at least one of the reasons listed exhaustively in subparagraphs (A), (B) and (C) of Article 9(1) and it must meet the criteria laid down in Article 9(2), the purpose of which is to limit derogation to what is strictly necessary and to enable the Commission to supervise them. In that regard, it must be held that the derogation provided for in paragraph 22(3) of the Federal law do not meet the requirements laid down in Article 9 of the Birds Directive, since the activities defined in paragraph 22(3) cannot be attributed to any of the reasons set out in Article 9 of the Birds Directive.

C-57/89, Commission v. Germany - “Leybucht“

Judgment of the Court of 28 February 1991 - Commission of the European Communities v Federal Republic of Germany - Conservation of wild birds - Construction work in a special protection area

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61989J0057:EN:HTML

The Commission claims that the dyke-building operations in the Leybucht disturb birds which enjoy special protection under the provisions of Article 4(1), in conjunction with Annex I, and damage the habitat of the birds, which is designated as a special protection area. The Commission emphasizes that the first sentence of Article 4(4) requires Member States to take positive steps to avoid any deterioration or pollution of habitats as part of the management of special protection areas. The Commission states that coastal defence measures such as the strengthening of a dyke are acceptable in the case of a threat to human life, but only on condition that the necessary measures are restricted to those which cause only the minimum necessary deterioration of the special protection area in question. According to the Commission, those conditions have not been fulfilled in the present case. It is of the opinion that both the construction work in the Leybucht and its results entail deterioration in the living conditions of protected birds and the loss of land areas of considerable ecological importance, thereby

leading to lower population densities for some of the species of birds listed in Annex I to the Directive, in particular the avocet.

The German Government observes that according to the information sent to the Commission pursuant to Article 4(3), the new line of the dyke in the Leybucht and the areas located on the landward side of the dyke are excluded from the special protection area. It states that the boundaries of the area in question are defined in the regulation creating the national park in such a way that the protected area extends only to the foot of the dyke, in the form it will have once the construction work in question has been completed. According to the German Government, the sole purpose of the operations is to secure the safety of the dyke. It emphasizes that during the planning stage of the project at issue the competent authorities took account of all bird conservation requirements and balanced them against the requirements of coastal protection. The German Government states that the new line of the dyke and the temporary disturbances caused by the works constitute the smallest possible interference for bird life in the Leybucht. It adds that the Commission has not furnished any evidence at all that the measures at issue significantly impair the protection of those birds. With regard to the interpretation of Article 4(4), the German Government claims that that provision requires a balance to be struck between the various public interests likely to be affected by the management of a special protection area, so that the Member States must have a wide discretionary power in this field.

The United Kingdom considers that the Commission has not established that the project at issue has a significant effect within the meaning of the first sentence of Article 4(4). It states that that condition must be interpreted as meaning that the deterioration of a special protection area must be such as to threaten the survival or reproduction of protected species within their area of distribution. In the United Kingdom' s view, the material supplied by the Commission does not appear sufficient to support the conclusion that the operations in the Leybucht involve such deterioration. The United Kingdom emphasizes the importance of the evidence supplied by the defendant which shows that the works at issue will significantly improve ecological conditions in the Leybucht. It considers that it is legitimate, when assessing whether a particular project will cause deterioration to a special protection area and whether any such deterioration will be significant, to consider whether the works will at the same time bring compensatory ecological improvements. In the submission of the United Kingdom, within the context of Article 4(4) account can be taken of other important public interest considerations, including those referred to in Article 2. It considers that the Member States must be able to take into account the interests of persons living in or around a special protection area.

With regard to the boundaries of the special protection area in question, it must be pointed out that the boundary of the Leybucht is defined by the regulation creating the national park and the maps appended thereto. Although the plan of the area does include a reference to the regional planning scheme, the legal measure designating the special protection area nevertheless sets out its precise territorial delimitation, constituted by the present line of the dyke. The displacement of the dyke towards the sea as part of the coastal defence project thus entails a reduction in the protected area. Consequently, in order to resolve this dispute it is necessary to settle a number of questions of principle concerning the obligations of the Member States under Article 4(4) in relation to the management of the special protection areas. It must be determined whether - and if so, under what conditions - the Member States are authorized to reduce the size of a special protection area and to what extent other interests may be taken into account.

With regard to the powers of the Member States to review in that way a decision to classify an area as a special protection area, it must be stated that a reduction in the geographical extent of a protected area is not expressly envisaged by the terms of the Directive. Although the Member States do have a certain discretion with regard to the choice of the territories which are most suitable for classification as special protection areas pursuant to Article 4(1), they do not have the same discretion under Article 4(4) in modifying or reducing the extent of the areas, since they have themselves acknowledged in their declarations that those areas contain the most suitable environments for the species listed in Annex I to the Directive. If that were not so, the Member States could unilaterally escape from the obligations imposed on them by Article 4(4) with regard to special protection areas. That interpretation of Article 4(4) is borne out, moreover, by the ninth recital in the preamble, which underlines the special importance which the Directive attaches to special conservation measures concerning the habitats of the birds listed in Annex I in order to ensure their survival and reproduction in their area of distribution. It follows that the power of the Member States to reduce the extent of a special protection area can be justified only on exceptional grounds. Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the Directive. In that context the interests referred to in Article 2, namely economic and recreational requirements, do not enter into consideration. As the Court pointed out in its previous judgments, that provision does not constitute an autonomous derogation from the general system of protection established by the Directive.

With regard to the reason put forward in this case, it must be stated that the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dyke works and the strengthening of coastal

structures as long as those measures are confined to a strict minimum and involve only the smallest possible reduction of the special protection area. With regard to the part of the project concerning the Leghorn area, the line of the dyke was influenced by considerations relating not only to coastal protection but also to the concern to ensure that fishing vessels from Greasier had access to the harbour. In the light of the principles for the interpretation of Article 4(4) set out above, to take account of such an interest is in principle incompatible with the requirements of the provision. However, that part of the project has at the same time specific positive consequences for the habitat of birds. Once the works are completed it will be possible to close two navigation channels which cross the Leybucht, with the result that the Leybucht will be left in absolute peace. Moreover, the decision approving the proposed works envisages a strict protection scheme for the Leghorn area. The dyke which previously protected the Heavener Hodge site will be opened, thus once more exposing an extensive area to tidal movements and allowing the formation of salt meadows of considerable ecological importance. The desire to ensure the survival of the fishing port of Greasier could thus be taken into account in order to justify the decision on the line of the new dyke because there were the abovementioned offsetting ecological benefits, and solely for that reason. Finally, the disturbance arising from the construction work itself does not exceed what is necessary to carry it out. The information concerning the number of avocets in that sector of the Wattenberg shows, moreover, that during the period in question there was no significant change, within the meaning of Article 4(4), in population trends for that species. Furthermore, the Commission has not supplied any other evidence relating to population trends for protected species. It follows from the foregoing that the application must be dismissed.

C-157/89, Commission v. Italy

Judgment of the Court of 17 January 1991. Commission of the European Communities v Italian Republic. Failure to comply with a directive - Conservation of wild birds.

Ruling is not available in English. Source: Report on Birds Directive European Court of Justice Cases with Case Summaries, RSPB 2004

Opening of the hunting season for four species as from 18 August

Commission position: National provisions authorising the hunting of coot, moorhen, mallard and blackbird as from 18 August are incompatible with the second sentence of Article 7(4) of the Birds Directive, on the ground that the reproduction and rearing period for those species has not yet finished on that date.

Italian position: The Italian legislation complies with the requirements laid down in the second and third sentences of Article 7(4), since on the one hand, most fledglings of the species in question normally have become independent of their parents by 18 August. Moreover, the regions are empowered to vary the dates for the opening and closing of the hunting season which are fixed by the national legislation, in order to take account of particular rearing cycles or migratory movements.

Court position: According to the scientific data provided by the Commission in respect of the above species, a significant fraction of fledglings of three of the species mentioned, namely young coots, moorhen and mallards, will possibly still be in the nest or dependent on their parents for food on 18 August. In contrast, it appears from the same data that young blackbirds become independent before that date. Except as regards the blackbird, the Commission's first complaint must be upheld.

The opening of the hunting season for 19 species up until 28 February or 10 March

Commission position: National provisions authorising the hunting until 28 February of 10 migratory species and until 10 March of nine other species which, during the months of January, February and March, cross Italy on their way back to their rearing grounds in central and northern Europe do not comply with the third sentence of Article 7(4).

Italian position: Depending on the species, the migratory birds in question normally do not fly over Italy in substantial numbers before 28 February or 10 March. The Italian legislation adapted the hunting seasons to suit the requirements relating to the protection of migratory birds which are laid down in the International Convention for the Protection of Birds of 18 October 1950. It argues that in the absence of specific requirements in the Directive the requirements of the above Convention may be accepted as criteria for the adequate protection of migrant birds within the context of the Directive. Moreover, the regions are empowered to vary the dates for

the opening and closing of the hunting season which are fixed by the national legislation, in order to take account of particular rearing cycles or migratory movements.

Court position: The Convention in question, which requires migrants to be protected particularly in March, cannot constitute a fundamental element for the interpretation of the Directive, which embodies stricter requirements in terms of protection. According to the scientific data provided by the Commission for the migratory species mentioned in the application and in particular the report of the Istituto Nazionale di Biologia della Selvaggina, a substantial fraction of those species may be flying over Italian territory as early as February, with the result that the Italian legislation does not comply with the aforementioned provision of the Directive. Next to it, it must however be held that non-compliance with the Directive has not been made out sufficiently as regards two of them, namely redshank and curlew, since it is stated in the aforementioned report that redshank do not cross Italian territory until the first half of March and that they cross Italian territory in late March/early April. Except as regards redshank and curlew, the Commission's second complaint must be upheld.

C-355/90, Commission v. Spain - “Santoña Marshes”

Judgment of the Court of 2 August 1993. - Commission of the European Communities v Kingdom of Spain. - Conservation of wild birds - Special protection areas.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61990J0355:EN:HTML

The obligation to classify the Santoña marshes as a SPA

The Santoña marshes are one of the most important ecosystems in the Iberian peninsula for many aquatic birds. The marshes serve as a wintering area or staging post for many birds on their migrations from European countries to the southern latitudes of Africa and the Iberian peninsula itself. The birds observed in the area include various species that are becoming extinct, in particular the spoonbill, which feeds and rests in the Santoña marshes in the course of its migrations. Moreover, it emerged from the case file and at the hearing before the Court that the area in question is regularly visited by 19 of the species listed in Annex I to the Directive and at least 14 species of migratory birds. It means that the Santoña marshes are not only a habitat that is essential for the survival of several species in danger of extinction within the meaning of Article 4(1) but also wetlands of international importance for regularly occurring migratory species in that area within the meaning of Article 4(2).

The Spanish Government recognizes the ecological value of the area. It points out that the Santoña and Noja marshes were classified as nature reserves by Law No 6 of 27 March 1992, because of the importance of those wetlands as habitats for many species of animals. However, it considers that the national authorities have a margin of discretion with regard to the choice and delimitation of special protection areas and the timing of their classification as such.

That argument cannot be accepted. Although Member States do have a certain margin of discretion with regard to the choice of special protection areas, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the Directive, such as the presence of birds listed in Annex I, on the one hand, and the designation of a habitat as a wetland area, on the other. As to the classification of the Santoña marshes as a nature reserve by Law No 6 of 27 March 1992, this cannot be regarded as satisfying the requirements laid down in the Directive, either in respect of the territorial extent of the area or as regards its legal status as a protected area. In this connection, it must be observed first of all that the nature reserve does not cover the whole of the marshes, since an area of 40 000 square metres is excluded. Yet that land is of particular importance for aquatic birds in danger of extinction within the meaning of Article 4(1)(a), since a steady reduction in the space available for nesting has been observed in the other marshland areas close to the coast. Next the necessary protection measures have not been defined even for the marshes within the classified area. Indeed, it appears from the case file that the plan for the management of nature reserves provided for in Article 4 of the Law has not been approved by the competent authorities. Yet that plan is of the utmost importance for the protection of wild birds because it intended to identify activities which will give rise to a change in the ecosystems of the area. Since measures as essential as those determining the management of the area or governing the use of the marshes and the activities carried out there have not been adopted, the requirements of the Directive cannot be held to have been satisfied.

The interpretation of Articles 3 and 4

The Commission claims that it is possible for a Member State to infringe both Article 4(1) and (2), relating to the classification of a territory as a special protection area, and Article 4(4), which concerns the protection measures relating to such an area.

According to the Spanish Government, a Member State cannot be accused of having infringed both those provisions at the same time, because the protection measures cannot be implemented until the decision has been taken to classify a territory as a special protection area.

That line of reasoning must be rejected. The objectives of protection set out in the Directive, as expressed in the ninth recital in its preamble, could not be achieved if Member States had to comply with the obligations arising under Article 4(4) only in cases where a special protection area had previously been established. With respect to the relationship between Articles 3 and 4, it must be borne in mind that the first of those provisions imposes obligations of a general nature, namely the obligation to ensure a sufficient diversity and area of habitats for all the birds referred to in the Directive, while the second contains specific obligations with regard to the species of birds listed in Annex I and migratory species not listed in that Annex. As it is undisputed that both categories of birds are found in the Santoña marshes, it will be sufficient to consider the Commission' s complaints in the light of the provisions of Article 4.

The obligation to protect the Santoña marshes pursuant to Article 4(4)

The second section of the road between Argoños and Santoña

The Commission claims that the new route followed by the C-629 road between Argoños and Santoña results not only in a considerable reduction in the surface area of the Santoña marshes but also in disturbances affecting the peaceful nature of the area and consequently the wild birds protected by the provisions of the Directive.

The Spanish Government explains that the new road is necessary to improve access to the town of Santoña. Also, the new route is the best of various possible alternatives, mainly because it affects only a small proportion of the total surface area of the marshes.

These explanations cannot be accepted. As the Court stressed in Case C-57/89 Commission v Germany, although Member States do have a certain discretion with regard to the choice of the territories which are most suitable for classification as special protection areas, they do not have the same discretion under Article 4(4) in modifying or reducing the extent of those areas. The Court finds in this connection that the construction of the new section of road C-629 between Argoños and Santoña involves a reduction in the surface area of the marshland, an effect that, moreover, is aggravated by the erection of a number of new buildings near this new section of road. These operations have resulted in the loss of refuge, rest and nesting areas for birds. In addition to the disturbances caused by the road works, the action in question has modified the ebb and flow of the tide, causing this part of the marshland to silt up. Since, regard being had to the considerations of principle set out above, such action cannot be justified by the need to improve access to the municipality of Santoña.

The industrial estates at Laredo and Colindres

The Commission considers that the establishment of industrial estates at Laredo and Colindres is resulting in the disappearance of a substantial part of the marshland, namely the area adjoining the mouth of the Asón river, also known as the Asón or Treto estuary. The filling-in of land adjoining these sites is also alleged to affect the ebb and flow of the tide in the bay.

The Spanish Government explains that the competent authorities have abandoned the idea of establishing these industrial estates as they were originally planned.

The Court takes note of the written and oral statements of the Spanish Government to the effect that the industrial estates at Laredo and Colindres have not been established and the municipalities concerned have abandoned the idea of carrying out those two projects as they were originally planned. Although it is no longer proposed to carry out those projects, the fact remains that, after the Kingdom of Spain joined the Communities, the local authorities re-sealed the dykes previously built round the land earmarked for the industrial estates. Nor is it disputed that no steps have so far been taken to demolish those dykes, even though the local authorities have acknowledged their harmful impact on the aquatic environment and have undertaken to demolish them. Accordingly, it must be held that there has been a failure to fulfil obligations in this respect.

The aquaculture facilities

The Commission takes issue with the granting of authorization by the Spanish authorities to a fishermen' s association to farm clams in the middle of the marshes, as well as the projects for other aquaculture operations in the estuary.

The Spanish Government emphasizes the economic interest of this activity and contends that it has only a small impact on the ecological situation of the marshes.

In this connection, it should be stressed that the installation of aquaculture facilities, which not only reduce the surface area of the marshland and cause variations in the natural sedimentation processes there, but also modify the structure of the existing marsh bed, has the effect of destroying the particular vegetation of those areas, which is an important source of food for the birds. As has already been observed, considerations relating to the economic problems caused by the decline in the industrial and fishery sectors in the region, which are, moreover, contradicted by the fact that other projects have been abandoned because they were not profitable, cannot justify a derogation from the protection requirements laid down in Article 4(4).

The discharge of waste water

The Commission claims that the discharge of untreated waste water, has had detrimental effects on the quality of the water in Santoña bay.

The Spanish Government does not deny that untreated waste water from the municipalities in the Santoña bay area has been discharged into the Santoña marshes. However, it claims that the Directive does not contain any provision obliging Member States to equip themselves with systems for treating waste in order to preserve the quality of the water in a special protection area.

That argument must be rejected. The discharge of waste water containing dangerous toxic substances is highly detrimental to the ecological conditions in the Santoña marshes and has a significant effect on the quality of the water in the area. In view of the fundamental importance of the quality of that water to the marshlands, the Kingdom of Spain is under a duty, where necessary, to provide systems for treating waste in order to prevent pollution of those habitats.

C-435/92 (reference for a preliminary ruling) - "Association pour la Protection des Animaux Sauvages and others"

Judgment of the Court of 19 January 1994. - Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique. - Reference for a preliminary ruling: Tribunal administratif de Nantes - France. - Conservation of wild birds - Hunting season.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61992J0435:EN:HTML

The Administrative Court of Nantes referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 7(4). Those questions were raised in the course of six actions for annulment which were brought before the Administrative Court of Nantes by various associations for the protection of the environment and a hunters' association against the decisions of the Prefects of Maine-et-Loire and of Loire-Atlantique fixing the closing dates for their respective departments for the 1992/93 hunting season. The proceedings essentially concern the compliance of those dates with the provisions of the Directive relating to the protection of migratory birds during their return to their rearing grounds. Considering that the outcome of those proceedings depended in particular on the interpretation of Article 7(4), the Administrative Court of Nantes asked whether

1. the closing date for the hunting of migratory birds and waterfowl should be fixed as the date of the commencement of pre-mating migration or the varying date of commencement of migration;

2. the principle of staggering the closing dates for hunting seasons by reference to species is compatible with the system of protection provided by the Directive and, if so, within what limits; and

3. the power of the Prefects to set the closing dates for hunting in their department is compatible with the system of protection provided by the Directive.

The first question

The national court seeks guidance as to the criteria to be applied in fixing the closing date for the hunting of migratory birds and waterfowl, having regard to the fact that the commencement of pre-mating migration is liable to vary each year on the basis of a number of factors. First, it should be noted that under Article 7(4) the Member States are to see in particular that the species to which hunting laws apply are not hunted during the rearing season or during the various stages of reproduction (second sentence) and in particular in the case of migratory species to which hunting regulations apply that they are not hunted during their period of reproduction or during their return to their rearing grounds (third sentence). Secondly, reference should be made to the judgment of the Court in Case C-157/89 Commission v Italy. In that judgment, the Court first notes that birds' migratory movements are subject to a degree of variability which, owing to meteorological circumstances, affects in particular the periods during which migration takes place. Thus, a number of birds of a given migratory species may begin their return journey to their rearing grounds comparatively early relative to average migratory flows. That is particularly true where the species concerned regularly travels between migration and rearing grounds which are sometimes at a considerable distance from each other, crossing numerous borders and affecting different countries and where, within one species, there are different populations whose routes sometimes diverge and pass through separate areas. In that judgment, the Court then states that Article 7(4) is designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat. Accordingly, it held that protection against hunting activities could not be confined to the majority of the birds of a given species, as determined by average migratory movements. In this case, it should be observed that the findings contained in the abovementioned judgment as to the variability of migratory movements have been confirmed by the joint studies on the Court file, according to which the date of the commencement of pre-mating migration varies on the basis of several factors, namely the species of bird concerned, differences from year to year, geographical differences and the availability of feeding material. In the light of the principles of interpretation set out in the judgment, it should be noted that the method consisting in fixing the closing date for hunting by reference to the period during which migratory activity reaches its highest level cannot be considered to be compatible with Article 7(4). The same is true of those methods which take into account the moment at which a certain percentage of birds have started to migrate and of those which consist in ascertaining the average date of the commencement of pre-mating migration. Accordingly, the reply to the first question referred should be that pursuant to Article 7(4) the closing date for the hunting of migratory birds and waterfowl must be fixed in accordance with a method which guarantees complete protection of those species during the period of pre-mating migration and that, as a result, methods whose object or effect is to allow a certain percentage of the birds of a species to escape such protection do not comply with that provision.

The second question

The national court seeks guidance as to whether the national authorities are empowered by the Directive to fix closing dates for hunting which vary according to the species concerned. It appears from the order for reference and the argument before the Court that there are two difficulties with such a method: first the disturbances caused by hunting to other species of bird for which hunting has already closed and secondly the risks of confusion between different species. So far as concerns the first difficulty, it should be noted that any hunting activity is liable to disturb wildlife and that it may in many cases affect the state of conservation of the species concerned, independently of the extent to which it depletes numbers. The regular elimination of individuals keeps the hunted populations in a permanent state of alert which has disastrous consequences for numerous aspects of their living conditions. It should be added that those consequences are particularly serious for groups of birds which, during the season of migration and wintering, tend to gather together in flocks and rest in areas which are often very confined or even enclosed. Disturbances caused by hunting force these animals to devote most of their energy to moving to other spots and to fleeing, to the detriment of time spent feeding and resting for the purpose of the migration. Those disturbances are reported to have an adverse impact on the level of energy of each individual and the mortality rate of all the populations concerned. The effect of disruption caused by hunting birds of other species is particularly significant for those species whose return migration takes place earlier. With regard to the second difficulty, namely the risk that certain species for which hunting has already closed will be subject to indirect depletion owing to confusion with the species for which hunting is still open, it must be emphasized that the third sentence of Article 7(4) is specifically intended to prevent those species from being exposed to the risk of depletion due to hunting during the period of pre-mating migration, requiring the Member States to take all necessary measures to prevent any hunting during that period. It is no answer to the foregoing to argue that hunting is a recreational activity justifying an exception to Article 7(4). It should be noted on this point that, as the Court stated in its previous judgments, it is clear from Article 2, which requires the Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking

account of economic and recreational requirements, that the protection of birds must be balanced against other requirements, such as those of an economic nature. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the Directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation. In this case, that is true of the third sentence of Article 7(4) which contains a clear and specific requirement, independent of the general requirement laid down in Article 2. Fixing one single date for all the species concerned for the closing of hunting, which is equivalent to that fixed for the species which is the earliest to migrate, guarantees in principle that the objective laid down in the third sentence of Article 7(4) is realized. However, it is possible that the Member State concerned may be able to adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering. Accordingly, the reply to be given to the second question is that the national authorities are not empowered by the Directive to fix closing dates for the hunting season which vary according to the species of bird, unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering.

The third question

The national court essentially seeks guidance as to whether, first, the Directive permits the closing of hunting to be fixed at different dates in different parts of the territory of a Member State and, secondly, whether a Member State may delegate the implementation of the Directive to subordinate authorities. It should be noted that the fact that the closing dates for hunting vary from region to another is in itself compatible with the third sentence of Article 7(4). That provision requires only that the closing date for hunting be set in such a way as to make possible complete protection of migratory birds during their pre-mating migration. If it appears that the pre-mating migration begins at different times in different parts of the territory of a Member State then the Member State is permitted to set different closing dates for hunting. Similarly, nothing prevents a Member State from conferring on subordinate authorities the power to fix the closing date for the hunting of migratory birds, provided that it guarantees, by legislation which is general in scope and not limited in time, that that date will be fixed in such a way as to ensure complete protection of the species of bird referred to in the Directive during pre-mating migration. Accordingly, the reply to be given to the third question referred is that, on condition that complete protection of the species is guaranteed, the fixing of closing dates which vary between the different parts of the territory of a Member State is compatible with the Directive. If the power to fix the closing date for the hunting of migratory birds is delegated to subordinate authorities, the provisions which confer that power must ensure that the closing date can be fixed only in such a way as to make possible complete protection of the birds during pre-mating migration.

C-44/95 (reference for a preliminary ruling) - “Lappel Bank”

Judgment of the Court of 11 July 1996. - Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds. - Reference for a preliminary ruling: House of Lords - United Kingdom. - Directive 79/409/EEC on the conservation of wild birds - Directive 92/43/EEC on the conservation of the natural habitats of wild fauna and flora - Delimitation of Special Protection Areas - Discretion enjoyed by the Member States - Economic and social considerations

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61995J0044:EN:HTML

Lappel Bank is an area of inter-tidal mudflat immediately adjoining, at its northern end, the Port of Sheerness and falling geographically within the bounds of the Medway Estuary and Marshes. Medway Estuary and Marshes are an area of wetland of international importance covering 4 681 hectares on the north coast of Kent and listed under the Ramsar Convention. They are used by a number of wildfowl and wader species as a breeding and wintering area and as a staging post during spring and autumn migration. The site also supports breeding populations of the avocet and the little tern, which are listed in Annex I to the Birds Directive. The Port of Sheerness is at present the fifth largest in the United Kingdom for cargo and freight handling. It is a flourishing commercial undertaking, well located for sea traffic and access to its main domestic markets. The Port, which is also a significant employer in an area with a serious unemployment problem, plans extended facilities for car storage and value added activities on vehicles and in the fruit and paper product market, in order better to compete with continental ports offering similar facilities. Lappel Bank is the only area into which the Port of Sheerness can realistically envisage expanding.

On 15 December 1993, the Secretary of State decided to designate the Medway Estuary and Marshes as a Special Protection Area (hereinafter "SPA"). Accordingly, taking the view that the need not to inhibit the viability of the port and the significant contribution that expansion into the area of Lappel Bank would make to the local and national economy outweighed its nature conservation value, the Secretary of State decided to exclude area of about 22 hectares known as Lappel Bank from the Medway SPA. Lappel Bank shares several of the important ornithological qualities of the area as a whole. Although it does not support any of the species referred to in Article 4(1) of the Birds Directive, some of the bird species of the area are represented in significantly greater numbers than elsewhere in the Medway SPA. Lappel Bank is an important component of the overall estuarine ecosystem and the loss of that inter-tidal area would probably result in a reduction in the wader and wildfowl populations of the Medway Estuary and Marshes.

The Royal Society for the Protection of Birds (hereinafter “RSPB”) applied to the Divisional Court of the Queen' s Bench Division to have the Secretary of State' s decision quashed on the ground that he was not entitled, by virtue of the Birds Directive, to have regard to economic considerations when classifying an SPA. The Divisional Court found against the RSPB. On appeal by the RSPB, the Court of Appeal upheld that judgment. The RSPB therefore appealed to the House of Lords. Uncertain as to how the Directive should be interpreted, the House of Lords stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

1. Is a Member State entitled to take account of economic and recreational requirements in classification of an area as a Special Protection Area and/or in defining the boundaries of such an area pursuant to Article 4(1) and/or 4(2) of that Directive?

2. If the answer to Question 1 is 'no', may a Member State nevertheless take account of economic and recreational requirements in the classification process in so far as:

(a) they amount to a general interest which is superior to the general interest which is represented by the ecological objective of the Directive, i.e. the test which the European Court has laid down in, for example, Commission v Germany ('Leybucht Dykes') Case 57/89, for derogation from the requirements of Article 4(4); or

(b) they amount to imperative reasons of overriding public interest such as might be taken into account under Article 6(4) of Habitats Directive?

The first question

As a preliminary point, it must be borne in mind that, according to the ninth recital in the preamble to the Birds Directive, "the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds [covered by the Directive]", that "certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution", and, finally, that "such measures must also take account of migratory species". That recital is formally reflected in Articles 3 and 4. In its judgment in Case C-355/90 Commission v Spain (hereinafter "Santoña Marshes") the Court pointed out that the first of those provisions imposes obligations of a general character, namely the obligation to ensure a sufficient diversity and area of habitats for

all the birds referred to in the Directive, while the second contains specific obligations with regard to the species of birds listed in Annex I and the migratory species not listed in that Annex.

According to the United Kingdom Government and the Port of Sheerness Limited, Article 4 cannot be considered in isolation from Article 3. They state that Article 4 provides, in relation to certain species of particular interest, for the specific application of the general obligation imposed by Article 3. Since the latter provision allows account to be taken of economic requirements, the same should apply to Article 4(1) and (2). In its written observation the French Government reaches the same conclusion, observing that, when an SPA is created, the Member States take account of all the criteria mentioned in Article 2 of the Birds Directive, which is general in scope, and, therefore, inter alia, of economic requirements.

According to the Court, those arguments cannot be upheld. Article 4 of the Birds Directive lays down a protection regime which is specifically targeted and reinforced both for the species listed in Annex I and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the Community. Whilst Article 3 of the Birds Directive provides for account to be taken of the economic and recreational requirements mentioned in Article 2 for the implementation of general conservation measures, including the creation of protection areas, Article 4 makes no such reference for the implementation of special conservation measures, in particular the creation of SPAs. Consequently, having regard to the aim of special protection pursued by Article 4 and the fact that, according to settled case-law, Article 2 does not constitute an autonomous derogation from the general system of protection established by the Directive, it must be held that the ecological requirements laid down by the former provision do not have to be balanced against the interests listed in the latter, in particular economic requirements. It is the criteria laid down in paragraphs (1) and (2) of Article 4 which are to guide the Member States in designating and defining the boundaries of SPAs. It is clear from Santoña Marshes that, notwithstanding the divergences between the various language versions of the last subparagraph of Article 4(1), the criteria in question are ornithological criteria.

In view of the foregoing, the answer to the first question must be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State is not authorized to take account of the economic requirements mentioned in Article 2 thereof when designating an SPA and defining its boundaries.

The second question

The first part of the second question

By this part of the question, the national court seeks to ascertain whether Article 4(1) or (2) of the Birds Directive must be interpreted as allowing a Member State, when designating an SPA and defining its boundaries, to take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that Directive.

In its judgment in Case C-57/89 Commission v Germany (hereinafter "Leybucht Dykes"), the Court held that the Member States may, in the context of Article 4(4) of the Birds Directive, reduce the extent of a SPA only on exceptional grounds, being grounds corresponding to a general interest superior to the general interest represented by the ecological objective of the Directive. It was held that economic requirements cannot be invoked in that context. It is also clear from Santoña Marshes that, in the context of Article 4 of that Directive, considered as a whole, economic requirements cannot on any view correspond to a general interest superior to that represented by the ecological objective of the Directive.

Accordingly, without its being necessary to rule on the possible relevance of the grounds corresponding to a superior general interest for the purpose of classifying an SPA, the answer to the first part of the second question must be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that Directive.

The second part of the second question

By this part of the question, the House of Lords asks essentially whether Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may, when designating an SPA and defining its boundaries, take account of economic requirements to the extent that they reflect imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive.

According to the Court, it is important first to bear in mind that Article 7 of the Habitats Directive provides in particular that the obligations arising under Article 6(4) thereof are to apply, in place of any obligations arising under the first sentence of Article 4(4) of the Birds Directive, to the areas classified under Article 4(1) or

similarly recognized under Article 4(2) of that Directive as from the date of implementation of the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive, whichever is the later. Article 6(4) of the Habitats Directive, as inserted in the Birds Directive, has, following Leybucht Dykes where the point in issue was the reduction of an area already classified, widened the range of grounds justifying encroachment upon SPAs by expressly including therein reasons of a social or economic nature. Thus, the imperative reasons of overriding public interest which may, pursuant to Article 6(4) of the Habitats Directive, justify a plan or project which would significantly affect an SPA in any event include grounds relating to a superior general interest of the kind identified in Leybucht Dykes and may where appropriate include grounds of a social or economic nature. Next, although Article 6(3) and (4) of the Habitats Directive, in so far as it amended the first sentence of Article 4(4) of the Birds Directive, established a procedure enabling the Member States to adopt, for imperative reasons of overriding public interest and subject to certain conditions, a plan or a project adversely affecting an SPA and so made it possible to go back on a decision classifying such an area by reducing its extent, it nevertheless did not make any amendments regarding the initial stage of classification of an area as an SPA referred to in Article 4(1) and (2) of the Birds Directive. It follows that, even under the Habitats Directive, the classification of sites as SPAs must in all circumstances be carried out in accordance with the criteria permitted under Article 4(1) and (2) of the Birds Directive. Economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. But that does not mean that they cannot be taken into account at a later stage under the procedure provided for by Article 6(3) and (4) of the Habitats Directive.

The answer to the second part of the second question must therefore be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive.

C-118/94 (reference for a preliminary ruling) – “Regione Veneto”

Judgment of the Court (Fifth Chamber) of 7 March 1996. - Associazione Italiana per il World Wildlife Fund, Ente Nazionale per la Protezione Animali, Lega per l'Ambiente - Comitato Regionale, Lega Anti Vivisezione - Delegazione Regionale, Lega per l'Abolizione della Caccia, Federnatura Veneto and Italia Nostra - Sezione di Venezia v Regione Veneto. - Reference for a preliminary ruling: Tribunale amministrativo regionale per il Veneto - Italy. - Council Directive 79/409/EEC on the conservation of wild birds - Hunting - Conditions for exercise of the Member States' power to derogate.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61994J0118:EN:HTML

Regional Administrative Court for the Veneto Region referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 9 of the Birds Directive. That question was raised in proceedings brought by Associazione Italiana per il World Wildlife Fund ("WWF Italiana") and other associations for the protection of nature ("the applicants") against the Regione Veneto, supported by Italian Hunting Federation (hereinafter "the Federation"), for annulment of the measure adopted by the Regional Council of the Veneto on 21 July 1992 fixing the hunting calendar for the 1992/1993 season for infringement inter alia of the principles referred to in the Directive.

The question referred asks the Court essentially to clarify the conditions under which Article 9 authorizes Member States to derogate from the general prohibition on hunting protected species laid down in Articles 5 and 7. As a preliminary point, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement a Community Directive, the national court called upon to interpret and apply that law must do so, as far as possible, in the light of the wording and the purpose of the Directive so as to achieve the result intended by the Directive and thereby comply with the third paragraph of Article 189 of the Treaty. Next, where by means of a directive the Community authorities have placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before the courts and national courts were prevented from taking it into consideration as an element of Community law. Consequently, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against any authority of a Member State where that State has either failed to implement the Directive in national law by the end of the period prescribed or has failed to implement it correctly. Moreover, a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.

In order to answer the question, it must be noted that the Court has already held with regard to the Directive, in its judgment in Case 252/85 Commission v France, that while transposition into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision, and a general legal context may be sufficient if it actually ensures the full application of the Directive in a sufficiently clear and precise manner, faithful transposition becomes particularly important in a case such as this in which the management of the common heritage is entrusted to the Member States in their respective territories. It is important also to bear in mind that the Court has stated that the possibility provided for in Article 9 of derogating from the restrictions on hunting, as well as from the other restrictions and prohibitions contained in Articles 5, 6 and 8, is subject to three conditions. First, the Member State must restrict the derogation to cases in which there is no other satisfactory solution. Secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c). Thirdly, the derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. Although Article 9 therefore authorizes wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations. It has been stated that with regard to the conservation of wild birds, the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the Directive must be reproduced in specific national provisions. Furthermore, it should be noted that in the Commission v Italy judgment cited above the Court had to give a ruling on the interpretation of Article 9 with respect to a national provision concerning hunting, according to which the regions could operate or authorize the operation, by means of specific regulations, of arrangements for capturing and selling, even outside the period when hunting was allowed, migratory birds of species to be specified from among those which might be hunted under that law, with a view to their being kept for use as live decoys in cover-shooting, or for recreational purposes in traditional fairs and markets. In that judgment, the Court observed first that the provision concerned made no reference to Article 9(1), which provides that a derogation from Articles 7 and 8 may be granted only if there is no other satisfactory solution, and secondly that the provision of national law did not, contrary to the requirements of Article 9(2), specify the means, arrangements or methods of capture authorized, the circumstances of time and place under which the derogations might be granted or the species covered by the derogations. The Court stated that since the provision in question did not establish the criteria and conditions provided for in Article 9(2) or require the regions to take account of those criteria and conditions, it introduced an element of uncertainty as regards the obligations which the regions must observe when adopting their regulations. Therefore, there was no guarantee that the capture of certain species of birds would be limited to the strict minimum, as required by Article 9(1)(c), that the period of capture would not coincide unnecessarily with periods in which the Directive aims to provide special protection or that the means, arrangements or methods for capture were not large-scale, non-selective or capable of causing the local disappearance of a species. It followed that the essential elements of Article 9 had not been transposed completely, clearly and unequivocally into the Italian rules (Commission v Italy, cited above). The Court has also held that national legislation which declares the hunting of certain species open in principle, without prejudice to provisions to the contrary laid down by the regional authorities, does not satisfy the requirements of protection laid down by the Directive and is contrary to the principle of legal certainty. Consequently, national legislation which authorizes the hunting of certain species of birds not included in the list in Annex II to the Directive without, however, listing the criteria for derogation or clearly and specifically obliging the regions to take account of those criteria and to apply them, does not satisfy the conditions to which the derogations provided for by Article 9 are subject.

In the light of the foregoing, the answer to the question must be that Article 9 is to be interpreted as meaning that it authorizes the Member States to derogate from the general prohibition on hunting protected species laid down by Articles 5 and 7 only by measures which refer in sufficient detail to the factors mentioned in Article 9(1) and (2).

C-3/96, Commission v. Netherlands

Judgment of the Court of 19 May 1998. - Commission of the European Communities v Kingdom of the Netherlands. - Conservation of wild birds - Special protection areas.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61996J0003:EN:HTML

It follows from Article 4(1) of the Birds Directive that each Member State has a specific obligation to designate sufficient SPAs to ensure the survival and reproduction of all the species of birds mentioned in Annex I which are on its territory. Ornithological study “Inventory of Important Bird Areas in the European Community” published in July 1989 (hereinafter `IBA 89') identifies, on the basis of the ornithological criteria used and

explained in that study, 70 territories with a total area of 797 920 hectares suitable for classification as SPAs. The Netherlands Ministry of Agriculture and Fisheries has drawn up its own list of potentially classifiable territories, which contains 53 sites with a total area of 398 180 hectares. Those 53 sites correspond in part to 57 sites mentioned in IBA 89. However, the Netherlands Government has given no explanation of the scientific criteria on which its list of territories potentially classifiable as SPAs is based.

The Commission submits that by designating only 23 territories with a total area of 327 602 hectares as SPAs, the Kingdom of the Netherlands has manifestly exceeded the limits of the discretion conferred on Member States by Article 4. On this point, the Commission maintains, first, that the sites classified by the Netherlands coincide, wholly or partly, with 33 sites mentioned in IBA 89, in other words less than half the total number of sites considered by that scientific report to be suitable for classification as SPAs, and that their number represents only slightly over half the 57 sites listed in IBA 89 which the Netherlands authorities themselves regarded as important areas for birds. Second, the total area of the 23 SPAs in the Netherlands is also quite insufficient: 327 602 hectares as against the 797 920 hectares covered by the 70 sites mentioned in IBA 89. Moreover, as one SPA, the Waddenzee, alone extends to 250 000 hectares, the remaining SPAs cover only 77 602 hectares, which is not sufficient to guarantee adequate protection for a large number of the species of birds listed in Annex I to the Directive. Another indication that the protection given by the Netherlands to the species of birds listed in Annex I to the Directive is insufficient is the fact that the population of nine of those species has declined by over 50%. Of particular significance in this respect is the fall in the population of sedentary species such as Tetrao tetrix and Botaurus stellaris.

The Netherlands Government contends that the designation of SPAs is only one of the measures by which a Member State may perform its obligation under Article 4(1) to take special conservation measures. Member States may also have recourse to other conservation measures to comply with that obligation. There can therefore be an infringement of that provision only if a Member State has not taken any special conservation measures at all. The Netherlands Government contends that by taking other measures of relevance in this context, such as the Nature Conservation Law, the sale of sites to nature conservation organisations and bird conservation plans, it has complied with the Directive. The Netherlands Government next observes that the Member States have a margin of discretion in implementing Article 4(1). With respect more particularly to the designation of SPAs, Article 4(1) merely requires designation of the most suitable territories. The scheme of the provision is thus based on an assessment in the specific case of the question whether a particular site is one of the most suitable territories. When adopting the special conservation measures provided for in Article 4(1), Member States must take account not only of the specific factors mentioned in that provision but also of economic and recreational requirements, in accordance with Article 2.

In addition, the German Government contends, on the basis of the Member States' margin of discretion, that Article 4(1) leaves the choice of SPAs to Member States and that the only decisive factor is that the areas must be suitable in number and area for conservation of the species concerned and capable, together with the areas classified by the other Member States, of constituting a coherent network of protection areas. In its contention, the provision does not require a particular number of areas to be classified, but rather requires Member States to ensure that the SPAs which are created are suitable for the conservation of endangered species of birds. The Netherlands Government adds that it used three criteria, which also form the basis of IBA 89, to draw up its list of sites to be protected. However, because of the general character of those criteria, their application does not produce unequivocal results. That is why differences may appear between the territories which, according to IBA 89, satisfy the criteria of Article 4(1) and those which are designated as SPAs by the Member State concerned. The criterion applied by the Commission, namely that Member States must designate as SPAs at least half in number and area of the territories listed by IBA 89, does not appear in the Directive. The German Government, for its part, states that IBA 89 contains only a list of sites which, according to scientific criteria, could potentially serve for the conservation of endangered species. However, the list is not included in the Directive and is not legally binding. Moreover, there was no agreement at Community level either on the criteria on which the list is based or on the resulting list. The German Government adds that the fixing of a minimum of 50% of sites classified is arbitrary and has no scientific basis. Finally, the Netherlands Government contends that to find that nine species have declined by over 50%, without taking account of the various factors which may be responsible, is not enough to establish that the Kingdom of the Netherlands has infringed Article 4(1). In particular, the fall in numbers of Tetrao tetrix is the consequence of a disastrous hatching season probably caused by an atmospheric deposit originating outside the territories in question. As to Botaurus stellaris, the Government observes that despite the fact that 10% of that species are in SPAs, its population is falling, as in all other European territories. That shows that the decline of that species is not due to the inadequacy of the special conservation measures adopted by the Kingdom of the Netherlands.

It must first be observed that, contrary to the contention of the Kingdom of the Netherlands, Article 4(1) requires Member States to classify as SPAs the most suitable territories in number and size for the conservation of the

species mentioned in Annex I, an obligation which it is not possible to avoid by adopting other special conservation methods. It follows from that provision, as interpreted by the Court, that if such species occur on the territory of a Member State, it is obliged to define inter alia SPAs for them. Such an interpretation of the obligation to classify SPAs is moreover consistent with the system of specifically targeted and reinforced protection laid down by Article 4 in respect in particular of the species listed in Annex I, a fortiori since even Article 3 provides, for all the species of birds covered by the Directive, that the preservation, maintenance and re-establishment of biotopes and habitats is to include primarily measures such as the creation of protected areas. Besides, if Member States could escape the obligation to classify SPAs if they considered that other special conservation measures were sufficient to ensure survival and reproduction of the species mentioned in Annex I, the objective of creating a coherent network of SPAs, referred to in Article 4(3), might not be achieved.

Second, it must be pointed out that the economic requirements mentioned in Article 2 may not be taken into account when selecting an SPA and defining its boundaries. Moreover, while the Member States have a certain margin of discretion in the choice of SPAs, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the Directive. It follows that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Directive. Consequently, Member States are obliged to classify as SPAs all the sites which, applying ornithological criteria, appear to be the most suitable for conservation of the species in question. Thus where it appears that a Member State has classified as SPAs sites the number and total area of which are manifestly less than the number and total area of the sites considered to be the most suitable for conservation of the species in question, it will be possible to find that that Member State has failed to fulfil its obligation under Article 4(1).

Third, it should be observed, that the Netherlands Government, while not questioning the scientific reliability of IBA 89, contends that the application of the criteria on which that report is based cannot, in view of their general character, lead to unequivocal results as regards the classification of SPAs. It has maintained that, although it applied the same criteria as those on which IBA 89 is based, it arrived in its inventory of sites potentially classifiable as SPAs at a result which was very different from that indicated by that report. At the hearing, however, it admitted that its criteria differed from those used in IBA 89. In that regard, it is significant that the Kingdom of the Netherlands has to this very day failed to produce a single document from the national procedure for classifying SPAs which indicates the criteria which governed the designation of SPAs in that Member State. Moreover, throughout the pre-litigation procedure and also in its defence and rejoinder, it stressed that when designating SPAs it had, under Article 2, to take account of economic and recreational requirements. That approach is inconsistent with the Netherlands Government's assertion that it applied exclusively ornithological criteria when designating SPAs. In this connection, it must be pointed out that IBA 89 draws up an inventory of areas which are of great importance for the conservation of wild birds in the Community. That inventory was prepared for the competent directorate-general of the Commission by the Eurogroup for the Conservation of Birds and Habitats in conjunction with the International Council of Bird Preservation and in cooperation with Commission experts. In the circumstances, IBA 89 has proved to be the only document containing scientific evidence making it possible to assess whether the defendant State has fulfilled its obligation to classify as SPAs the most suitable territories in number and area for conservation of the protected species. The situation would be different if the Kingdom of the Netherlands had produced scientific evidence in particular to show that the obligation in question could be fulfilled by classifying as SPAs territories whose number and total area were less than those resulting from IBA 89. It follows that that inventory, although not legally binding on the Member States concerned, can, by reason of its acknowledged scientific value in the present case, be used by the Court as a basis of reference for assessing the extent to which the Kingdom of the Netherlands has complied with its obligation to classify SPAs. It should be added that, even supposing that the application of the ornithological criteria in IBA 89 could lead different entities to produce markedly different classifications of SPAs, the mere possibility of this, which has not been shown to have occurred in the present case, cannot as such be taken into consideration in order to undermine the probative value of IBA 89 in this instance. Since it thus appears that the Netherlands has classified as SPAs territories whose number and total area are clearly smaller than the number and total area of the territories suitable, according to IBA 89, for classification as SPAs, the requirements of Article 4(1) cannot be regarded as satisfied.

Consequently, without there being any need to consider the other arguments which have been put forward, it must be held that by classifying as SPAs territories whose number and total area are clearly smaller than the number and total area of the territories suitable for classification as SPAs within the meaning of Article 4(1), the Kingdom of the Netherlands has failed to fulfil its obligations under that Directive.

Other matters in this case were important procedural questions, especially role of pre-litigation procedure and reasoned opinion:

The aim of the pre-litigation procedure is thus to give the Member State an opportunity to justify its position or, as the case may be, to comply of its own accord with the requirements of the Treaty. If that attempt to reach a settlement proves unsuccessful, the Member State is requested to comply with its obligations as set out in the reasoned opinion which concludes the pre-litigation procedure provided for in Article 169 (now Article 226 EC), within the period prescribed in that opinion. As the Court has previously held, the proper conduct of the pre-litigation procedure constitutes an essential guarantee intended by the Treaty not only to protect the rights of the Member State concerned but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.

It should be borne in mind that the subject-matter of an action for failure to fulfil obligations is determined by the Commission's reasoned opinion. The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes.

C-202/01, Commission v France

C-240/00, Commission v Finlande

C-378/01, Commission v Italie

C-10/96 (reference for a preliminary ruling) - "ASBL"

Judgment of the Court (Third Chamber) of 12 December 1996. - Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, intervener: Fédération royale ornithologique belge ASBL. - Reference for a preliminary ruling: Conseil d'Etat - Belgium. - Council Directive 79/409/EEC on the conservation of wild birds - Prohibition of capture - Derogations.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61996J0010:EN:HTML

The Belgian Conseil d'État submitted for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of the Birds Directive. Those questions arose in an action for annulment brought by the Royal Belgian League for the Protection of Birds (hereinafter `the Ligue Royale') and the Society for Bird Studies AVES (hereinafter `AVES') against two orders of the Region of Wallonia, which, inter alia, authorize the capture, under specified conditions, of certain species of birds protected by the Directive.

1. Do Articles 5, 9 and 18 of the Birds Directive allow a Member State to take account, on a decreasing basis and over a specified period, of the fact that the prohibition of capturing birds for recreational purposes would compel numerous fanciers to alter their installations and to abandon certain habits where that State recognizes that breeding is possible but is not yet feasible on a large scale for that reason?

2. Do Articles 5, 9 and 18 of the Birds Directive allow Member States, and if so to what extent, to authorize the capture of birds living naturally in the wild state within European territory with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings?

The first question

By its first question, the national court is asking in substance whether the Directive, and in particular Article 9(1)(c) thereof, must be interpreted as meaning that a Member State may, on a decreasing basis and for a limited period, authorize the capture of certain protected species in order to enable bird fanciers to stock their aviaries, where breeding and reproduction of those species in captivity are possible but not yet practicable on a large scale by reason of the fact that many fanciers would be compelled to alter their installations and change their habits.

It should first be pointed out that the Court has held, that the capture and sale of wild birds with a view to keeping them for use as live decoys or for recreational purposes in fairs and markets may constitute judicious use authorized by Article 9(1)(c). It cannot therefore be ruled out that the capture of certain protected species for recreational purposes, such as that intended to enable fanciers to stock their aviaries, may also constitute judicious use within the meaning of Article 9(1)(c). That said, it must, however, be pointed out that a derogation from the system of protection established by the Directive and, in particular, from the prohibition of killing or

capturing protected species, as laid down in Article 5(a), can be accorded only if there is no other satisfactory solution. The breeding and reproduction of protected species in captivity may constitute such a solution if they prove to be possible. It should be observed in that regard that, as is clear from the documents before the Court, the breeding and reproduction in captivity of the species concerned in the main proceedings are not only scientifically and technically feasible, but those activities have also been successfully carried on by some breeders in Wallonia and, on a larger scale, by breeders in Flanders. In those circumstances, breeding and reproduction in captivity could be regarded as not constituting an `other satisfactory solution' only if it were established that, were it not for the capture of birds in the wild, those activities could not prosper. Consequently, the fact that the breeding and reproduction in captivity of the species concerned are not yet feasible on a large scale by reason of the installations and the inveterate habits of bird fanciers, habits which, moreover, have been encouraged by domestic rules derogating from the general scheme of the Directive, is not in itself such as to cast doubt on the satisfactory nature of the alternative solution to capturing birds in the wild. In view of the foregoing considerations, the answer to the first question must be that the Directive, and in particular Article 9(1)(c) thereof, must be interpreted as meaning that a Member State may not, on a decreasing basis and for a limited period, authorize the capture of certain protected species in order to enable bird fanciers to stock their aviaries, where breeding and reproduction of those species in captivity are possible but are not yet practicable on a large scale by reason of the fact that many fanciers would be compelled to alter their installations and change their habits.

The second question

By its second question, the national court seeks to ascertain whether, and if so to what extent, national authorities are authorized under the Directive, and in particular under Article 9(1)(c) thereof, to allow the capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity resulting from too many endogenous crossings.

It must first be noted that, if the capture of protected species, in so far as it is intended to enable fanciers to stock their aviaries, may, as held in paragraph 16 of this judgment, constitute judicious use within the meaning of Article 9(1)(c), the same must hold true as regards the capture of protected species for the purpose of obviating the problems of consanguinity in bird breeding for recreational purposes. It must next be borne in mind that, as already indicated in paragraph 17 of this judgment, a derogation from Article 5(a) may be accorded only if there is no other satisfactory solution. In particular, that condition would not be met if it were possible to obviate the problems of consanguinity by cooperation and exchanges of specimens between breeding establishments. Finally, as regards the extent to which the capture of protected species may be permitted, it is for the competent authorities of the Member State concerned to fix the number of wild specimens which may be captured at the level of what proves to be objectively necessary in order to ensure sufficient genetic diversity of the species bred in captivity, subject always to observance of the maximum limit of `small numbers' referred to in Article 9(1)(c).

The answer to the second question must therefore be that national authorities are authorized under the Directive, and in particular under Article 9(1)(c) thereof, to permit the capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings, on condition that there is no other satisfactory solution, it being understood that the number of specimens which may be captured must be fixed at the level of what proves to be objectively necessary to provide a solution for those problems, subject always to observance of the maximum limit of `small numbers' referred to in that provision.

C-166/97, Commission v. France – “Seine Estuary”

Judgment of the Court (Fifth Chamber) of 18 March 1999. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Special protection areas.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61997J0166:EN:HTML

The extent of the SPA

The Seine estuary is one of the most important wetlands of the French coast from an ornithological point of view and is a site particularly favoured by a very large number of the species listed in Annex I to the Birds Directive and also by migratory species. It submits that the creation by the French Republic in 1990 of an SPA of 2 750 hectares does not fulfil that country's obligations under Article 4(1) and (2) of the Birds Directive. On account of

its scientifically proven ornithological interest, an area of 21 900 hectares in the Seine estuary was recognised in 1994 by the French authorities as an important area for bird conservation (zone important pour la conservation des oiseaux or `ZICO'). Furthermore, the European ornithological inventory `Important Bird Areas in Europe', published in 1989, includes an area of 7 800 hectares in the estuary.

The French Government admits that, when the time allowed to it for compliance with the reasoned opinion expired, the area of 2 750 hectares classified as an SPA in the Seine estuary was insufficient. However, it states that the extension of the SPA which took place in November 1997 had been delayed in order for the local population principally affected to be consulted and their support obtained.

In this connection, it is sufficient to observe that, according to the settled case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive. Moreover, it is common ground that the Seine estuary is a particularly important ecosystem as a migration staging post, wintering area and breeding ground for a large number of the bird species referred to in Article 4(1) and (2) of the Birds Directive. It must therefore be held that France failed to classify, within the period laid down, a sufficiently large area of the Seine estuary as an SPA within the meaning of Article 4(1) and (2) of the Birds Directive.

The legal protection regime of the SPA

The protection regime for that SPA, was defined by an agreement from 11 April 1985 by the Ministry of the Environment with the Autonomous Ports of Le Havre and Rouen (hereinafter `the Agreement'). The Commission maintains that France failed to establish for the Seine estuary a legal regime which would satisfactorily preserve the integrity of the SPA created in 1990, because the protection regime which the Agreement provides for that SPA fails, in the Commission's submission, to meet the conservation requirements defined in Article 4(1) and (2) of the Birds Directive. Moreover, no other measure designed to provide the SPA with an adequate legal protection regime has been adopted.

The French Government argues that the Agreement did, in fact, provide effective protection of the SPA which, in any event, is State-owned land. Furthermore, an area of 7 800 hectares including the SPA has since 1973 had the status of a maritime game reserve, as a result of which all forms of hunting are prohibited there. In addition, the Brotonne Nature Reserve in the Seine estuary has, since 1974, enjoyed the status of a regional nature reserve. Lastly, the implementation of various measures of the management of the SPA has ensured compliance with the obligations laid down by Article 4(1) and (2) of the Birds Directive. The SPA thus enjoys the benefit of a diversified and effective protection regime.

In this connection, it must be observed that it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion. It is common ground, however, that the Agreement, which was entered into for a term of ten years and was not renewed, expired on 11 April 1995. Consequently, it was no longer in force on 3 September 1995, the date on which the two months' period laid down in the reasoned opinion expired. There is, therefore, no need to consider whether the protection regime which the Agreement provides for the SPA satisfies the conservation requirements defined in Article 4(1) and (2) of the Birds Directive. As regards the other measures which, according to the French Government, are intended to provide the SPA with an adequate protection regime, it must be borne in mind that, according to the case-law of the Court, Article 4(1) and (2) of the Birds Directive requires the Member States to provide SPAs with a legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the Directive and the breeding, moulting and wintering of migratory species not listed in Annex I which are, nevertheless, regular visitors. In this connection, it must be pointed out that, after the Commission had, in the reasoned opinion, charged the French Republic with having failed to satisfy the requirements of Article 4(1) and (2) of the Birds Directive in that it had done no more than provide the SPA created in 1990 with the protection regime under the Agreement, the French Government replied by letter of 19 October 1995 that the Agreement was merely a transitional measure and that it was therefore intended, as a first step, to adopt a decree creating a nature reserve which would swiftly ensure lasting protection for the most vulnerable areas of the estuary, and subsequently to adopt other measures designed to provide an effective safeguard for the natural heritage of the estuary, in order to comply with the requirements set out in Article 4(1) and (2) of the Birds Directive. It is not disputed that the Brotonne Nature Reserve mentioned above does not include the SPA created in 1990 but only those parts of the Seine estuary classified as an SPA in November 1997. It follows that, on the expiry of the period laid down in the reasoned opinion, the only status enjoyed by the SPA created in 1990 was that of State-owned land and of a maritime game reserve. For want of any specific substantive measures, except in relation to hunting, such a regime is incapable of providing adequate protection for the purposes of Article 4(1) and (2) of the Birds Directive. Consequently, the Commission was justified in

charging the French Republic with having failed to adopt measures providing the SPA with an adequate legal protection regime for the purposes of Article 4(1) and (2) of the Birds Directive.

C-96/98, Commission v. France – "Poitevin Marsh"

Judgment of the Court (Fifth Chamber) of 25 November 1999. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Directive 79/409/EEC - Conservation of wild birds - Special protection areas.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998J0096:EN:HTML

The extent of the SPAs

The Poitevin Marsh, which consists of various natural environments favourable to ensuring the conservation of many bird species listed in Annex I to the Birds Directive as well as a significant number of migratory species, is an area of outstanding ornithological interest at both Community and international level. The classification of 26 250 hectares of the Poitevin Marsh as SPAs fails, in the Commission's submission, to meet the French Republic's obligations under Article 4(1) and (2) of the Birds Directive. 77 900 hectares of the Poitevin Marsh were recognised by the French authorities in 1994 as constituting an important area for bird conservation (zone importante pour la conservation des oiseaux, hereinafter `ZICO'). In addition, 57 830 hectares of the Poitevin Marsh were included in the European ornithological inventory entitled `Important Bird Areas in Europe' published in 1989 (`the IBA'). According to the Commission, the entire ZICO of the Poitevin Marsh or, at the very least, the entire area featuring in the IBA inventory should be classified as an SPA. French Republic failed, within the period prescribed in reasoned opinion, to classify as SPAs, within the meaning of Article 4(1) and (2) of the Birds Directive, a sufficient area in the Poitevin Marsh.

The legal status of the protection of the SPAs already classified

The Commission submits that those areas of the Poitevin Marsh which the French Republic has classified as SPAs do not have a legal status such as to guarantee protection of habitats and the survival and reproduction of the protected species. In particular, the agri-environmental measures and Law No 97-3 of 3 January 1992 on Water (hereinafter `the Law on Water'), to which the French Government refers, do not make it possible to ensure the effective protection of bird life required by Article 4 of the Birds Directive. So far as the other measures mentioned by the French Government are concerned, these, the Commission argues, were adopted late.

The French Government contends that the agri-environmental measures are in fact contracts concluded between the State and farmers which are designed to develop environmentally-conscious farming methods, in particular by limiting the use of nitrogen-based fertilisers and the frequency of mowings and reapings. These contracts contribute to the maintenance of extensive farming and make it possible to avoid the ploughing-up of wet meadows and drainage and hydraulic modifications, thus ensuring the maintenance of wetlands and natural bird habitats. The French Government also submits that, to the extent to which it protects wetlands, the Law on Water contributes directly to the conservation of wild birds. Finally, it points out that the three prefectorial decrees on biotope protection concerning the Marais doux de Charente-Maritime, the Terrées du Pain Béni and the Pointe de l'Aiguillon were adopted on 7 October 1997, 29 December 1997 and 12 February 1998 respectively, and that 2 300 hectares in the Baie de l'Aiguillon were classified as a nature reserve in July 1996.

In this connection, it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion. The three prefectorial decrees on biotope protection and the creation of the nature reserve in the Baie de l'Aiguillon mentioned in paragraph 18 of the present judgment were adopted after the two-month period laid down in the reasoned opinion of 28 November 1995 had expired. Those measures should therefore not be taken into consideration for the purposes of the present infringement proceedings. With regard to the other measures which, according to the French Government, are intended to provide the SPAs with a sufficient protection regime, it must be borne in mind that, according to the Court's case-law, Article 4(1) and (2) of the Birds Directive requires the Member States to provide SPAs with a legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the Directive and the breeding, moulting and wintering of migratory species not listed in Annex I which are, nevertheless, regular visitors. As Article 2 of the Law on Water makes clear, that legislation is intended to achieve a balanced management of water resources, designed to ensure, in particular, the conservation of aquatic ecosystems, wet sites and wetlands, protection against all pollution and the restoration of the quality of surface and underground water and marine territorial waters, proper respect for water as an economic resource, in such a way as to meet or

reconcile requirements relating to health, public health, public safety, the provision of public drinking water, the preservation and free flow of water, flood protection, protection of agriculture, fisheries and sea-farming, fresh-water fishing, industry, energy protection, transport, tourism, recreation and water sports, as well as all other lawfully-pursued human activities. Under Article 10(II) of the Law on Water, installations, works and activities involving the removal of surface or underground water, whether replaced or not, alterations to the level or method of disposal of water or overflows, waste outflows, or direct or indirect waste water, continuous or occasional, even non-polluting, are defined in the nomenclature drawn up by decree of the Conseil d'État following consultation with the National Water Board, and subject to authorisation or declaration depending on the danger which they pose and the serious nature of the effects which they may have on water resources and aquatic ecosystems. Even if it were to be assumed that the SPAs classified consist entirely of wetlands and that the Law on Water enables water resources in these areas to be preserved in an efficient manner, the fact still remains that, to the extent to which it includes only provisions relating to water management, that Law is not in itself such as to ensure sufficient protection for the purposes of Article 4(1) and (2) of the Birds Directive. So far as the agri-environmental measures are concerned, it must be held that these are voluntary and purely hortatory in nature in relation to farmers working holdings in the Poitevin Marsh. Those measures cannot therefore, in any event, be capable of supplementing effectively the protection regime for the classified SPAs. It must for that reason be held that, by failing to adopt measures conferring a sufficient legal protection regime on the SPAs classified in the Poitevin Marsh, the French Republic has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive.

C-371/98 (reference for a preliminary ruling) – “First Corporate Shipping”

Judgment of the Court of 7 November 2000. - The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust. - Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court) - United Kingdom. - Directive 92/43/EEC - Conservation of natural habitats and of wild fauna and flora - Definition of the boundaries of sites eligible for designation as special areas of conservation - Discretion of the Member States - Economic and social considerations - Severn Estuary.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998J0371:EN:HTML

The Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 2(3) and 4(1) of the Habitats Directive. The question arose in proceedings brought by First Corporate Shipping Ltd (hereinafter FCS) for judicial review of the act by which the Secretary of State for the Environment, Transport and the Regions indicated that he was minded to propose the Severn Estuary to the Commission of the European Communities as a site eligible for designation as a special area of conservation (SAC) under Article 4(1) of the Habitats Directive.

FCS is the statutory port authority for the port of Bristol, on the Severn Estuary, and owns considerable land in the neighbourhood of the port. Since acquiring the port, FCS has invested, in partnership with other undertakings, nearly £220 million in capital in developing its facilities. It employs 495 permanent full-time employees. The number of workers employed at the port, including FCS's own employees, is between 3 000 and 5 000. The Secretary of State indicated that he was minded to propose the Severn Estuary to the Commission as a site eligible for designation as an SAC under Article 4(1) of the Habitats Directive, most of the intertidal part of the estuary having already been classified as a special protection area under the Birds Directive. FCS thereupon applied to the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales for leave to apply for judicial review. FCS submitted before that court that Article 2(3) of the Habitats Directive obliged the Secretary of State to take account of economic, social and cultural requirements when deciding which sites should be proposed to the Commission pursuant to Article 4(1) of that Directive. The Secretary of State contended that, in the light of the Court's reasoning in Case C-44/95 (Lappel Bank), he could not take economic, social and cultural requirements into account when deciding which sites should be proposed to the Commission pursuant to Article 4(1) of the Habitats Directive. In those circumstances, the High Court of Justice stayed proceedings and referred the following question to the Court for a preliminary ruling:

Is a Member State entitled or obliged to take account of the considerations laid down in Article 2(3) of the Habitats Directive, namely, economic, social and cultural requirements and regional and local characteristics, when deciding which sites to propose to the Commission pursuant to Article 4(1) of that Directive and/or in defining the boundaries of such sites?

It should be noted that the question of interpretation referred for a preliminary ruling relates only to Stage 1 of the procedure for classifying natural sites as SACs laid down by Article 4(1) of the Habitats Directive. Under that provision, on the basis of the criteria set out in Annex III (Stage 1) together with relevant scientific information, each Member State is to propose and transmit to the Commission a list of sites, indicating which natural habitat types in Annex I and native species in Annex II are to be found there. Annex III to the Habitats Directive, which deals with the criteria for selecting sites eligible for identification as sites of Community importance and designation as SACs, sets out, as regards Stage 1, criteria for the assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II. Those assessment criteria are defined exclusively in relation to the objective of conserving the natural habitats or the wild fauna and flora listed in Annexes I and II respectively. It follows that Article 4(1) of the Habitats Directive does not as such provide for requirements other than those relating to the conservation of natural habitats and of wild fauna and flora to be taken into account when choosing, and defining the boundaries of, the sites to be proposed to the Commission as eligible for identification as sites of Community importance.

FCS submits that identifying and defining the boundaries of the sites to be notified to the Commission with a view to designation as SACs, as required by Article 4(1) of the Habitats Directive, constitute a measure taken pursuant to the Directive within the meaning of Article 2(3). It follows that Article 2(3) imposes an obligation on a Member State to take account of economic, social and cultural requirements and regional and local characteristics when it applies the criteria in Annex III to the Directive when drawing up the list of sites to be transmitted to the Commission.

According to the Finnish Government, it is open to a Member State, when proposing its list of sites to the Commission, to take account of economic, social and cultural requirements and regional and local characteristics, provided that it does not compromise realisation of the Habitats Directive's nature protection objectives. The Government observes that there may, for example, be such a large number of sites eligible to be considered of Community importance within the territory of a Member State that that State is entitled to exclude some of them from its list of proposed sites without jeopardising realisation of those objectives.

It should be noted that the first subparagraph of Article 3(1) of the Habitats Directive provides for the setting up of a coherent European ecological network of SACs to be known as Natura 2000, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, to enable them to be maintained or, where appropriate, restored at a favourable conservation status in their natural range. Moreover, Article 4 of the Habitats Directive sets out the procedure for classifying natural sites as SACs, divided into several stages with corresponding legal effects, which is intended in particular to enable the Natura 2000 network to be realised, as provided for by Article 3(2). In particular, the first subparagraph of Article 4(2) prescribes that the Commission is to establish, on the basis of the lists drawn up by the Member States and in agreement with each Member State, a draft list of sites of Community importance. To produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Habitats Directive's objective of conservation of natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the Directive. Only in that way is it possible to realise the objective, in the first subparagraph of Article 3(1) of the Habitats Directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i), read in conjunction with Article 2(1), that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies. Having regard to the fact that, when a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States, it cannot of its own accord, whether because of economic, social or cultural requirements or because of regional or local characteristics, delete sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level. In particular, if the Member States could take account of economic, social and cultural requirements and regional and local characteristics when selecting and defining the boundaries of the sites to be included in the list which, pursuant to Article 4(1) of the Habitats Directive, they must draw up and transmit to the Commission, the Commission could not be sure of having available an exhaustive list of sites eligible as SACs, with the risk that the objective of bringing them together into a coherent European ecological network might not be achieved.

The answer to the national court's question must therefore be that, on a proper construction of Article 4(1) of the Habitats Directive, a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that Directive, when selecting and defining the

boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance.

C-374/98, Commission v. France - “Basses Corbières”

Judgment of the Court (Sixth Chamber) of 7 December 2000. - Commission of the European Communities v French Republic. - Failure of Member State to fulfil its obligations - Directives 79/409/EEC and 92/43/EEC - Conservation of wild birds - Special protection areas.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998J0374:EN:HTML

The classification as an SPA

The Commission states that the ornithological richness of the Basses Corbières site, which is situated in a migration corridor of European importance, caused the French authorities to enter it as an important area for the conservation of wild birds (zone importante pour la conservation des oiseaux sauvages; ZICO), and that the area thus designated as a ZICO amounts to 47 400 hectares. The Basses Corbières site both shelters several species listed in Annex I to the birds Directive, particularly a pair of Bonelli's eagles, of which there are about 20 pairs in France, and constitutes an important area for the migration of birds of prey.

The French Government acknowledges that the classification of the Basses Corbières as an SPA has been delayed on account of fierce local controversy. Nevertheless, thanks to the work of a mediator sent by the French Government, it had been possible to classify a major part of the Basses Corbières site as an SPA. The French Government further argues that, under Article 4 of the birds Directive, as interpreted by the Court of Justice, it is for the Government to classify as SPAs the territories which appear to it to be the most suitable in number and size for the conservation of birds. The French authorities were therefore not required to classify the whole of the area listed in the national inventory of ZICOs as SPAs. The Government also maintains that Bonelli's eagle is the most remarkable species of the area in terms of ornithological interest. As for migratory species, it claims that the area is more one of passage than of stopping or feeding. Certain species might, it is true, be observed on a migratory halt in that area for a resting or feeding period. However, the Basses Corbières region does not contain large gathering areas as is the case on coastal lakes.

It should first be noted that, according to the settled case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive. Second, it is well settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion. On that point, it is undisputed that no part of the Basses Corbières site had been classified as an SPA before the expiry of the period laid down by the reasoned opinion. Third, it is undisputed that the Basses Corbières site contains natural areas of particular ornithological interest, at least because of the presence of Bonelli's eagle, which is a species listed in Annex I to the birds Directive. In that respect it should be noted that, in January 1999, the French authorities classified two nesting areas of Bonelli's eagle, representing a total area of around 360 hectares and already referred to by two prefectoral decrees for conserving the biotope of that species, as SPAs. One of those areas extends over the municipalities of Tautavel and Vingrau, the other over the municipalities of Maury, Planèzes and Raziguières. However, it has not been shown that there are migratory species justifying the classification of the Basses Corbières site as an SPA by virtue of Article 4(2) of the birds Directive. All the species mentioned for that purpose by the Commission as migratory species, such as the honey buzzard, the black kite, the kite, the Egyptian vulture, the short-toed eagle, the marsh harrier, the hen harrier and Montagu's harrier are listed in Annex I to the birds Directive, whereas Article 4(2) of that Directive applies only to migratory species not listed in Annex I. Therefore, without there being any need in this case to consider what area the SPA in the Basses Corbières should cover for the obligations arising under the birds Directive to be met, it must be concluded that the French Republic has not, within the prescribed period, classified any territory in the Basses Corbières site as an SPA within the meaning of Article 4(1) of the birds Directive.

The disturbance and deterioration caused by the limestone quarries of Vingrau and Tautavel

According to the Commission given that, as from the implementation date of the habitats Directive, namely 10 June 1994, the obligations under Article 6(2) to (4) of that Directive were substituted, pursuant to Article 7 thereof, for the obligations under the first sentence of Article 4(4) of the birds Directive those obligations under

the habitats Directive have had to be complied with since that date in the case of the Basses Corbières site, even if the latter has not yet been classified as an SPA under Article 4(1) and (2) of the birds Directive. In reply to the Court's question on that point, the Commission maintains that, since Article 7 of the habitats Directive does not in any way amend Article 4(1) and (2) of the birds Directive, the grounds which led the Court to extend the protection regime under the first sentence of Article 4(4) of the birds Directive to areas not classified as SPAs are equally relevant in relation to the protection regime under Article 6(2) to (4) of the habitats Directive, which replaced it. The Commission further argues that, if the provisions of Article 7 of the habitats Directive had to be interpreted as being intended to make the obligations under Article 6(2) to (4) applicable only to SPAs actually classified as such by the national authorities pursuant to Article 4(1) and (2) of the birds Directive, the result would be a duality in the protection schemes that would be hard to justify. The protection regime laid down in the birds Directive is, the Commission submits, stricter than that under the habitats Directive, and it would be paradoxical to place areas of ornithological interest that have not been the subject of a national classification measure such as an SPA under a stricter protection scheme than that applicable to areas which have actually been classified as SPAs by Member States. The Commission states that the realisation of the project to open and work limestone quarries in the territory of the Vingrau and Tautavel municipalities within the Basses Corbières site is likely to cause disturbance to the species present in that site and a deterioration of their habitat. It argues that, for Bonelli's eagle in particular, the opening of the quarries involves the disappearance of part of its hunting territory and risks disturbing its reproduction on account of the visual and noise pollution connected with the quarries' activity. The Commission also argues that in this case, even if, for determining the areas due to benefit from the special protection regime, one were to take only those classified as SPAs by the French authorities and which correspond to the territories covered by the two decrees for protecting the biotope (nesting areas of Bonelli's eagle), it appears that the quarrying project of the OMYA company is likely significantly to affect those areas, which are of undisputed ornithological interest. The Commission maintains that, in those circumstances, an appropriate assessment of the impact of the project on the conservation of the site concerned should have been carried out. The impact study prior to the authorisation to operate quarries, dated 1994, did not meet that requirement.

The French Republic also infringed the obligation to adopt appropriate compensatory measures. The Commission submits that the cultivation of prey for Bonelli's eagle, the scientific monitoring of that species, the construction of a merlon and a plan for managing the natural environment, besides the fact that they do not concern the other bird species requiring protection, cannot compensate for the disturbance and deterioration caused, since the latter have not been assessed. Since there had been no appropriate assessment of the impact of the quarries project on the site to be classified as an SPA in the municipality of Vingrau and, moreover, a negative impact was far from being excluded, the Commission claims that the French authorities should have refused to give their agreement to that project without demonstrating that there was no alternative solution and that a major public interest was capable of justifying the project. In that respect, the Commission states that several reports emanating from qualified universities conclude that solutions do exist which are equivalent to that of the Vingrau deposit. In any event, neither the OMYA company nor the French authorities had seriously studied those other solutions. The French Government maintains that the Commission does not present any scientific or other evidence to demonstrate that the quarries create significant disturbance for the pair of Bonelli's eagles or for the other species. In any event, the Government denies that the opening and operation of the quarries are capable of entailing serious consequences for the species present in the site. In that respect, it argues, first, that none of the scientific studies carried out concluded that operation of the quarries might involve such consequences for the wild birds and in particular Bonelli's eagle; second, that such operation was preceded by a detailed impact study which concluded that the project had no significant effect on the environment; and, finally, that important precautionary measures designed to avoid potential negative effects of the project on the environment have been put into operation. The French Government states that Bonelli's eagle was present before the Tautavel quarry began operating in 1968, and that it has since maintained itself on the site without the working of the limestone noticeably causing a disturbance of the species. Nothing in the monitoring of that species, carried out by local bird protection associations independent of the administration, supports the conclusion that moving the Tautavel workings to Vingrau might have negative effects, the nesting area of Bonelli's eagle being in any event unaffected by either of the working sites. Concerning the hunting area of Bonelli's eagle, the French Government points out that, in the impact study referred to above, it is stated, first, that the area needed for working the quarries should not unduly disturb the habits of that species, which has a hunting territory of several square kilometres, and, secondly, that precautionary measures to encourage proliferation of the small prey upon which that eagle feeds have been taken. As regards possible alternative solutions to the deposit currently being worked by the OMYA company in the Vingrau and Tautavel municipalities, the French Government claims that they have been seriously studied by that company but are not equivalent to that deposit. In reply to the question put by the Court as to the applicability of Article 6(2) to (4) of the habitats Directive to areas not yet classified as SPAs, the French Government, which acknowledges that it has not pleaded the inapplicability of those provisions to the Basses Corbières area, maintains that the

substitution of the obligations contained therein for those in the first sentence of Article 4(4) of the birds Directive, as provided for in Article 7 of the habitats Directive, concerns only areas already classified as SPAs under the birds Directive.

It first needs to be considered whether Article 6(2) to (4) of the habitats Directive apply to areas which have not been classified as SPAs but should have been so classified. In that respect, it is important to note that the text of Article 7 of the habitats Directive expressly states that Article 6(2) to (4) apply, in substitution for the first sentence of Article 4(4) of the birds Directive, to the areas classified under Article 4(1) or (2) of the latter Directive. It follows that, on a literal interpretation of that passage of Article 7 of the habitats Directive, only areas classified as SPAs fall under the influence of Article 6(2) to (4) of that Directive. Moreover, the text of Article 7 of the habitats Directive states that Article 6(2) to (4) of that Directive replace the first sentence of Article 4(4) of the birds Directive as from the date of implementation of the habitats Directive or the date of classification by a Member State under the birds Directive, where the latter date is later. That passage of Article 7 appears to support the interpretation to the effect that the application of Article 6(2) to (4) presupposes the classification of the area concerned as an SPA. It is clear, therefore, that areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the birds Directive. Thus, the fact that, as the case law of the Court of Justice shows, the protection regime under the first sentence of Article 4(4) of the birds Directive applies to areas that have not been classified as SPAs but should have been so classified does not in itself imply that the protection regime referred to in Article 6(2) to (4) of the habitats Directive replaces the first regime referred to in relation to those areas. Moreover, as regards the Commission's argument concerning a duality of applicable regimes, it should be noted that the fact that the areas referred to in the previous paragraph of this judgment are, under the first sentence of Article 4(4) of the birds Directive, made subject to a regime that is stricter than that laid down by Article 6(2) to (4) of the habitats Directive in relation to areas classified as SPAs does not appear to be without justification. A Member State cannot derive an advantage from its failure to comply with its Community obligations. In that respect, if it were lawful for a Member State, which, in breach of the birds Directive, has failed to classify as an SPA a site which should have been so classified, to rely on Article 6(3) and (4) of the habitats Directive, that State might enjoy such an advantage.

Since no formal measure for classifying such a site as an SPA exists, it is particularly difficult for the Commission, in accordance with Article 155 of the EC Treaty (now Article 211 EC), to carry out effective monitoring of the application by Member States of the procedure laid down by Article 6(3) and (4) of the habitats Directive and to establish, in appropriate cases, the existence of possible failures to fulfil the obligations arising thereunder. In particular, the risk is significantly increased that plans or projects not directly connected with or necessary to the management of the site, and affecting its integrity, may be accepted by the national authorities in breach of that procedure, escape the Commission's monitoring and cause serious, or irreparable ecological damage, contrary to the conservation requirements of that site. Natural or legal persons entitled to assert before the national courts interests connected with the protection of nature, and especially wild bird life, which in this case means primarily environmental protection organisations, would face comparable difficulties. A situation of this kind would be likely to endanger the attainment of the objective of special protection for wild bird life set forth in Article 4 of the birds Directive, as interpreted by the case-law of the Court. The duality of the regimes applicable, respectively, to areas classified as SPAs and those which should have been so classified gives Member States an incentive to carry out classifications, in so far as they thereby acquire the possibility of using a procedure which allows them, for imperative reasons of overriding public interest, including those of a social or economic nature, and subject to certain conditions, to adopt a plan or project adversely affecting an SPA. It follows from the above that Article 6(2) to (4) of the habitats Directive do not apply to areas which have not been classified as SPAs but should have been so classified.

C-38/99, Commission v. France

Judgment of the Court (Sixth Chamber) of 7 December 2000. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Hunting periods.

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The opening dates for hunting

The New Rural Code provides that the minister responsible for hunting may, by order published at least 20 days before the date of its entry into force, authorise the hunting of waterfowl before the opening date for hunting in

general in maritime hunting areas and on rivers, streams, canals, reservoirs, lakes, ponds and undrained marshes, only shooting above the surface of the water being allowed. For 69 departments of Metropolitan France, the ministerial orders set the opening dates for the hunting of waterfowl within the period from 19 July to 31 August 1997, before the general opening date for hunting. The New Rural Code determined directly, for 68 of the 69 departments of the Metropolitan territory previously covered by the abovementioned ministerial orders, the early opening dates for the hunting of waterfowl within the public maritime domain and other areas. The department of Moselle, which is covered by one of the ministerial orders, was expressly excluded from the scope of that provision.

The Commission contends that the early opening dates for the hunting of waterfowl set by the ministerial orders had no scientific basis and, in certain cases, were incompatible with the prohibition of hunting of waterfowl in the rearing period and during the various stages of reproduction and dependency of the species of birds concerned laid down in Article 7(4) of the Birds Directive. It also argues that the early opening dates for the hunting of the species of waterfowl identified in the New Rural Code are essentially the same as those provided for in the rules in force before that Law was enacted. Accordingly, they too are excessively early.

The French Government replies that the early opening dates for the hunting of waterfowl set by the ministerial orders were based on scientific information. They were determined using a method based on annual observations made and acted upon in accordance with a protocol drawn up by the National Museum of Natural History and the National Hunting Authority which was presented in a 1989 report entitled Pattern and timing of pre-mating migration and reproduction of waterfowl in France. That method makes it possible to protect species that are rearing their young and only a minority of individual birds are liable not to benefit from such protection. The killing of a significant number of birds is thus obviated. The French Government asserts that the early opening dates for the hunting of the species of waterfowl mentioned in the New Rural Code were determined by reference to the results obtained from the application of that method over a period of five years. The French Government recognises, however, in the light of the latest scientific knowledge summarised in the report of the Scientific Committee of the National Museum of Natural History of 30 September 1999 that, as a result of that method, the opening of hunting for certain of the relevant species, in certain areas, is too early.

In that connection it should be borne in mind that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion. By the end of that period, the procedure for determining early dates for the opening of the hunting of waterfowl, provided for in the ministerial orders adopted under the New Rural Code, had been replaced by the procedure introduced by another Article the same code. Nevertheless, as far as the choice of early opening dates for the hunting of waterfowl was concerned, the latter system differed only minimally from the former system. It is therefore necessary to examine this charge in relation to the system of early opening dates for the hunting of waterfowl. In that connection, it must be made clear that Article 7(4) seeks in particular to impose a prohibition of hunting of all species of wild birds during the rearing periods and the various stages of reproduction and dependency and, in the case of migratory species, during their return to their rearing grounds. Moreover, the Court has held that that Article is designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat. Accordingly, protection against hunting activities cannot be confined to the majority of the birds of a given species, as determined by average reproductive cycles and migratory movements.

In this case, the French Government itself recognises that the early opening dates for the hunting of waterfowl indicated in the New Rural Code do not enable all individuals of species which are rearing their young to be protected. That is tantamount to admitting that, for certain of the species concerned and in certain areas, hunting is opened too early. Furthermore, it is clear from a study by the National Hunting Authority of February 1998 regarding two species of birds which may be hunted that the early opening dates for hunting given in the ministerial orders fairly frequently impinge upon the periods in which a significant number of young birds are dependent in so far as they are not yet able to fly. Thus, in the case of mallards, in eight departments no more than 80% of young birds were able to fly by the early opening date for hunting; on the same date, in 26 other departments, a maximum of 90% of young birds were able to fly. In the case of the coot, in eight departments, no more than 80% of young birds were able to fly by the early opening date of hunting; in 15 other departments, no more than 90% of young birds were able to fly by that date. Given that the system of early opening dates for the hunting of waterfowl displays, as regards the choice of dates, only minimal differences from the system established by the ministerial orders, the information given in the survey referred to in the foregoing paragraph of this judgment remains, for the most part, relevant for assessing the compatibility of the new system with the requirements of the Directive. It follows that the system of earlier opening dates for the hunting of waterfowl is not capable of fulfilling the requirement laid down in Article 7(4) of the Wild Birds Directive, as interpreted by the Court, that there be a complete system of protection for wild birds over the period in which their survival is particularly threatened.

Closing dates for hunting

Article L. 224-2 of the New Rural Code, as amended by Law No 94-591, provided that no person may hunt outside the open hunting periods determined by the administrative authority. However, for waterfowl and birds of passage, the closing dates for hunting shall be as follows, throughout the Metropolitan territory, with the exception of the departments of Lower Rhine, Upper Rhine and Moselle - mallard: 31 January; common pochard, lapwing: 10 February; greylag goose, gadwall, teal, garganey, coot, goldeneye, oyster-catcher, golden plover, redshank, ruff, black-tailed godwit, skylark, mistle thrush: 20 February; other species of waterfowl and birds of passage: the last day of February. The administrative authority may, by order adopted after an opinion has been obtained from the Departmental Council for Hunting and Wild Animals, bring forward the closing dates mentioned in the foregoing paragraphs, subject to the proviso that such dates must fall before 31 January.

The third paragraph of Article L. 224-2 of the New Rural Code, as amended by Law No 98-549, which remained in force until the adoption of Law No 2000-698, provided that for waterfowl and birds of passage, throughout the Metropolitan territory, with the exception of the departments of Lower Rhine, Upper Rhine and Moselle, the closing dates shall be as follows - mallard: 31 January; common pochard, tufted duck, lapwing: 10 February; greylag goose, gadwall, teal, garganey, coot, goldeneye, red-crested pochard, golden plover, redshank, ruff, black-tailed godwit, skylark: 20 February; other species of waterfowl and birds of passage: the last day of February.

The Commission contends that the closing dates for hunting, in the case of the species of waterfowl and birds of passage expressly mentioned in Law No 94-591, allowed an overlap between the hunting period and the return migration periods scientifically identified for 31 species. For 12 of them, the overlap exceeded 20 days. Law No 98-549 made no major changes in that respect. The overlap affects 29 species and is of 20 or more days for the 12 species referred to above. In practice, such rules do not, in its view, ensure complete protection for species of birds during pre-mating migration, contrary to the requirements of Article 7(4), as interpreted by the Court. The Commission also observes that, since the closing dates for hunting are staggered, and species displaying similarities may be hunted or not hunted depending on the closing date adopted for each of them, there is a risk of confusion. Those dates should therefore be fixed in such a way as to ensure complete protection for species, which means that the risk of confusing species must be taken into account. However, according to the information now available, that is not the case in France at present. The Commission also contends that the ORNIS method referred to by the French Government is based on express acceptance of an overlap, described as insignificant, between hunting periods and migration periods for certain birds, except as regards late migrating species and those in a poor state of conservation, the hunting of which must cease within the 10 days preceding the 10-day period during which their migratory flights commence. However, Article 7(4) cannot be properly complied with on the basis of that method, as the Court held in its judgment in APAS v Préfets de Maine-et-Loire and Loire-Atlantique, cited above. The Directive, as interpreted by the Court, requires total cessation of hunting as soon as migration begins, save in exceptional cases (isolated specimens commencing migration). Thus, all overlapping must be prohibited and no other criterion, such as the state of conservation of species, can be relied on as a reason to allow the hunting of birds which have started migrating.

The French Government recognises that some of the dates laid down by Laws No 94-591 and No 98-549 may be open to criticism under Article 7(4), as interpreted by the Court. However, it states that Law No 94-591 provided for 10-day staggering of closing dates for hunting in reliance on the ORNIS method, as described in the Memorandum on Certain Biological Concepts Employed in the Directive, which was adopted on 28 April 1993 by the Committee for the Adaptation to Technical and Scientific Progress, also known as the ORNIS Committee, set up under Article 16. That memorandum was published by the Commission on 24 November 1993 in the Second report on the application of the Directive. The closing dates for hunting adopted by Law No 98-549 are also arrived at, in essence, by applying that method. According to the French Government, the ORNIS method allows the capture, during the overlap between the hunting season and the start of migration, of a number of birds not constituting a significant kill, provided that the state of conservation of the species so allows, with the result that complete protection of the species and not of each individual bird is ensured. The few cases in which application of that method by the French authorities does not yield a result conforming to the requirements of the Wild Birds Directive are attributable to inadequate application of that method and not to any shortcomings inherent in it. As regards the argument that the practice of staggering closing dates for hunting is liable to undermine the objective of complete protection of species, by reason of the risk of confusion between some of them, the French Government contends that it is not sufficient, in Treaty-infringement proceedings, for the Commission to refer to the existence of a risk: the Commission must also demonstrate specific materialisation of that risk by establishing that the allegedly unlawful practice is in reality inimical to the desired protection. In view of the fact that the staggering of closing dates for hunting is not a new practice, the Commission should be

in a position to demonstrate that such practices have had an impact on the population levels of the species concerned.

The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion. Therefore it is appropriate to examine this charge only in relation to the system of closing dates for the hunting of waterfowl and birds of passage introduced by the third paragraph of Article L. 224-2 of the New Rural Code, as amended by Law No 98-549. By the end of the period laid down in the reasoned opinion, that system had superseded the one introduced by the second paragraph of Article L. 224-2 of the New Rural Code, as amended by Law No 94-591. It should also be noted that the French Government itself admits that the system at issue does not, in certain cases, satisfy the requirements of the Directive. Finally, it is clear from an examination of a table drawn up in accordance with information from the ORNIS database, produced to the Court, that, for 29 migratory species which may be hunted in France, the closing dates for hunting are fixed, depending on the species concerned, 10, 20 or even 30 days later than the date of commencement of return migration (also known as pre-mating migration) of the species. The species concerned are mallard, lapwing, greylag goose, teal, coot, pintail, shoveler, pigeon, white-fronted goose, bean goose, scaup, stock dove, woodpigeon, moorhen, jack snipe, velvet scoter, curlew, grey plover, common eider, spotted redshank, redwing, blackbird, song thrush, fieldfare, black-tailed godwit, skylark, mistle thrush and snipe. It follows that a greater or lesser percentage of birds, depending on the species involved, is not protected against hunting in the pre-mating migration periods, during which the survival of birds is under particular threat. As the Court has held, a method whose object or effect is to allow a certain percentage of the birds of a species to escape complete protection during the period of pre-mating migration does not comply with Article 7(4). As regards the staggering of closing dates for hunting, it must be borne in mind that the national authorities are not empowered by the Directive to lay down dates which vary according to species of bird unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of species of bird liable to be affected by such staggering. The French Government has produced no such evidence. It must therefore be held that, with regard to the choice of closing dates for the hunting of certain species of waterfowl and of migratory birds, the French Republic has not correctly implemented Article 7(4) within the prescribed period.

Communication of the provisions for transposition of the Directive

The Commission maintains that the French authorities have not communicated to it the dates of the hunting season for migratory birds in the departments of Lower Rhine, Upper Rhine and Moselle. The French Government recognises that it had not forwarded any information of that kind by the end of the period prescribed in the reasoned opinion. Accordingly, it must be held that, by failing to notify within the prescribed periods the dates of the hunting season for migratory birds in the departments of Lower Rhine, Upper Rhine and Moselle, the French Republic has failed to fulfil its obligations under Article 7(4).

Transposition of the second and third sentences of Article 7(4)

The Commission contends that transposition into French law of the principle of complete protection during hunting periods, as embodied in the second and third sentences of Article 7(4), which has not taken place, is necessary to ensure that the authorities responsible for determining dates for hunting are in a position to do so in accordance with the clear provisions of the Directive and that every interested party should benefit from the full effect of those provisions. With regard more particularly to the rules in force at the end of the period prescribed in the reasoned opinion, the Commission contends that, although the early opening and closing dates for hunting are now fixed by the legislature, the latter has always allowed the administrative authorities a degree of latitude as regards determining such dates and laying down rules governing hunting within the legally defined periods. Thus, the opening and closing dates for hunting laid down by the legislature in the second and third paragraphs of Article L. 224-2 of the New Rural Code, as amended by Law No 98-549, do not apply to the departments of Lower Rhine, Upper Rhine and Moselle. It is incumbent upon the prefects of those departments to lay down the opening and closing dates for hunting in accordance with Article R. 229-2 of that code, which defines, for those three departments, the open season for hunting in general. As regards measures governing hunting arrangements, the Commission points out that, pursuant to the last three paragraphs of Article L. 224-2 of the same code, as amended by Law No 98-549, the administrative authorities are, where necessary, to draw up management plans. However, the latter are very closely linked to, in particular, the determination of dates for closing of the hunting season.

According to the French Government, the charge of failure to transpose the principle of complete protection into French law is purely formal since the travaux préparatoires for both Law No 94-591 and Law No 98-549 prove that the legislature wished to comply with Article 7(4) , as interpreted by the Court, notwithstanding the fact that some of the dates adopted seem hardly compatible with that provision. In reality, the transposition of such a principle into national law is superfluous since the law in force ensures that it is actually applied. The French Government contends that, in any event, the Directive is a well-known measure as well known as a provision incorporating a new principle in the Rural Code would be and that citizens know that they are able to rely on it, as is demonstrated by the increasing number of administrative actions based on that measure. Moreover, the French courts have never declined to examine the compatibility of administrative measures with the Wild Birds Directive or, in particular, with the principle of complete protection.

In response to that submission, it must be observed, first, that it is common ground that the provisions of the second and third sentences of Article 7(4) had not been formally incorporated in French law by the end of the period prescribed by the reasoned opinion. Second, the Court has indeed held that the transposition of a directive into domestic law does not necessarily require the provisions of the Directive to be enacted in precisely the same words in a specific, express provision of national law and that a general legal context may be sufficient if it actually ensures the full application of the Directive in a sufficiently clear and precise manner. However, the Court has also held that faithful transposition becomes particularly important in the case of this Directive where management of the common heritage is entrusted to the Member States in their respective territories. Third, with regard to the departments of Lower Rhine, Upper Rhine and Moselle, Article R. 229-2 of the Rural Code provides that the open season for hunting in general must be within the following dates: general opening date, no earlier than 23 August; general closing date, no later than 1 February. Under the same code, it is the responsibility of the prefect to make an annual order for opening of the hunting season. In so far as domestic law contains no provision requiring the prefects of those departments to take account, in adopting the annual order for opening of the hunting season, of the prohibition of hunting any species of bird during the sensitive periods mentioned above (rearing periods, various stages of reproduction and dependency, during return of migratory species to their rearing grounds and other periods during which the survival of wild birds is particularly under threat) that law is subject to a degree of legal uncertainty as regards the obligations to be complied with by prefects in adopting measures. As a result, there is no guarantee that the hunting of wild birds will be proscribed during the rearing period or the various stages of reproduction and dependence or, in the case of migratory species, during their return to their rearing grounds. It follows that essential provisions of the Directive, such as those of the second and third sentences of Article 7(4), have not in any event been completely, clearly and unambiguously transposed into the French rules. It must therefore be held that, as regards the department of Lower Rhine, Upper Rhine and Moselle, the French Republic has not correctly transposed the second and third sentences of Article 7(4) within the prescribed period.

C-67/99, Commission v. Ireland

Judgment of the Court (Sixth Chamber) of 11 September 2001. - Commission of the European Communities v Ireland. - Failure by a Member State to fulfil its obligations - Directive 92/43/EEC - Conservation of natural habitats - Conservation of wild fauna and flora - Article 4(1) - List of sites - Site information.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61999J0067:EN:HTML

The first plea in law

With regard to the obligation to transmit the site list referred to in Article 4(1), first subparagraph, of the Habitats Directive, the Commission points out that each Member State's contribution to the setting up of a coherent European ecological network depends on the representation on its territory of the natural habitat types and species' habitats listed in Annexes I and II to the Directive respectively. It is clear from the combined provisions of Article 4(1) of and Annex III to the Directive that Member States enjoy a certain margin of discretion when selecting sites for inclusion in the list. The exercise of that discretion is, however, in the Commission's view, subject to compliance with the following three conditions:

- only criteria of a scientific nature may guide the choice of the sites to be proposed;

- the sites proposed must provide a geographical cover which is homogeneous and representative of the entire territory of each Member State, with a view to ensuring the coherence and balance of the resulting network. The list to be submitted by each Member State must therefore reflect the ecological variety (and, in the case of species, the genetic variety) of the natural habitats and species present within its territory;

- the list must be complete, that is to say, each Member State must propose a number of sites which will ensure sufficient representation of all the natural habitat types listed in Annex I and all the species' habitats listed in Annex II to the Directive which exist on its territory.

So far as the Irish national list is concerned, the Commission notes that, when the period laid down in the reasoned opinion expired on 19 February 1998, Ireland had forwarded to it a list of 207 sites, but that this was no more than an indicative list. When the Commission brought its action before the Court on 25 February 1999, Ireland had not confirmed this indicative list but had merely sent a partial definitive list of 48 sites and related information, and at the date of the hearing, 18 January 2001, Ireland had transmitted in total a list of 362 sites. The Commission states that it instituted the present proceedings with a view to securing a declaration that the Irish national list was manifestly inadequate, and that such inadequacy far exceeded the margin of discretion given to Member States. Not only is such inadequacy evident with regard to the situation existing when the period set in the reasoned opinion expired, but also a whole series of provisos concerning the list of 362 sites still remained to be formulated. The Irish national list, the Commission concludes, did not therefore meet the criteria set out in Article 4(1), read in conjunction with Annex III thereto.

The Irish Government accepts that, when the period laid down in the reasoned opinion expired, it had not forwarded to the Commission any list of sites capable of being designated as SACs. It argues that this delay was attributable to domestic difficulties. In order to obtain approval of the population for the ambitious objectives pursued by the Directive, it was considered necessary to launch a vast programme of public consultation. It points out that the 362 Irish sites officially notified up to January 2001 are protected under Irish law, which goes much further than what is required under the Directive.

Although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1), that Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the Directive. It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the Directive. Only in that way, moreover, is it possible to realise the objective, in the first subparagraph of Article 3(1), of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i), read in conjunction with Article 2(1) thereof, that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies. It is also necessary to recall that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion. The Court cannot therefore take account of any subsequent changes. When the period laid down in the reasoned opinion expired on 19 February 1998, the content of the Irish national list sent to the Commission was manifestly inadequate, going well beyond the margin of discretion available to Member States for the purpose of drawing up the list of sites mentioned in Article 4(1), first subparagraph. In accordance with the case-law cited in the preceding paragraph of the present judgment, the lists of sites communicated to the Commission after the expiry of that period are irrelevant for purposes of the present action. It must therefore be concluded that, by failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1), Ireland has failed to fulfil its obligations under that Directive.

The second plea in law

With regard to the obligation to transmit information on the sites eligible for designation as SACs, the Irish Government acknowledges that it had not sent that information by the expiry of the period laid down in the reasoned opinion, but at the same time argues that, since the format was not adopted until December 1996 and the Commission insisted that the information in question be transmitted by means of that format, it was not possible to complete this important work within the set period.

The Commission submits that the obligation to transmit the site information had to be met before 11 June 1995. Even if certain Member States which already had the list of proposed sites and relevant information before 11 June 1995 wished to await adoption of the format, they could, after the format was notified on 19 December 1996, rapidly have incorporated that information in the format and forwarded it to the Commission. The Commission adds that, in order to take account of the late adoption of the format, it extended the pre-litigation procedure by addressing an additional letter of formal notice to Ireland on 11 July 1997, thus well after the date

on which the format was notified. The Irish authorities were therefore fully in a position to meet their obligation to transmit the information on each site. When the period laid down in the reasoned opinion expired on 19 February 1998, Ireland had not sent to the Commission the information on the sites to be proposed.

It is necessary first to point out that, even though the Commission had initially sent to the Irish Government a letter of formal notice on 24 April 1996, that is to say, before the format was notified, it sent to the Irish Government a new letter of formal notice, following notification of the format, giving it a new period within which to comply with Article 4(1), second subparagraph. Next, it must be noted that, following notification of the Directive on 10 June 1992, the Member States were aware which types of information they would be required to collate for purposes of transmission within three years of that notification, that is to say, by 11 June 1995. They also knew that this information had to be provided on the basis of the format once it had been drawn up by the Commission. Article 4(1), second subparagraph, expressly states that the information to be transmitted, in a format established by the Commission, must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1). The period which the Commission gave to the Irish Government for meeting its obligation to include on the format the site information, which it was required to have at its disposal prior to 11 June 1995, must consequently be regarded as reasonable. From 19 December 1996, the date on which the format was notified, to 19 February 1998, when the period laid down in the reasoned opinion expired, the Irish Government benefited from a period of more than one year to comply with that specific obligation. Since the Irish Government acknowledges that, when the period laid down in the reasoned opinion expired, it had not transmitted to the Commission, on the basis of the format, the information on the sites to be proposed, it must be held that, by failing to transmit to the Commission, within the period prescribed, the information relating to the sites on the list mentioned in the first subparagraph of Article 4(1), pursuant to the second subparagraph of that Article, Ireland has failed to fulfil its obligations under that Directive.

C-71/99, Commission v. Germany

Judgment of the Court (Sixth Chamber) of 11 September 2001. - Commission of the European Communities v Federal Republic of Germany. - Failure by a Member State to fulfil its obligations - Directive 92/43/EEC - Conservation of natural habitats - Conservation of wild fauna and flora - Article 4(1) - List of sites - Site information.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61999J0071:EN:HTML

The first plea in law

With regard to the obligation to transmit the site list referred to in Article 4(1), first subparagraph, the Commission points out that each Member State's contribution to the setting up of a coherent European ecological network depends on the representation on its territory of the natural habitat types and species' habitats listed in Annexes I and II to the Directive respectively. It is clear from a combined reading of Article 4(1) of and Annex III to the Directive that Member States enjoy a certain margin of discretion when selecting sites for inclusion in the list. The exercise of that discretion is, however, in the Commission's view, subject to compliance with the following three conditions:

- only criteria of a scientific nature may guide the choice of the sites to be proposed;

- the sites proposed must provide a geographical cover which is homogeneous and representative of the entire territory of each Member State, with a view to ensuring the coherence and balance of the resulting network. The list to be submitted by each Member State must therefore reflect the ecological variety (and, in the case of species, the genetic variety) of the natural habitats and species present within its territory;

- the list must be complete, that is to say, each Member State must propose a number of sites which will ensure sufficient representation of all the natural habitat types listed in Annex I and all the species' habitats listed in Annex II to the Directive which exist on its territory.

The Commission states that it instituted the present proceedings with a view to securing a declaration that the German national list was manifestly inadequate, and that such inadequacy far exceeded the margin of discretion conferred on Member States. Such inadequacy is evident with regard to the situation existing when the period set in the reasoned opinion expired, and even though the German authorities have, since then, forwarded several other lists of sites, the infringements of which they stand accused still persist. The Commission submits in this connection that a comparison between the proposals of the German authorities and the scientific data provided by those authorities, in particular the manual entitled Das europäische Schutzgebietssystem Natura 2000 edited

by the Bundesamt für Naturschutz (Federal Office for Nature Protection) amply demonstrates the true nature of those infringements. The German national list does not therefore, in the Commission's opinion, satisfy the criteria referred to in Article 4(1), read in conjunction with Annex III thereto.

The German Government acknowledges that, when the period set in the reasoned opinion expired, it had not forwarded all of the sites which it intended to include on the list of sites mentioned in the first subparagraph of Article 4(1). However, it submits, first, that compliance with the obligation to forward such a list under the first subparagraph of Article 4(1) was conditional on the Member States' receiving the format, which is the first document to define the information enabling relevant sites to be selected. Consequently, the period provided for compliance with that obligation could have begun to run, at the earliest, only from notification of the format and had not yet expired at the date on which the action was brought.

Second, the German Government contends that the Directive confers on the Member States a wide margin of discretion in regard to selection of the sites for inclusion on the list to be forwarded to the Commission. The Member States are therefore entitled to notify only those sites which they consider to be appropriate and necessary for the establishment of a coherent European network of SACs, on the basis of technical criteria and having regard to the objectives of the Directive. The national level, it argues, is the most appropriate one at which to carry out an adequate selection among the sites hosting the natural habitats and species' habitats referred to respectively in Annexes I and II to the Directive. The Member States, it argues, are better informed as to the sites present within their territory.

Third, the German Government challenges the scientific sources to which the Commission referred in order to demonstrate that the German Government had forwarded an incomplete list. It contends that the manual mentioned in paragraph 21 of the present judgment is in no wise the German reference list, and is not even a scientifically certain basis of assessment.

It must first be stated that the obligation to forward the list of sites mentioned in the first subparagraph of Article 4(1) was not conditional on adoption of the format. The format is not the first text to have defined the information allowing Member States to select the relevant sites. Once the Directive had been notified, the Member States were aware of all the selection criteria to be taken into consideration. Article 4(1) requires each Member State to propose, on the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, a list of sites indicating which types of natural habitat under Annex I and which native species under Annex II to the Directive they host. It follows from Annex III (Stage 1) to the Directive that the relevant criteria are the degree of representativity of the natural habitat type on the site, the area of the site covered by the natural habitat type and its degree of conservation, the size and density of the population of the species present on the site, their degree of isolation, the degree of conservation of their habitats and, finally, the comparative value of the sites.

Next, although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1), that Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the Directive. It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the Directive. Only in that way, moreover, is it possible to realise the objective, set out in the first subparagraph of Article 3(1), of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i), read in conjunction with Article 2(1) thereof, that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies.

Finally, it must be borne in mind that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion. The Court cannot therefore take account of any subsequent changes. When the period laid down in the reasoned opinion expired on 19 February 1998, the content of the German national list sent to the Commission was manifestly inadequate, far exceeding the margin of discretion which Member States enjoy in drawing up the list of sites mentioned in Article 4(1), first subparagraph. In accordance with the case-law cited in the preceding paragraph of the present judgment, the lists of sites communicated to the Commission after the expiry of that period are irrelevant for purposes of the present action.

It must therefore be concluded that, by failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1), the Federal Republic of Germany has failed to fulfil its obligations under that Directive.

The second plea in law

With regard to the obligation to transmit information on the sites eligible for designation as SACs, the German Government does not deny its failure to forward that information by the expiry of the period laid down in the reasoned opinion, but argues that the preparatory work necessary for collating information on the sites to be proposed, for the completion of which Member States had a three-year period, could not practically begin until the end of 1996, when the format had been notified to the Member States.

The Commission submits that the obligation to transmit the site information was to be met before 11 June 1995. Even if certain Member States which already had the list of proposed sites and relevant information before 11 June 1995 wished to await adoption of the format, they could, after the format was notified on 19 December 1996, rapidly have incorporated that information in the format and forwarded it to the Commission. The Commission adds that, in order to take account of the late adoption of the format, it extended the pre-litigation procedure by addressing an additional letter of formal notice to the Federal Republic of Germany on 3 July 1997, well after the date on which the format was notified. The German authorities were thus fully in a position to meet their obligation to transmit the information on each site. When the period laid down in the reasoned opinion expired on 19 February 1998, the Federal Republic of Germany had not sent to the Commission the information on the sites to be proposed.

It is necessary first to point out that, even though the Commission had initially sent to the German Government a letter of formal notice on 4 March 1996, that is to say, before the format was notified, it sent to that Government a new letter of formal notice, following notification of the format, giving it a new period within which to comply with Article 4(1), second subparagraph.

Next, it must be noted that, following notification of the Directive on 10 June 1992, the Member States were aware which types of information they would be required to collate for purposes of transmission within three years of that notification, that is to say, by 11 June 1995. They also knew that this information had to be provided on the basis of the format once it had been drawn up by the Commission. Article 4(1), second subparagraph, of the Directive expressly states that the information to be transmitted, in a format established by the Commission, must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1). The period which the Commission gave to the German Government for meeting its obligation to include on the format the site information, which it was required to have at its disposal prior to 11 June 1995, must therefore be regarded as reasonable. From 19 December 1996, the date on which the format was notified, to 19 February 1998, when the period laid down in the reasoned opinion expired, the German Government benefited from a period of more than one year to carry out that specific operation.

Since the German Government acknowledges that, when the period laid down in the reasoned opinion expired, it had not transmitted to the Commission, in the format, the information on the sites to be proposed, it must be held that, by failing to transmit to the Commission, within the prescribed period, the information relating to the sites on the list mentioned in the first subparagraph of Article 4(1), pursuant to the second subparagraph of Article 4(1) thereof, the Federal Republic of Germany has failed to fulfil its obligations under that Directive.

C-220/99, Commission v. France

Judgment of the Court (Sixth Chamber) of 11 September 2001. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Directive 92/43/EEC - Conservation of natural habitats - Conservation of wild fauna and flora - Article 4(1) - List of sites - Site information.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61999J0220:EN:HTML

The first plea in law

With regard to the obligation to transmit the site list referred to in Article 4(1), first subparagraph, of the Habitats Directive, the Commission points out that each Member State's contribution to the setting up of a coherent European ecological network depends on the representation on its territory of the natural habitat types and

species' habitats listed in Annexes I and II to the Directive respectively. It is clear from a combined reading of Article 4(1) of and Annex III to the Directive that Member States enjoy a certain margin of discretion when selecting sites for inclusion in the list. The exercise of that discretion is, however, in the Commission's view, subject to compliance with the following three conditions:

- only criteria of a scientific nature may guide the choice of the sites to be proposed;

- the sites proposed must provide a geographical cover which is homogeneous and representative of the entire territory of each Member State, with a view to ensuring the coherence and balance of the resulting network. The list to be submitted by each Member State must therefore reflect the ecological variety (and, in the case of species, the genetic variety) of the natural habitats and species present within its territory;

- the list must be complete, that is to say, each Member State must propose a number of sites which will ensure sufficient representation of all the natural habitat types listed in Annex I and all the species' habitats listed in Annex II to the Directive which occur within its territory.

So far as the French national list is concerned, the Commission notes that, when the period laid down in the reasoned opinion expired on 6 January 1998, the French Republic had forwarded to it a list of 535 sites; when it brought its action before the Court, this list had increased to 672 sites; at the date of the hearing, 18 January 2001, the French Republic had forwarded in total a list of 1 030 sites.

The Commission states that it instituted the present proceedings with a view to securing a declaration that the French national list was manifestly inadequate, and that such inadequacy far exceeded the margin of discretion given to Member States. Such inadequacy is evident with regard to the situation existing when the period set in the reasoned opinion expired, since the French Republic subsequently almost doubled the number of sites proposed. That inadequacy, moreover, still persists, notwithstanding indubitable progress. The French national list, the Commission concludes, does not therefore meet the criteria set out in Article 4(1), read in conjunction with Annex III thereto.

The French Government acknowledges that, when the period set in the reasoned opinion expired, it had not forwarded all of the sites which ought to feature on the list of sites mentioned in Article 4(1), first subparagraph, of the Directive. The French Government does, however, point out that, at the date of the hearing, the French national list contained a total of 1 030 sites covering approximately 5% of French territory. The Commission, it argues, has failed to adduce any evidence capable of establishing that this list of 1 030 sites does not satisfy the obligation laid down in Article 4(1). The first stage of the procedure for the designation of SACs does not, it contends, involve the establishment of an exhaustive inventory of the sites within the territory of each Member State which host the natural habitat types and native species listed in Annexes I and II to the Directive respectively. The relevance of the national list must be judged, not on the basis of the number of sites proposed, but on the basis of the representative nature of the natural habitats and species' habitats featuring on that list, assessed particularly with regard to their degree of rarity and their distribution throughout national territory.

Although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1), that Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the Directive. It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the Directive. Only in that way, moreover, is it possible to realise the objective, set out in the first subparagraph of Article 3(1), of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i), read in conjunction with Article 2(1) thereof, that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies. It must also be recalled that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion. The Court cannot therefore take account of any subsequent changes. When the period laid down in the reasoned opinion expired on 6 January 1998, the content of the French national list sent to the Commission was manifestly inadequate, going well beyond the margin of discretion available to Member States for the purpose of drawing up the list of sites mentioned in Article 4(1), first subparagraph. In accordance with the case-law cited in the preceding paragraph of the present judgment, the lists of sites communicated to the Commission after the expiry of that period are irrelevant for purposes of the present action. It must therefore be concluded that, by failing to transmit to the

Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1), the French Republic has failed to fulfil its obligations under that Directive.

The second plea in law

With regard to the obligation to transmit information on the sites eligible for designation as SACs, the French Government acknowledges that it did not send that information by the expiry of the period laid down in the reasoned opinion, but argues that it was quite impossible for it to meet that obligation within the time specified. It considers that the Commission's delay in drafting the format affected the entire national procedure. When the Commission notified Decision 97/266 adopting the format, the French authorities were obliged to transfer and amend all of the data already contained on a national schedule.

The Commission submits that the obligation to transmit the site information was to be met before 11 June 1995. Even if certain Member States which already had the list of proposed sites and relevant information before 11 June 1995 wished to await adoption of the format, they could, after the format was notified on 19 December 1996, rapidly have incorporated that information in the format and forwarded it to the Commission. The Commission adds that, in order to take account of the late adoption of the format, it extended the pre-litigation procedure by addressing an additional letter of formal notice to the French Republic on 3 July 1997, thus well after the date on which the format was notified. The French authorities were therefore fully in a position to meet their obligation to transmit the information on each site. When the period laid down in the reasoned opinion expired on 6 January 1998, the French Republic had not sent to the Commission the information on the sites to be proposed.

It is necessary first to point out that, even though the Commission had initially sent to the French Government a letter of formal notice on 27 March 1996, that is to say, before the format was notified, it sent to that Government a new letter of formal notice, following notification of the format, giving it a new period within which to comply with Article 4(1), second subparagraph. Next, it should be noted that, following notification of the Directive on 10 June 1992, the Member States were aware which types of information they would be required to collate for purposes of transmission within three years of that notification, that is to say, by 11 June 1995. They also knew that this information had to be provided on the basis of the format once it had been drawn up by the Commission. Article 4(1), second subparagraph, expressly states that the information to be transmitted, in a format established by the Commission, must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1). The period which the Commission gave to the French Government for meeting its obligation to include on the format the site information, which it should have had at its disposal prior to 11 June 1995, must therefore be regarded as reasonable. From 19 December 1996, the date on which the format was notified, to 6 January 1998, when the period laid down in the reasoned opinion expired, the French Government benefited from a period of more than one year to comply with that specific obligation. Since the French Government acknowledges that, when the period laid down in the reasoned opinion expired, it had not transmitted to the Commission, in the format, the information on the sites to be proposed, it must be held that, by failing to transmit to the Commission, within the period prescribed, the information relating to the sites on the list mentioned in the first subparagraph of Article 4(1), pursuant to the second subparagraph of Article 4(1), the French Republic has failed to fulfil its obligations under that Directive.

C-103/00, Commission v. Greece – "*Caretta caretta* on Zakinthos"

Judgment of the Court (Sixth Chamber) of 30 January 2002. - Commission of the European Communities v Hellenic Republic. - Failure by a Member State to fulfil its obligations - Directive 92/43/EEC - Conservation of natural habitats and of wild fauna and flora - Protection of species.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62000J0103:EN:HTML

The sea turtle *Caretta caretta* only lays eggs every two or three years. In Greece, the laying season starts at the end of May and finishes at the end of August. The turtle leaves the sea at night and moves towards the driest area of the beach, where it digs a hole of 40 to 60 centimetres in which it lays an average of 120 eggs. Two months later the eggs hatch and the baby turtles then crawl onto the sand and head towards the sea. The baby turtles are very vulnerable and a large number of them die. The Commission emphasises the fact that the bay of Laganas on Zakinthos is a vital breeding region, perhaps even the most important in the Mediterranean, for the sea turtle *Caretta caretta*. Given the significance of the bay of Laganas, the Greek authorities have proposed that the region be classified as one of the sites of Community importance for the Natura 2000 network. The

Commission's principal complaint is that the Hellenic Republic has infringed its obligations under the Treaty and Article 12(1)(b) and (d), first, by failing to adopt a legislative framework which would ensure the strict protection of the sea turtle *Caretta caretta* against any deliberate disturbance during its breeding period and against any deterioration or destruction of its breeding sites and, second, by failing to take specific measures to prevent such nuisances.

Legislative provisions for the protection of the *Caretta caretta* species

According to the Commission, the Greek Government has not adopted an institutional framework within the prescribed time-limit capable of ensuring the effective long-term protection of the sea turtle *Caretta caretta*.

The Greek Government claims that by issuing a presidential decree on 22 December 1999 which classifies the land and sea regions of the bay of Laganas and the Strofada islands as a national marine park and the costal areas of the communes of Zakinthos and Laganas as a regional park, it has instituted a system of strict protection for the sea turtle *Caretta caretta*. The Greek Government submits that, over the last 20 years, measures have been progressively taken to ensure the protection of that species on the island of Zakinthos. It refers to various laws, regulations and administrative measures adopted to that end from 1980 onwards. The Decree of 1999 constitutes only the most recent measure in a process of progressive implementation of a system of strict protection for that species. According to the Greek Government, the lack of grounds for the Commission's action is also demonstrated by the nesting figures available for the sea turtle *Caretta caretta* on the bay of Laganas over the last 15 years. These figures do not show that the number of nests has decreased.

It should be observed in this regard that the Court has consistently held that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes. The Decree of 1999, on which the Greek Government has based a significant part of its pleadings, was adopted after the expiry of the two-month time-limit laid down in the reasoned opinion. Consequently, it is not necessary to examine whether the system of protection for the sea turtle *Caretta caretta* provided for by that decree meets the protection requirements set out in Article 12(1)(b) and (d). As regards the other measures which, according to the Greek Government, are intended to implement an effective system of protection for that species, it must be remembered that Article 12(1)(b) and (d) require that the requisite measures be taken to establish a system of strict protection for the animal species listed in Annex IV(a) of that Directive in their natural habitats, prohibiting the deliberate disturbance of those species, particularly during the period of breeding, rearing, hibernation and migration, and the deterioration or destruction of breeding sites or resting places. First, it is undisputed that the bay of Laganas is a vital breeding region for the protected species *Caretta caretta*. Second, according to the findings of the Greek Council of State in a report in 1999 Annexed to the draft presidential decree establishing the marine park of Zakinthos, the provisions in force at that time did not ensure, to the extent necessary, the effective protection of the sea and land areas of the bay of Laganas. In particular, given the pressure and the erosion caused to the breeding beaches at Dafni, Gerakas and Kalamaki by the construction of access routes to those beaches and given the noise resulting from human activity, the Council of State recommended the prohibition not only of the opening of new access routes to those beaches, but also of the creation of infrastructure such as kiosks, tents or parking facilities. The Greek Government does not contest those matters. Third, it should be observed that during the pre-litigation period, the Greek Government particularly stressed that the adoption of a decree creating a marine park at Zakinthos would introduce a system of strict protection for the sea turtle *Caretta caretta*. In its defence, the Greek Government claimed that, in respect of that species, the Decree of 1999 met the protection objectives set out in Article 12. In its rejoinder, the Greek Government submitted, for the first time, that the requisite measures to establish a system of strict protection for that species pursuant to Article 12(1)(b) and (d) had been taken prior to 14 August 1999, the date on which the time-limit set by the Commission expired. However, in the oral hearing, the Greek Government admitted that the Decree of 1999 had established a system creating stricter protection than had been afforded by the system of protection previously in force. It should also be observed that, when asked by the Court to identify, and submit the wording of, the specific provisions in force in their legal system on 14 August 1999 which it believed met the requirements laid down by Article 12(1)(b) and (d), the Greek Government merely listed a series of laws, regulations and administrative measures without referring to any specific provisions capable of meeting those requirements. In the light of the foregoing, it must be held that the Greek Government did not adopt a legal framework within the prescribed time-limit which was capable of ensuring strict protection for the sea turtle *Caretta caretta* against any deliberate disturbance during the breeding period and against any deterioration or destruction of its breeding sites. Consequently, the Commission's application must be granted on this point. The fact that it does not appear that the number of nests of that species has decreased over the last 15 years does not, of itself, call this finding into question.

Specific measures for the protection of the *Caretta caretta* species

The Commission points out that, during a visit to the breeding beaches of the sea turtle *Caretta caretta* on the island of Zakinthos at the end of August 1999, its officials reported inter alia the use of mopeds on the sand beach to the east of Laganas, the presence of pedalos and small boats in the sea around Gerakas and Dafni and the presence of illegal buildings on the beach at Dafni.

The Greek Government does not dispute the accuracy of those findings.

It is undisputed that the use of mopeds on a beach used for breeding by the *Caretta caretta* turtle is, particularly owing to the noise pollution, liable to disturb that species during the laying period, the incubation period and the hatching of the eggs, as well as during the baby turtles' migration to the sea. It is also established that the presence of small boats near the breeding beaches constitutes a source of danger to the life and physical well-being of the turtles. It is apparent from the documents before the Court that at the time the facts were ascertained by the Commission's officials, the use of mopeds on the breeding beaches was prohibited and notices indicating the presence of turtle nests on the beaches had been erected. As regards the sea area around Gerakas and Dafni, it had been classified as an absolute protection area and special notices had been erected there. It follows that the use of mopeds on the sand beach to the east of Laganas and the presence of pedalos and small boats in the sea area around Gerakas and Dafni constitute the deliberate disturbance of the species in question during its breeding period for the purposes of Article 12(1)(b). Moreover, the acts were not isolated occurrences. As regards the use of mopeds on the breeding beaches, this is clear from the Greek Government's assertion that nocturnal supervision of the eastern part of beach at Laganas was, at the material time, particularly difficult to ensure owing to the length of the beach, the high number of access points and the low number of supervisors. As far as the presence of small boats in the relevant sea area is concerned, it should be noted that these were observed on two visits to Zakinthos by Commission officials, as stated at paragraphs 8 and 13 of this judgment. Finally, there is no doubt that the presence of buildings on a breeding beach such as the one at Dafni is liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d). It must, therefore, be held that the Hellenic Republic did not take, within the prescribed time-limit, all the requisite specific measures to prevent the deliberate disturbance of the sea turtle *Caretta caretta* during its breeding period and the deterioration or destruction of its breeding sites. Consequently, the Commission's application must also be granted on this point. In the light of the foregoing, the Court finds that by failing to take, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakinthos so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under Article 12(1)(b) and (d).

C-117/00, Commission v. Ireland – “Owenduff-Nephin Beg Complex”

Judgment of the Court (Sixth Chamber) of 13 June 2002. - Commission of the European Communities v Ireland. - Failure by a Member State to fulfil its obligations - Directives 79/409/EEC and 92/43/EEC - Conservation of wild birds - Special protection areas.

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The plea of infringement of Article 3 of the Birds Directive

The Commission states that the habitat of the Red Grouse is hill land and bog and that its diet consists principally in common heather, on which it also relies for building its nests and for protection from predators. The range of the Red Grouse is, therefore, limited in Ireland to areas of bog and moorland where heather is plentiful. However, heather is a species of plant that is particularly vulnerable to overgrazing and in Ireland it is under serious threat from overgrazing. The Commission cites in this connection various studies which show that there has recently been a very marked decline in that Member State in Red Grouse populations and a significant reduction in the areas where the species is found, including its mating grounds. As far as declining populations are concerned, the Commission refers to a 1993 report of the Irish Wildbird Conservancy. As regards the contraction of its range, the Commission refers to two atlases of breeding birds in Great Britain and Ireland. Furthermore, the species' breeding range still lies to a significant extent within areas designated by the Irish authorities as degraded. According to the Commission, Ireland has thus failed to fulfil its duty to safeguard a sufficient diversity and area of habitats for the Red Grouse.

The Irish Government maintains that the Commission has failed to establish that the facts of which it complains had the effect, whether jointly or separately, of reducing the habitat of the Red Grouse to such a degree that it is no longer sufficient for its conservation. The Irish Government states that the Red Grouse, as a subspecies of the Willow Grouse, belongs to a species that is widespread and not under threat. As regards the two atlases to which the Commission refers and which relate to the periods 1968 to 1972 and 1988 to 1991 respectively, the difference in methods used to prepare those atlases renders any comparison of the figures and any conclusions drawn therefrom unreliable for the purpose of establishing a decline in the numbers of Red Grouse or a contraction of its range. The Irish Government also disputes that areas of heathland necessary to the Red Grouse are under serious threat from overgrazing, although it acknowledges that overgrazing has had a negative effect on the numbers of Red Grouse and on the extent of the species' habitat.

Article 3 of the Birds Directive requires Member States to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds covered by the Directive. The case-law of the Court of Justice shows that the obligations on Member States arising under Article 3 therefore exist before any reduction is observed in the number of birds or any risk of a protected species becoming extinct has materialised. The report prepared in 1993 by the Irish Wildbird Conservancy, a non-governmental organisation dedicated to the protection of birds in Ireland, identified the Red Grouse as one of the country's 12 most endangered breeding birds and indicated that the numbers of Red Grouse had diminished by more than 50% over the last 20 years. Moreover, comparison of the two scientific works, The Atlas of Breeding Birds in Britain and Ireland: 1968-1972 and The New Atlas of Breeding Birds in Britain and Ireland: 1988-1991, produced by D.W. Gibbons, J.B. Reid and R.A. Chapman, reveals a significant contraction in the range in which the species is present and in which the species breeds. It is important to emphasise in this connection that, whilst, in the second atlas, the authors discuss and acknowledge the need for caution in comparing data, they note that despite these difficulties, the change maps do reflect the real underlying distributional changes [of the species]. It is not in dispute that the breeding range of the Red Grouse, which is given a full entry in Annex II/1 to the Birds Directive, coincides, to a large extent, with the areas designated by the Irish Heritage Council as having been degraded by overgrazing. It should also be borne in mind that, in its letter of 1 September 1998, Ireland acknowledged that, in general terms, it was reasonable to conclude that Red Grouse populations had been affected by the consequences of overgrazing on their habitats. In the same letter, Ireland stated that the Red Grouse is dependent on common heather, which is the predominant plant species on many Irish heaths, raised bogs and uplands, and that it would be designating a very large area of those types of habitat, probably in excess of 250 000 hectares, as special areas of conservation within the meaning of the Habitats Directive, and that this would provide mechanisms to control the overgrazing. Moreover, according to the Action Plan for Ireland's 12 most threatened breeding bird species prepared in 1995 by the Irish Wildbird Conservancy, it is essential that pasturelands be properly managed as part of the priority actions which consist, initially, in halting the decline in Red Grouse populations and in their areas of distribution and, subsequently, in repopulating the areas of distribution abandoned since the time of the first atlas, mentioned in paragraph 17 of the present judgment. In light of the foregoing, it must be held that Ireland has not taken all the measures necessary to safeguard a sufficient diversity and area of habitats for the Red Grouse for the purposes of Article 3 of the Birds Directive. Consequently, the Commission's action must, on this point, be upheld.

The plea alleging infringement of the first sentence of Article 4(4) of the Birds Directive and Article 6(2) of the Habitats Directive

The Commission maintains that Ireland has failed to take the necessary measures to prevent the blanket bog of the Owenduff-Nephin Beg Complex SPA from being damaged by overgrazing. In particular, the Rural Environmental Protection Scheme (REPS) adopted by the Irish authorities has been, and still is, inadequate to combat the problem of overgrazing both generally and within the Owenduff-Nephin Beg Complex. The Commission nevertheless recognises the potential of the REPS, following its revision in 1998, effectively to deal with overgrazing of commonages, provided that commonage framework plans are established, implemented and monitored. The Commission argues that the general reduction of 30% in the mountain sheep quota decided upon during the winter of 1998/1999 is inadequate, if consideration is given to all of the areas affected by overgrazing.

Whilst it acknowledges that there has been an increasing problem of overgrazing in the Owenduff-Nephin Beg Complex, the Irish Government contends that the Commission has produced insufficient evidence to establish that Ireland has failed to fulfil its obligations under Article 6(2) of the Habitats Directive and the first sentence of Article 4(4) of the Birds Directive. It points out first of all that, since 1996, farmers participating in the REPS have had to comply with grazing strategies for commonages. Next, it refers to the conditions for the conservation of blanket bogs, heaths and upland grasslands designated as National Heritage Areas under the REPS as in force from 1 January 1999. Furthermore, Ireland purchased 10 000 of the 25 255 hectares of land in the Owenduff-Nephin Beg Complex SPA and has granted licences for only six cattle and 150 sheep on this land. In 2000

Ireland adopted a framework plan for the other commonages in the SPA. The remaining 5 000 hectares in the Complex are not in commonage and are unaffected by the problem of overgrazing. In addition, the Irish Government states that the Commission approved, by decision of 6 August 1998 taken pursuant to Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 L 215, p. 85), amendments to the REPS notified to the Commission in or after June 1997. Lastly, the Irish Government points out that implementation of the Conservation Management Plan for the Owenduff-Nephin Beg Complex has been delayed by the need to engage in detailed public consultations with the persons affected. First of all, it should be recalled that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion. Thus, in the present case, measures adopted by Ireland after 8 June 1998 cannot be taken into account. Secondly, it is important to note that it is undisputed that the Owenduff-Nephin Beg Complex has been classified as an SPA since October 1996. In so far as concerns land classified as an SPA, Article 7 of the Habitats Directive provides that the obligations arising under the first sentence of Article 4(4) of the Birds Directive are replaced, inter alia, by the obligations arising under Article 6(2) of the Habitats Directive as from the date of implementation of the Habitats Directive or the date of classification under the Birds Directive, where the latter date is later. It follows that, in the present case, Article 6(2) of the Habitats Directive, rather than the first sentence of Article 4(4) of the Birds Directive, has applied to the Owenduff-Nephin Beg Complex SPA since October 1996. That being so, the Commission's plea must be dismissed in so far as it is based on infringement of the first sentence of Article 4(4) of the Birds Directive and the Court must confine itself to considering whether there has been an infringement of Article 6(2) of the Habitats Directive. Article 6(2) of the Habitats Directive, like the first sentence of Article 4(4) of the Birds Directive, requires Member States to take appropriate steps to avoid, inter alia, deterioration of habitats in the SPAs classified pursuant to Article 4(1). Whilst the Commission pursues no claim of infringement against Ireland in relation to the 10 000 hectares in State ownership and upon which grazing will now be very light, it is clear from the documents before the Court that other parts of the Owenduff-Nephin Beg Complex SPA have been seriously damaged. The Conservation Plan for this SPA, completed on 22 August 2000 by Dúchas, the heritage service of the Department of Arts, Heritage, Gaeltacht and the Islands, states that some blanket bog and heath areas within the site are heavily eroded caused by the excessive numbers of sheep. In places there is mobile peat with associated haggs and gullies that have eroded to the underlying bedrock. On the higher ground, the heath is severely degraded due to the grazing pressure on ericaceous (heath) species. In the recent past large tracts of the peatland system adjacent to the site have been planted with conifers, resulting in the destruction of vast tracts of both lowland and upland blanket bog. In their correspondence with the Commission preceding the issue of the Commission's reasoned opinion the Irish authorities had already recognised that the Owenduff-Nephin Beg Complex was heavily stocked with sheep which were penetrating into the uninhabited valleys and mountain slopes. They had also acknowledged that damage caused by overgrazing was particularly severe on the slopes west of Lough Feeagh and that this had contributed to the recent decline in the numbers of Greenland White-fronted Geese which feed there. According to the Conservation Plan mentioned in paragraph 28 of the present judgment, it will be necessary to keep grazing at a sustainable level in order to achieve objectives such as the maintenance and, where possible, the enhancement of the ecological value of both the priority habitat of the Owenduff-Nephin Beg Complex, that is to say blanket bog, and other habitats characteristic of the site and the maintenance and, where possible, increase of populations of birds mentioned in Annex I to the Birds Directive which frequent the site, including in particular the Greenland White-fronted Goose and the Golden Plover, species which provided justification for the classification of the site as an SPA. Overgrazing by sheep is in fact causing severe damage in places and is the greatest single threat to the site. Furthermore, the Irish Government itself recognises in its rejoinder that it is necessary for the Irish authorities not only to take measures to stabilise the problem of overgrazing, but also to ensure that damaged habitats are allowed to recover. The Irish Government indicates that implementation of the Conservation Management Plan for the Owenduff-Nephin Beg Complex SPA, of the framework plans for the commonages situated in the SPA and of individual farm management plans will achieve this end. It follows from the foregoing that Ireland has not adopted the measures needed to prevent deterioration, in the Owenduff-Nephin Beg Complex SPA, of the habitats of the species for which the SPA was designated. Consequently, Ireland has failed to fulfil its obligations under Article 6(2) of the Habitats Directive and it follows that the Commission's action must be upheld on this point also, subject to the limitation mentioned in paragraph 25 of the present judgment. It must, therefore, be held that, by failing to take the measures necessary to safeguard a sufficient diversity and area of habitats for the Red Grouse and by failing to take appropriate steps to avoid, in the Owenduff-Nephin Beg Complex SPA, the deterioration of the habitats of the species for which the SPA was designated, Ireland has failed to fulfil its obligations under Article 3 of the Birds Directive and Article 6(2) of the Habitats Directive.

C-415/01, Commission v. Belgium

Judgment of the Court (Sixth Chamber) of 27 February 2003. - Commission of the European Communities v Kingdom of Belgium. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Special protection areas.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62001J0415:EN:HTML

The alleged lack of a system of protection of SPAs

The Commission points out the lack of any provision applying to the Région flamande which automatically links the classification of a site as an SPA to the application of the system of protection and conservation provided for by Community law in that respect.

The Belgian Government observes that there already exist, in the Région flamande, certain general and sectorial protection measures which affect SPAs, it recognises, on the other hand, that no provision applying to that region provides that the classification of a site as an SPA is automatically accompanied by the application to that site of the system of protection established by the Directive on birds.

It must be borne in mind that, according to the Court's case-law, Article 4(1) and (2) on birds requires the Member States to provide SPAs with a legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the Directive and the breeding, moulting and wintering of migratory species not listed in that Annex which are regular visitors. Since Article 7 on habitats provides that the obligations which arise, among others, under Article 6(2) of that Directive are to replace those arising under the first sentence of Article 4(4) on birds in respect of SPAs, the legal status of protection of those areas must also guarantee the avoidance therein of the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been designated. The absence of any provision applying to the Région flamande linking the classification of a site as an SPA to the application of a status of protection such as that described in paragraphs 15 and 16 of this judgment undermines the objective of special protection for wild bird life set out in Article 4 on birds.

The alleged unenforceability as against third parties of the demarcation of SPAs

The Commission claims that the Directive on birds has not been properly transposed on the ground that the maps demarcating the SPAs in the Région flamande do not have binding force with regard to third parties and cannot, therefore, be relied upon as against them. In Belgian law, measures adopted by the regional authorities must be published in the Moniteur belge in order to have binding force. Only such publication creates, as regards citizens, an irrebuttable presumption of their awareness of the measures adopted and ensures, thereby, that they are enforceable against third parties. The maps demarcating the SPAs in the Région flamande have not been published in the Moniteur belge. They have simply been lodged in municipal offices to enable the population to become acquainted with them.

The Kingdom of Belgium submits that the question of the binding force of the maps demarcating the SPAs is a matter for the domestic law of the Member States. They enjoy a broad discretion in determining the manner in which they ensure the binding force of measures transposing Directives. The fact that, under Belgian law, publication in the Moniteur belge is the general rule does not prevent, in particular cases, the possibility of choosing another method of publication, on condition that all citizens may effectively become acquainted with the legislation in question. The Cour de cassation (Court of Cassation, Belgium) has accepted that principle concerning publication of regional and area plans in the context of town and country planning. The Belgian Government maintains that the deposit at the relevant municipal offices of the maps on which the SPAs are demarcated, as prescribed by Article 3 of the Arrêté de l'exécutif flamand (Order of the Flemish Executive) of 17 October 1988 on the designation of special protection zones for the purposes of Article 4 on birds (Moniteur belge of 29 October 1988), constitutes, in this case, a sufficient method of publication, given that those concerned have a real possibility of becoming acquainted with those maps. Nevertheless, an amendment of the Décret de la Communauté flamande (Decree of the Flemish Community) of 21 October 1997 concerning nature conservation and the natural environment (Moniteur belge of 10 January 1998), is being prepared in order for the maps demarcating the SPAs to be published in the Moniteur belge.

It is important to recall that, according to consistent case-law, the provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. The principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to Community rules in such a way as to enable the persons concerned by such measures to

ascertain the scope of their rights and obligations in the particular area governed by Community law. With regard to maps demarcating SPAs, they must be invested with unquestionable binding force. If not, the boundaries of SPAs could be challenged at any time. Also, there would be a risk that the objective of protection under Article 4 on birds would not be fully attained. In the reply to the reasoned opinion, it is admitted that, in principle, only publication of a measure in the Moniteur belge ensures an irrebuttable presumption of awareness of that measure by third parties. The fact that the Cour de cassation has accepted, in the context of town and country planning, the binding nature of regional and area plans, although they have been published otherwise than in the Moniteur belge, does not, in this case, show that the same applies to maps demarcating SPAs in the Région flamande, which, according to the amendment referred to in paragraph 20 of this judgment, will in any case have to be published in the Moniteur belge. Even assuming that a rebuttable presumption of awareness of a measure could, as maintained in the reply to the reasoned opinion, arise from a method of publication other than entire publication in the Moniteur belge, it must be pointed out that maps demarcating SPAs with the benefit of such a presumption do not appear to have unquestionable binding force.

C-127/02 (reference for a preliminary ruling) – "Waddenvereniging and Vogelbeschermingsvereniging"

Judgment of the Court (Grand Chamber) of 7 September 2004. - Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij. - Reference for a preliminary ruling: Raad van State - Netherlands. - Directive 92/43/EEC -Conservation of natural habitats and of wild flora and fauna - Concept of "plan' or "project' - Assessment of the implications of certain plans or projects for the protected site.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62002J0127:EN:HTML

The reference for a preliminary ruling concerns the interpretation of Article 6 of the Habitats Directive was made in proceedings between the National association for conservation of the Waddenzee ('the Waddenvereniging') and the Netherlands association for the protection of birds ('the Vogelbeschermingsvereniging') on the one hand and the Secretary of State for agriculture, nature conservation and fisheries ('the Secretary of State') on the other in respect of licences which the latter issued to the Cooperative producers' association of Netherlands cockle fisheries ('the PO Kokkelvisserij') for the mechanical fishing of cockles in the special protection area (SPA) of the Waddenzee, classified within the meaning of Article 4 of the Birds Directive.

By decisions of 1 July 1999 and 7 July 2000 (the decisions at issue in the main action'), the Secretary of State issued licences to PO Kokkelvisserij, subject to certain conditions, to engage in mechanical cockle fishing in the Waddenzee SPA during the periods from 16 August to 25 November 1999 and 14 August to 30 November 2000 respectively. The Waddenvereniging and the Vogelbeschermingsvereniging challenged those decisions before the Secretary of State, who, by decisions of 23 December 1999 and 19 February 2001, held that the complaints made against the decisions at issue in the main action were not founded and rejected the applications against them. Those nature protection associations brought an action against those rejections before the Council of State. They claimed in essence that cockle fishing, as authorised by the decisions at issue in the main action, causes permanent damage to the geomorphology, flora and fauna of the Waddenzee's seabed. They also submitted that such fishing reduces the food stocks of birds which feed on shellfish, causing a decline in their populations, in particular for oystercatchers and eider ducks. The Waddenvereniging and the Vogelbeschermingsvereniging also claimed that those decisions were contrary to the Habitats and Birds Directives. As regards the correct transposition of Article 6(2) to 6(4) of the Habitats Directive into Netherlands law, the Council of State states that Article 12 of the Natuurbeschermingswet, although not expressly intended to implement the obligations laid down in Article 6(2) of the Habitats Directive, may be interpreted in a manner consistent with that provision. Similarly, the Natuurbeschermingswet does not contain rules which implement Article 6(3) and (4) of that Directive. Nor are there generally binding rules intended to implement the provisions of those two paragraphs which are otherwise applicable to the Waddenzee. The national court also states that according to the Waddenvereniging and the Vogelbeschermingsvereniging, in view of the expansion of cockle fishing in the Waddenzee SPA, there is a plan or project' which should be subject to appropriate assessment' in accordance with Article 6(3) of the Habitats Directive whereas the Secretary of State contends that the activity in question, inasmuch as it has been carried on for many years without any intensification, falls within Article 6(2) of that Directive. As regards the relationship between Article 6(2) and 6(3) of the Habitats Directive, the Waddenvereniging and the Vogelbeschermingsvereniging submit that although the activity for which licences were granted must be described as a plan' or project' within the meaning of Article 6(3), it must nevertheless be examined in the light of Article 6(2). It is therefore appropriate to consider whether Article 6(3) must be

regarded as a specific application of the rules in Article 6(2), so that those two paragraphs must be applied cumulatively, or as a provision with a separate, independent purpose, so that Article 6(2) relates to existing use while Article 6(3) applies to new plans or projects. The Council of State asks under what conditions an appropriate assessment' of the effect of the plan or project on the site concerned must be carried out. In addition, it asks what the criteria are on the basis of which it must be determined whether appropriate steps' or an appropriate assessment' are concerned, also in the light of the requirement laid down in Article 6(3) of the Habitats Directive for the competent authorities to agree to a plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned. Finally, the national court considers it relevant to know whether Article 6(2) and (3) of the Habitats Directive has direct effect. In those circumstances, the Council of State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. (a) Are the words plan or project in Article 6(3) of the Habitats Directive to be interpreted as also covering an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period, with a fresh assessment being carried out on each occasion as to whether, and if so in which sections of the area, the activity may be carried on?

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

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

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

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

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

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

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

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

4. (a) When Article 6(3) of the Habitats Directive is applied, on the basis of which criteria must it be determined whether or not there are appropriate steps within the meaning of Article 6(2) or an appropriate assessment, within the meaning of Article 6(3), in connection with the certainty required before agreeing to a plan or project?

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

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

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

First question

Question 1(a)

By Question 1(a), the national court in essence asks whether mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a

new assessment both of the possibility of carrying on that activity and of the site where it may take place, falls within the concept of plan' or project' within the meaning of Article 6(3) of the Habitats Directive.

The 10th recital in the preamble to the Habitats Directive states that an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'. That recital finds expression in Article 6(3), which provides inter alia that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its effects. The Habitats Directive does not define the terms plan' and project'. By contrast, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the sixth recital in the preamble to which states that development consent for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out, defines project' as follows in Article 1(2):

- the execution of construction works or of other installations or schemes,

- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.'

An activity such as mechanical cockle fishing is within the concept of project' as defined in the second indent of Article 1(2) of Directive 85/337. Such a definition of project' is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment. Therefore, an activity such as mechanical cockle fishing is covered by the concept of plan or project set out in Article 6(3) of the Habitats Directive. The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.

The answer to Question 1(a) must therefore be that mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of plan' or project' within the meaning of Article 6(3) of the Habitats Directive.

Question 1(b)

In the light of the reply to Question 1(a), there is no need to reply to Question 1(b).

Second question

By its second question, the national court in essence asks what the relationship is between Article 6(2) and Article 6(3) of the Habitats Directive.

It should be recalled that Article 6(2) of the Habitats Directive, in conjunction with Article 7 thereof, requires Member States to take appropriate steps to avoid, in SPAs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated. Article 6(3) of the Habitats Directive provides that the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of that plan or project for the site, that it will not adversely affect the integrity of the site. That provision thus establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site. The fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2). Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2). Nevertheless, it cannot be precluded that such a plan 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. Under those conditions, 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.

The answer to the second question must therefore be that Article 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).

Third question

Question 3(a)

According to the first sentence of Article 6(3) of the Habitats Directive, 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, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site. Therefore, the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume - as is, moreover, clear from the guidelines for interpreting that Article drawn up by the Commission, entitled Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive (92/43/EEC)' - that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project. As regards Article 2(1) of Directive 85/337, the text of which, essentially similar to Article 6(3) of the Habitats Directive, provides that Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to an assessment with regard to their effects', the Court has held that these are projects which are likely to have significant effects on the environment. It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.

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

Question 3(b)

As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned. Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. As the Commission in essence maintains, in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.

The answer to Question 3(b) must therefore be that, pursuant to the first sentence of Article 6(3) of the Habitats Directive, where a plan or project not directly connected with or necessary to the management of a site is likely

to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.

Fourth question

By Questions 4(a) to 4(c), the national court in essence asks the Court to clarify the concepts of appropriate steps' within the meaning of Article 6(2) of the Habitats Directive and appropriate assessment' within the meaning of Article 6(3) thereof and the conditions under which an activity such as mechanical cockle fishing may be authorised.

In the light of the context of the main action, as well as the foregoing observations, and in particular the answers to the first two questions, there is no need, as stated in point 116 of the Advocate General's Opinion, to answer the fourth question as regards Article 6(2) of the Habitats Directive. As regards the concept of appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that Directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed. As regards the conditions under which an activity such as mechanical cockle fishing may be authorised, given Article 6(3) of the Habitats Directive and the answer to the first question, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision. Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects. Otherwise, mechanical cockle fishing could, where appropriate, be authorised under Article 6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied.

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

Fifth question

In the light of the finding in paragraph 51 above, it is not necessary to consider the fifth question in so far as it relates to Article 6(2) of the Habitats Directive. It is therefore appropriate to consider that question only in so far as it concerns Article 6(3) of the Habitats Directive.

By its fifth question, the national court asks in essence whether, when a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of the Habitats Directive, it may examine whether the limits of discretion of the competent national authorities laid down by that provision have been complied with even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.

It should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 249 EC and by the Directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. As regards the right of an individual to rely on a directive and of the national court to take it into consideration, it would be incompatible with the binding effect attributed to a directive by Article 249 EC to exclude, in principle, the possibility that the obligation which it imposes may be relied on by those concerned. In particular, where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set by the Directive. That also applies to ascertaining whether, failing transposition into national law of the relevant provision of the Directive concerned, the national authority which has adopted the contested measure has kept within the limits of its discretion set by that provision. More particularly, as regards the limits of discretion set by Article 6(3) of the Habitats Directive, it follows from that provision that in a case such as that in the main action, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site, that being the case if there remains no reasonable scientific doubt as to the absence of such effects. Such a condition would therefore not be observed were the national authorities to authorise that activity in the face of uncertainty as to the absence of adverse effects for the site concerned. It follows that Article 6(3) of the Habitats Directive may be taken into account by the national court in determining whether a national authority which has granted an authorisation relating to a plan or project has kept within the limits of the discretion set by the provision in question.

Consequently, the answer to the fifth question must be that where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of the Habitats Directive, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.

C-182/02 (reference for a preliminary ruling) - Ligue pour la protection des oiseaux and Others

Judgment of the Court (Sixth Chamber) of 16 October 2003. - Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement. - Reference for a preliminary ruling: Conseil d'Etat - France. - Directive 79/409/EEC - Conservation of wild birds - Opening and closing dates for hunting - Derogations.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62002J0182:EN:HTML

The Council of State referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 9(1)(c) of the Birds Directive. Those questions were raised in actions brought before the League for the Protection of Birds, the Association for the Protection of Wild Animals and the Anti-Hunting Union respectively seeking the annulment, for misuse of powers, of Decree No 2000-754 of 1 August 2000 relating to the dates for the hunting of migratory birds and waterfowl and amending the Rural Code (hereinafter `the contested decree'). Article 2 of the contested decree provides that derogations from prohibitions on hunting outside the hunting periods set by the administrative authorities and during certain vulnerable periods for birds may be granted by prefects (departmental heads of administration) to permit the capture, keeping or other judicious use of geese, wood pigeons and thrush in small numbers, until 20 February. An order of the Minister responsible for hunting, adopted following consultation with the National Council for Hunting and Wildlife, lays down the conditions in which such uses may be authorised and the procedures for the controls to be implemented. The Minister also determines, after consultation with the National Hunting Federation and the National Authority for Hunting and Wildlife, the maximum number of birds, by species, which may be taken in each department. Prefects establish the maximum number of birds which may be taken by beneficiaries of the

derogation. In the actions brought before the Council of State to annul the contested decree for misuse of powers, that court in essence stated that Article 2 of that decree is intended to implement Article 9(1). According to the Council of State, the assessment of the legality of Article 2 depends, first, on whether Article 9(1)(c) permits derogations from the opening and closing dates for hunting set in the light of the objectives specified in Article 7(4) and, second, if so, what the criteria and limits are when laying down those derogations. The Council of State, after annulling Article 1 of the contested decree in part in so far as it related to the opening or closing dates for hunting certain species, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

`1. Does Article 9(1)(c) of Birds Directive permit a Member State to derogate from the opening and closing dates for hunting which follow from consideration of the objectives specified in Article 7(4) thereof?

2. If so, what are the criteria which make it possible to establish the limits of that derogation?'

The first question

Article 9(1)(c) provides that Member States may derogate from, inter alia, Article 7 where there is no other satisfactory solution, in order to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers. It therefore appears that Article 9(1)(c) permits authorisation, in compliance with the conditions set out in that provision, of the capture, keeping or other judicious use of certain birds during the periods mentioned in Article 7(4), during which the survival of wild birds is at particular risk. According to the case-law of the Court, Article 9 authorises Member States to derogate from provisions relating, inter alia, to hunting. The Court has also accepted the possibility of derogating from the prohibition on hunting species of birds not listed in Annex II to the Directive, to which Article 7(1) refers, in particular for the reason set out in Article 9(1)(c). It is clear from the foregoing that the hunting of wild birds for recreational purposes during the periods mentioned in Article 7(4) may constitute a judicious use authorised by Article 9(1)(c) of that Directive, as do the capture and sale of wild birds even outside the hunting season with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets.

The answer to the first question must therefore be that Article 9(1)(c) permits a Member State to derogate from the opening and closing dates for hunting which follow from consideration of the objectives set out in Article 7(4).

The second question

First, Article 9 authorises Member States to derogate from the general prohibition on hunting protected species which is laid down in Articles 5 and 7 only by measures which refer in sufficient detail to the factors mentioned in Article 9(1) and (2). A national measure which permits derogating from Article 7(4) by virtue of Article 9(1), such as the measure cited in paragraph 5 of this judgment, does not comply with the latter provision if it fails to refer to the fact that such a derogation can be granted only where there is no other satisfactory solution.

Second, as regards hunting in particular, that activity can be permitted pursuant to Article 9(1)(c) only if:

- there is no other satisfactory solution;

- it is carried out under strictly supervised conditions and on a selective basis;

- it applies only to certain birds in small numbers.

The first of the conditions set out in the preceding paragraph cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection. There would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7. The third of those conditions cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level. If that condition is not fulfilled, the use of birds for recreational hunting cannot, in any event, be considered judicious and, accordingly, acceptable for the purposes of the 11th recital in the preamble to the Directive.

Finally, the measures under which hunting is authorised pursuant to Article 9(1)(c) must, in accordance with Article 9(2), specify:

- the species which are subject to the derogations;

- the means, arrangements or methods authorised for capture or killing;

- the conditions of risk and the circumstances of time and place under which such derogations may be granted;

- the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;

- the controls which will be carried out.

In the light of the foregoing, the answer to the second question must be that Article 9 must be interpreted as allowing hunting to be authorised pursuant to Article 9(1)(c) where:

- there is no other satisfactory solution. That condition would not be met, inter alia, if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7;

- it is carried out under strictly supervised conditions and on a selective basis;

- it applies only to certain birds in small numbers; - mention is made of:

(a) the species which are subject to the derogations;

(b) the means, arrangements or methods authorised for capture or killing;

(c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;

(d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;

(e) the controls which will be carried out.

C-209/02, Commission v. Austria – „Wörschacher Moos“

Judgment of the Court (Second Chamber) of 29 January 2004. - Commission of the European Communities v Republic of Austria. - Directive 92/43/EEC - Failure of a Member State to fulfil obligations - Conservation of natural habitats - Wild fauna and flora - Habitat of the corncrake - Wörschacher Moos special protection area.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62002J0209:EN:HTML

The Commission brought an action under Article 226 EC for a declaration that, by authorising the proposed extension of the golf course in the district of Wörschach in the Province of Styria despite a negative assessment of the implications for the habitat of the corncrake (*crex crex*) in the special protection area, within the meaning of Article 4 of the Birds Directive, situated in that district, the Republic of Austria has failed to fulfil its obligations under Article 6(3) and (4), in conjunction with Article 7, of the Habitats Directive. The Commission maintains that, by virtue of Article 6(3) of the Habitats Directive, the planned extension of the golf course in question on a site classified as a SPA should never have been authorised. The extension was likely significantly to affect the site and the corncrake population, and therefore to reduce considerably the function of the SPA with regard to the conservation objectives fixed by Community legislation. Furthermore, the conditions for authorisation of the project under Article 6(4) of the Habitats Directive were not met.

The Austrian Government states that, in view of the impact assessment which was duly carried out and of the subsequent measures imposed by the decision of 14 May 1999, any significant threat to the corncrake population in the `Wörschach Moos' SPA was removed. Therefore it was not necessary for the conditions laid down in Article 6(4) of the Habitats Directive to be fulfilled in order for the extension of the golf course to be authorised.

It can be seen from Article 6(3) of the Habitats Directive, read in conjunction with Article 7, that any plan or project not directly connected with or necessary to the management of a SPA classified under Article 4 of the Birds Directive but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the SPA in view of the SPA's conservation objectives. In the light of the conclusions of the assessment of the implications for the SPA, the competent national authorities are to agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the SPA concerned and, if appropriate, after having obtained the opinion of the general public. It is common ground that, in 1998, in the course of the investigations preceding the adoption of the decision of 14 May 1999, an expert's report was produced, at the request of the authorities of the Province of Styria, by Mr Gepp of the Graz Institute for the Protection of Nature and Ecology. This report is reproduced as part of that decision. The report stated that a corncrake population was present in the SPA where the disputed extension to the golf course was to be created. The extension would entail in particular the loss of part of the feeding and resting areas of the species in question, the destruction of the functional links by the splitting up of

the different zones used by the corncrake and the elimination of, and disturbance to, elements of habitat. The measures which might counter the disturbance liable to be caused by the disputed project would be only partially effective, difficult to implement and of doubtful long-term effectiveness. In short, the creation of the two holes in question could well threaten the continued existence of the corncrake population in the `Wörschacher Moos' SPA, the only population in the Central Alps likely to reproduce. It is for this reason that the report suggests some alternative sites for the extension to the golf course. At the request of the authorities of the Province of Styria, Mr Lentner produced a report, on 26 June 1999, assessing the value of Mr Gepp's report, in the light of the conclusions drawn from it by the Styrian authorities. According to Mr Lentner, the proposition contained in the decision of 14 May 1999 that the measures laid down would enable negative effects on the corncrake population to be avoided and ensure its continuation was not in any way supported by Mr Gepp's report or by other ornithological reports or opinions available to the authorities. In reality, those measures, laid down as compensatory measures, had to be considered inappropriate for avoiding those negative effects with a margin of safety. Having regard to the content of those expert's reports and in the absence of evidence to the contrary, the inevitable conclusion is that at the time of the adoption of the decision of 14 May 1999, the Austrian authorities were not justified in considering that the planned extension of the golf course in question in the present case, coupled with the measures prescribed by that decision, was not such as significantly to disturb the corncrake population in the `Wörschacher Moos' SPA and would not adversely affect the integrity of that SPA. The fact that the note dated 15 July 2002 produced by Mr Gepp at the request of the Government of the Province of Styria regarding the interpretation of the assessments and conclusions contained in his own report seems to soften somewhat their implications cannot affect the finding made in the previous paragraph of this judgment. The same is true of the surveys of the corncrake population in the `Wörschacher Moos' SPA carried out in 2000 and 2002 and recording the presence, respectively, of three and two parading males, to which the Austrian Government refers to show that the creation of the extension of the golf course has not caused a significant reduction in that population. It is apparent from the above that the decision of 14 May 1999 was not adopted in compliance with the requirements of Article 6(3) of the Habitats Directive. It is also established that the conditions laid down in Article 6(4) thereof have not been fulfilled in the present case. Accordingly, it must be held that, by authorising the proposed extension of the golf course in the district of Wörschach in the Province of Styria despite a negative assessment of its implications for the habitat of the corncrake (crex crex) in the `Wörschacher Moos' SPA situated in that district and classified as provided for in Article 4 of the Birds Directive, the Republic of Austria has failed to fulfil its obligations under Article 6(3) and (4), in conjunction with Article 7, of the Habitats Directive.

C-98/03, Commission v. Germany

Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Conservation of natural habitats – Wild fauna and flora – Assessment of the implications of certain projects on a protected site – Protection of species

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0098:EN:HTML

National law

The Federal Republic of Germany has, inter alia, transposed the Directive by the Federal Law on Nature protection of 21 September 1998 (‘the BNatSchG 1998’). That law was subsequently repealed and replaced by the Federal Law on nature protection and countryside conservation of 25 March 2002 (‘the BNatSchG 2002’). Paragraph 34(1) of the BNatSchG 2002 transposed into German law the duty laid down in the first sentence of Article 6(3) to subject projects to an assessment of their implications for protected sites, for the purposes. Paragraph 10(1)(11) of the BNatSchG 2002 defines the concept of ‘projects within the meaning of the law’ as follows:

‘a) projects and measures planned within a site of Community importance or a European site for the protection of birds, in so far as they are subject to a decision by an authority or to notification to an authority or that they are carried out by an authority, and

b) acts affecting nature and the countryside, within the meaning of Paragraph 18, in so far as they are subject to a decision by an authority or to notification to an authority or that they are carried out by an authority, and

c) installations subject to an authorisation under Federal law on protection against pollution and the use of water, which are subject to an authorisation or to approval under the Law on water use,

in so far as, separately or in conjunction with other projects or plans, they are likely to have a significant effect on a site of importance to the Community or a European site for the protection of birds …'

Paragraph 18 of the BNatSchG 2002 provides:

'1. Acts affecting nature and the countryside, within the meaning of this Law, are changes of form or use of surface areas or changes to the level of the water table connected to the surface soil stratum which may alter to a considerable extent the capacity and functioning of the ecosystem or the countryside.

2. The use of soil for the purpose of agriculture, forestry and fishing shall not constitute an intervention where it takes account of the objectives and the principles of nature protection and countryside conservation. The use of soil for the purposes of agriculture, forestry and fishing does not, in principle, undermine the objectives and principles set out above, provided that it complies with the conditions in Paragraph 5(4) to (6) and the rules of professional practice under the Law on agriculture forestry and fishing and Paragraph 17(2) of the Federal Law on soil protection.'

Paragraph 36 of BNatSchG 2002 entitled 'Material nuisances' provides:

'If it is foreseeable that installations, subject to an authorisation under the Federal Law on protection against pollution, will cause emissions which, together with other installations or measures, will significantly affect, in the area of impact of that installation, the elements fundamentally necessary for the conservation of a site of Community importance or a European site for the protection of birds, and if the damage cannot be made good in accordance with Paragraph 19(2), the authorisation shall not be issued unless the conditions in the combined provisions of Paragraph 34(3) and (4) are fulfilled. Paragraph 34(1) and (5) are applicable mutatis mutandis. Decisions shall be taken with the agreement of the authorities responsible for nature protection and conservation areas.'

The first sentence of Paragraph 39(2) of the BNatSchG 2002, entitled 'Relationship with other legislative provisions', provides:

'The laws on the protection of plants, the protection of animals, protection against epizootic diseases and the laws on forests, hunting and fishing shall not be affected either by the provisions of this section or by the laws adopted pursuant thereto.'

Paragraph 42(1) and (2) of the BNatSchG 2002 are designed to transpose the prohibitions in Articles 12 and 13.

Paragraph 43 of the BNatSchG 2002, entitled 'Derogations', provides, in subparagraph 4, that 'the prohibitions laid down in Paragraph 42(1) and (2) shall not apply to acts intending to use soil for the purposes of agriculture, forestry or fishing and carried out in accordance with good professional practice and the requirements laid down in Paragraph 5(4) to (6); acts intending to process the products obtained in the course of those activities; acts designed to implement an act authorised under Paragraph 19, or an assessment of the effect on the environment within the framework of the Law on the assessment of environmental impact; acts to implement a measure authorised under Paragraph 30; provided that animals and their nesting and incubation sites, habitats and resting places, and plant species which are specifically protected, are not unintentionally damaged as a result.'

The Directive was also transposed in the Federal Republic of Germany by way of a number of sectoral laws, including the Law on plant protection of 14 May 1998 (Planzenschutzgesetz, BGBl. 1998 I, p. 971, 'the PflSchG'), which provides in Paragraph 6(1):

'Pesticides must be used in accordance with good professional practice. Use shall be prohibited if it is foreseeable that it will produce harmful effects on humans or animals or the water table, or that it will produce other serious harmful effects, in particular, on the balance of nature. The competent authority shall order the measures necessary in order to satisfy the requirements mentioned in the first two sentences of this subparagraph.'

The first complaint

The Commission complains that the Federal Republic of Germany has failed to fully transpose Article 6(3) and (4) into its national law in so far as the definition of 'project', in Paragraph 10(1)(11)(b) and (c) of the BNatSchG 2002, which applies to projects undertaken outside the SACs, is too restrictive and excludes the duty to carry out an assessment of the implications of certain acts and other activities which are potentially harmful to protected sites. As regards projects within the meaning of Paragraph 10(1)(11)(b) of the BNatSchG 2002, the Commission submits that since they include only acts affecting nature and the countryside, within the meaning of Paragraph 18, certain projects likely to have a significant effect on protected sites are not subject to a prior assessment of

the implications for the site in accordance with Article 6(3) and (4). Paragraph 18(1) covers only changes of form or use of surface areas, but fails to take account of any other activities or measures which do not concern the surface area of a protected site or those which do not result in any change, even where they are likely to have a significant effect on such a site. In fact, the term 'project', within the meaning of Paragraph 10(1)(11)(b) of the BNatSchG 2002, which refers to acts carried out outside the SACs, is narrower than that in Paragraph 10(1)(11)(a), which concerns projects carried out within an SAC. In its definition of measures to be subject to an assessment of the implications, the Directive does not distinguish between measures taken outside or inside a protected site. Moreover, Paragraph 18(2) of BNatSchG 2002 excludes from the term 'project' within the meaning of Paragraph 10(1)(11)(b) the use of soil for the purposes of agriculture, forestry and fishing, where that project takes account of the objectives and principles of nature protection and countryside conservation. Furthermore, as regards Paragraph 10(1)(11)(c) of the BNatSchG 2002, the Commission criticises the fact that the definition of 'project' is limited, on one hand, to installations subject to authorisation under the Federal Law on protection against pollution (Bundes-Immissionsschutzgestez, 'the BImSchG') and, on the other hand, to the use of water which is subject to authorisation or approval under the Law on water use (Wasserhaushaltsgesetz, 'the WHG'). Therefore, the installations and uses of water not subject to authorisation or approval are excluded from the duty to carry out an assessment of the implications for the site laid down in Article 6(3), regardless of whether or not they may have a significant impact on the protected sites.

The German Government submits, first of all, that the Commission interprets the term 'project' too widely, since it does not permit any limit on the duty to carry out an assessment of the implications that the activities referred to by German law may have on the sites. That term should be interpreted in the light of the specific definition in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. Next, the German Government contends that the term 'act', within the meaning of Paragraph 18(1) of the BNatSchG 2002, requires a case by case assessment in the light of the objectives of the Directive. Therefore, in practice, Paragraph 18(1) does not limit the term 'project' with the meaning of the Directive. Paragraph 18(1) does not require a change of form or use of the surface area, but that there be an act where an activity has an effect on the surface area which impacts on the protected site. As regards the derogation laid down in Paragraph 18(2) of the BNatSchG 2002, the German Government submits that it is a mandatory requirement of that provision that the objectives and principles of nature protection and countryside conservation have been taken into consideration, so that the use of soil for the purposes of agriculture, forestry and fishing does not constitute a project which must be subject to an assessment of its implications. Finally, as regards Paragraph 10(1)(11)(c) of the BNatSchG 2002, the German Government states that the installations which are not subject to authorisation or approval under the BImSchG must themselves comply with requirements which take account of the Directive. The BImSchG requires, inter alia, verification that serious environmental damage which is preventable by the state of current technology is in fact prevented, and that the damage that cannot be avoided by current technology is reduced to the minimum. As regards the use of water which does not require an authorisation under the WHG, the German Government contends, in particular, that such use concerns very small quantities of water, which is compatible with 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). If uses which do not have any significant impact on the status of a body of water are not taken into consideration under Directive 2000/60 they cannot have any significant impact on neighbouring SACs.

Findings of the Court

According to the first sentence of Article 6(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, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The Court has already held that the requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned. Therefore, the condition, to which the assessment of the implications of a plan or a project on a particular site is subject, which requires such an assessment to be carried out where there are doubts as to the existence of significant effects, does not permit that assessment to be avoided, as do Paragraph 10(1)(11)(b) of the BNatSchG 2002, read in conjunction with Paragraph 18, and Paragraph 10(1)(11)(c), in respect of certain categories of projects, on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected sites. It should be noted, in particular, that Article 10(1)(11)(b) and (c) of the BNatSchG 2002 exclude from the assessment obligation (i) projects consisting of acts affecting nature and the countryside other than changes of form or use of surface areas or changes to the level of the water table connected to the surface soil stratum, and (ii) projects relating to installations or to use of water, on account of the fact that they are not

subject to authorisation. It does not appear that those criteria excluding the duty to carry out an assessment are capable of ensuring that those projects are never likely have a significant effect on the protected sites. As regards, in particular, installations not subject to authorisation under the BImSchG, the fact that that text requires verification, that serious environmental damage which may be prevented by current technology is in fact prevented, and that damage which cannot be prevented by current technology is reduced to the minimum, cannot be sufficient to ensure compliance with the duty laid down in Article 6(3). The duty of verification laid down by the BImSchG is not, in any event, capable of ensuring that a project relating to such an installation does not adversely affect the integrity of the protected site. In particular, the duty to verify whether serious environmental damage, which cannot be prevented by current technology, is reduced to the minimum, does not ensure that such a project will not give rise to such damage. As regards the use of water not requiring an authorisation under the WHG, the fact that it concerns the use of small quantities of water does not in itself preclude the possibility that some of those uses are likely to have a significant effect on a protected site. Even assuming that such uses of water are not likely to have a significant effect on the status of a body of water, it does not follow that they are not likely to have a significant effect on neighbouring protected sites. In the light of the foregoing, it must be held that the Federal Republic of Germany has failed to correctly transpose into its national law Article 6(3) as regards certain projects undertaken outside the SACs.

The second complaint

The Commission submits that Paragraph 36 of the BNatSchG 2002 does not correctly transpose Article 6(3) and (4), in so far as the authorisation for installations causing emissions is refused only where it is foreseeable that they directly affect an SAC situated in an area where those installations are operated. It follows that material nuisances caused outside such an area are, however, not taken into account, contrary to those provisions of the Directive.

The German Government states that monitoring of material nuisance caused by air pollutants or noise from the area affected by the installation must be carried out on an individual basis taking account of local data and the various pollutants emitted by the installation. Further, in practice, an authorisation for a project involving material nuisance is issued only if it does not have any harmful effects on the areas protected by the Directive.

Since, under Paragraph 36 of the BNatSchG 2002, the authorisation of installations causing emissions is refused only where they appear likely to affect a protected site situated in the area of impact particularly of those installations, installations whose emissions affect a protected site situated outside such an area may be authorised without taking account of the effects of those emissions on such a site. In that connection, it must be held that the system established by German law, so far as it covers emissions within an area of impact, as defined in technical circulars in accordance with general criteria on installations, do not appear to be capable of ensuring compliance with Article 6(3) and (4). In the absence of established scientific criteria, which have not been mentioned by the German Government, which would a priori rule out emissions affecting a protected site situated outside the area of impact of the installation concerned having a significant effect on that site, the system put in place by national law in the field in question is not, in any event, capable of ensuring that the projects or plans relating to installations causing emissions which affect protected sites situated outside their area of impact do not adversely affect the integrity of those sites, within the meaning of Article 6(3). Accordingly, it must be held that Article 6(3) has not been properly transposed.

The third complaint

The Commission complains that the Federal Republic of Germany has failed to properly transpose the obligation in Article 12(1)(d) to take the requisite measures to establish a system of strict protection for certain animals by prohibiting the deterioration or destruction of breeding sites or resting places. The Commission argues that that provision requires Member States to prohibit not only deliberate acts but also non-deliberate ones. It submits that Paragraph 43(4) of the BNatSchG 2002 fails to comply with Article 12(1)(d), in so far as it authorises a number of derogations from the rules protecting the sites ‘provided that animals, including their nesting or incubation sites, habitat or resting places … are not intentionally affected’.

The German Government observes that the transposition of Article 12(1)(d) is limited over the whole territory of the Federal Republic of Germany to deliberate acts, which, it argues, is in accordance with that provision since it does not require inclusion of non-deliberate destruction or deterioration of those sites in the system of protection that it establishes. An interpretation which also prohibits non-deliberate acts is, in any event, contrary to the principle of proportionality.

The Court has already held that the acts referred to in Article 12(1)(d) include non-deliberate acts. By not limiting the prohibition laid down in Article 12(1)(d) to deliberate acts, which it has done in respect of acts referred to in Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding grounds or resting places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts. In those circumstances the complaint alleging that Article 12(1)(d) has not been properly transposed must be accepted.

The fourth complaint

The Commission complains that the Federal Republic of Germany inserted in Paragraph 43(4) of the BNatSchG 2002 two derogations to the prohibitions laid down in Paragraph 42(1), which do not sufficiently take account of the conditions to which the derogations authorised by Article 16 are subject. More specifically, the Commission refers to derogations in German law to the systems for the protection of species to which implementing measures for an act authorised in accordance with Paragraph 19 of the BNatSchG 2002 and implementing measures authorised under Paragraph 30 of that law are entitled.

The German Government replies that the acts and measures which are the subject of the two derogations laid down in Paragraph 43(4) of the BNatSchG 2002 are subject to administrative decisions and that in order to adopt such decisions the competent authorities are, in any event, bound to observe the conditions laid down in Article 16.

It is clear from the 4th and 11th recitals in the preamble to the Directive that the threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Accordingly, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories. It follows that, in the context of the Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that Directive is clear and precise. Accordingly, even assuming that the two derogations at issue in this case must be the subject of administrative decisions, on the issuing of which the competent authorities do in fact comply with the conditions to which Article 16 subjects the authorisation of derogations, the fact remains that Paragraph 43(4) of the BNatSchG 2002 does not provide a legal framework consistent with the derogatory regime established by Article 16. That provision of national law does not submit the grant of the two derogations in question to all of the conditions laid down in Article 16. In that connection, it is sufficient to state that Paragraph 43(4) of the BNatSchG 2002 provides as the sole condition for authorisation for those derogations that animals, including their nesting or incubation sites, habitat or resting places and plant species which are particularly protected must not be subject to deliberate harm. Therefore, the complaint alleging that Article 16 has not been properly transposed into German law must be accepted.

The fifth complaint

The Commission refers to Paragraph 6(1) of the PflSchG, which prohibits the use of pesticides if it is foreseeable that they will produce effects harmful to human or animal health or the water table, or has other seriously harmful effects, in particular, on the balance of nature, the latter also covering plant and animal species within the meaning of Paragraph 2(6) of the PflSchG. The Commission argues that, by that prohibition, the Federal Republic of Germany has failed to transpose Articles 12, 13 and 16 in a sufficiently clear and precise manner.

The German Government contests the merits of that complaint, arguing that the provision referred to by the Commission contains a general prohibition which facilitates compliance with the prohibitions laid down in Articles 12 and 13. It also refers to the fact that, according to Paragraph 6(1) of the PflSchG, pesticides must be used in accordance with good professional practice, and that the competent authority may order the measures necessary to fulfil the requirements also mentioned in that provision.

In that connection, as was pointed out above, the Member States are, in the context of the Directive, under a particular duty to ensure that their legislation intended to transpose that Directive is clear and precise. According to settled case-law, Articles 12, 13 and 16 form a coherent body of provisions. Articles 12 and 13 require Member States to establish a system of strict protection for animal and plant species. Paragraph 6(1) of the PflSchG, by listing the situations in which the use of pesticides is prohibited, does not express in a clear, specific and strict manner the measures laid down in Articles 12 and 13 which prohibit protected species from being adversely affected. In particular, it does not appear that the prohibition on using pesticides, where it is

foreseeable that it will produce seriously harmful effects on the balance of nature, is as clear, precise and strict as the prohibition on the deterioration of breeding sites or resting places of protected animals laid down in Article 12(1)(d) or the prohibition of the deliberate destruction in the wild of protected plants laid down in Article 13(1)(a). Accordingly, the fifth complaint must be accepted in so far as it concerns Articles 12 and 13.

The sixth complaint

The Commission complains that the Federal Republic of Germany has infringed Articles 12 and 16 by failing to notify it of the fishery catch legislation or by failing to ensure that those provisions contain adequate bans on fishing. The Commission argues that the legislation in three Länder is not in accordance with the Directive. Thus, in Bavaria, the fish known by the scientific name coregonus oxyrhynchus does not feature among the species protected all year round. In Brandenberg, that species and the mollusc unio crassus are not protected. In Bremen, the legislation does not include in the list of fishing bans the three species which must be protected in that Land, namely, the two species previously mentioned and the fish acipenser sturio. Furthermore, that legislation expressly authorises fishing of specimens of acipenser sturio which are at least 100 cm long and specimens of the species coregonus oxyrhynchus which are at least 30 cm long. Moreover, no information is available on any fishing bans in the Länder of Berlin, Hamburg, Mecklenburg-West Pomerania, Lower Saxony, North Rhine-Westphalia, Saarland, Saxony and Saxe-Anhalt. It cannot, therefore, be held that the legislation in those Länder contains the fishing bans necessary to satisfy the provisions of Articles 12 and 16.

The German Government contends that, although Federal law authorises the Länder to lay down more specific provisions on the right to fish, those provisions must nevertheless be interpreted in accordance with the Directive. Where the provisions of the Länder on fishing contravene the protection of the species of fish and shellfish legally required by Community law, they are void on account of an infringement of Federal law. To that effect, the BNatSchG 2002 is a law which overrides the legislation of the Länder. The fishing ban laid down in Paragraph 42(1)(1) of the BNatSchG 2002, which also concerns the species mentioned in Annex IV of the Directive is therefore applicable. Therefore, it is not necessary to notify the provisions of the Länder on that matter. The German Government states that it will ensure that the provisions of the Länder on fishing will be amended forthwith, in so far as they do not comply with the conditions of the Directive and Federal law, as is the case, for example, of the legislation of the Land Bremen, which is complained of by the Commission.

It is common ground in this case that coregonus oxyrhynchus, unio crassus and acipenser sturio, which feature in Annex IV(a) to the Directive, are species found in Germany. Those species must therefore be subject, in accordance with Article 12(1)(a), to a system of strict protection prohibiting all forms of deliberate capture or killing of members of those species in the wild. It is clear from the file that, when the period set down in the reasoned opinion expired, Bremen's legislation authorised, inter alia, the capture of fish all year round so long as no fishing bans were issued. Coregonus oxyrhynchus is not the subject of a fishing ban. In Brandenburg neither that species nor unio crassus are the subject of a fishing ban. As to Bremen's legislation, the German Government has acknowledged that it is not in accordance with the Directive. Although it is true, as the German Government observes, that Paragraph 42(1) of the BNatSchG 2002 prohibits, inter alia, the capture and killing of the animal species covered by a system of strict protection, such as those mentioned in paragraph 74 of this judgment, the fact remains that, under the first sentence of Paragraph 39(2) of that law on the protection of animals, hunting and fishing are not affected by the provisions of that section. That section includes Paragraph 42 of the BNatSchG 2002. In those circumstances, it must be stated that the legislative framework existing in Germany, in which regional provisions which infringe Community law coexist with a Federal law which complies with it, does not ensure effectively, and in a clear and precise manner, in respect of the three animal species at issue in this case, the strict protection required by Article 12(1)(a), with respect to the prohibition of all forms of deliberate capture and killing of specimens of those species in the wild.

In this case, it is established that German law is not in accordance with Article 12(1)(a) and does not fulfil the conditions for derogation laid down in Article 16. As regards the rules on fishing in the other Länder, which have not been communicated to the Commission, it cannot be held that they do not satisfy the provisions of Articles 12 and 16, since no information is available on any fishing bans in those Länder, particularly since, as was stated in paragraph 77 of this judgment, Paragraph 42(1)(1) of the BNatSchG 2002 prohibits the capture and killing of specimens of the species coregonus oxyrhynchus, union crassus and acipenser sturio. In that connection, it must be observed that Article 23(3) provides that Member States are to communicate to the Commission the main provisions of national law which they adopt in the field covered by this Directive. However, the Commission has not based its action on that provision. It follows that the sixth complaint must be accepted within the limits set out in the preceding paragraphs of this judgment.

Accordingly, the Court finds that:

– by failing, in respect of certain projects carried out outside the SAC within the meaning of Article 4(1), to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) whether or not such projects are capable of significantly affecting such an SAC;

– by authorising emissions in an SAC, irrespective of whether they are likely to have a significant effect on that area;

– by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;

– by failing to ensure compliance with the criteria for derogation set out in Article 16 in the case of certain activities compatible with the conservation of the area;

– by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;

– by failing to ensure that legislation on fishing contains adequate bans on catches,

the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and (4) and Articles 12, 13 and 16.

C-117/03 (reference for a preliminary ruling) – "Dragaggi"

Judgement of the Court (Second Chamber) of 13 January 2005 In Case C-117/03, Reference for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by order of 17 December 2002, received at the Court on 18 March 2003, in the proceedings Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti, Regione Autonoma del Friuli Venezia Giulia

http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-117/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

The reference for a preliminary ruling relates to the interpretation of Articles 4(5), 6(3) and 21 of the Habitats Directive. The reference was submitted in proceedings between, first, Società Italiana Dragaggi SpA ('Dragaggi') amongst others and, second, the Ministry for Infrastructure and Transport and the Autonomous Region of Friuli-Venezia Giulia concerning the annulment, by the contracting authority, of a tender procedure relating to dredging works and the dumping of sediment on reclaimed land in the port of Monfalcone.

On 14 May 2001 Dragaggi was awarded a contract relating to dredging works and the dumping of the sediment on reclaimed land in the port of Monfalcone. Four months later the contracting authority annulled the entire tender procedure on the ground that the reclaimed land on which the sediment resulting from the works was intended to be deposited was classified as a site of Community interest, requiring an impact assessment under the relevant national legislation. According to the authority, such an assessment could not have a positive outcome. Dragaggi challenged the legality of the decision annulling the tender procedure before the Regional Administrative Court of Friuli Venezia Giulia. It contended in particular that the procedure for classifying as a site of Community importance the 'mouth of the Timavo' site where the reclaimed land in question was situated had not yet been completed. Although the Italian authorities had proposed a list of sites, including the site at the mouth of the Timavo, to the Commission, the latter had not yet adopted the Community list under the third subparagraph of Article 4(2). Therefore, the obligation to carry out a prior assessment of projects that had significant implications for the site was not yet applicable. In its judgment, the court rejected the argument alleging that the impact assessment procedure was not applicable to the project. According to the Regional Administrative Court of Friuli Venezia Giulia, where a Member State has, as in the present instance, identified a site hosting a priority species and has included it in the list proposed to the Commission, that site must, under paragraph 1 of Schedule III (Stage 2) to the Directive, be considered to be of Community importance. Accordingly it is subject, pursuant to Article 4(5), to the protective measures referred to in Article 6(2), (3) and (4) thereof, and in particular to the impact assessment which is provided for in Article 6(3). According to that court, this approach is the only one capable of giving logical meaning to the Directive which, inasmuch as it seeks to protect habitats or species in danger of disappearance and extinction, must be capable of applying directly, if only in order to provide a safeguard. Furthermore, the measures proposing the classification of the mouth of the Timavo as a priority site, in particular the decree of the Minister for the Environment of 3 April

2000, were not challenged. Holding that an impact assessment was necessary, the Regional Administrative Court of Friuli Venezia Giulia upheld Dragaggi's other complaints alleging that the persons concerned by the carrying out of the project had not been consulted, that alternative solutions to those defined in the project had not been considered before the tender procedure was annulled and that the competent authority had not considered the possibility of giving a positive assessment accompanied by conditions. Dragaggi brought an appeal against the judgment of the Regional Administrative Court of Friuli Venezia Giulia before the Council of State. In particular, it repeated before the Council of State the argument that Article 4(5) requires the protective measures envisaged in Article 6 to be applied only once the Community list has been established. In its submission, this view is confirmed by Article 4 of Decree No 357/97 which provides that the protective measures must be adopted within three months following the inclusion of the site on the list established by the Commission. The Council of State observed that, inasmuch as the listing of sites of Community importance hosting priority habitats appeared to be a purely declaratory act that did not require the exercise of any discretion by the Community authority, the interpretation placed on Article 4(5) by the Regional Administrative Court of Friuli Venezia Giulia could not be considered to be manifestly unfounded. In those circumstances the Council of State decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 4(5) of the Habitats Directive to be interpreted as meaning that the measures under Article 6 and, in particular, under Article 6(3) of that Directive are mandatory for the Member States only after final approval at Community level of the list of sites under Article 21 or, alternatively, in addition to determination of the ordinary commencement date of conservation measures, must a distinction be drawn between declaratory listing and determinative listing (including in the first category the listing of priority sites) with the result that, in order to ensure the effectiveness of the Directive, where a Member State identifies a site of Community importance sustaining priority natural habitat types or species, there must be considered to be an obligation to carry out an assessment of plans and projects with a significant effect on the site even before the Commission draws up the draft list of sites or the adoption of the final version of that list pursuant to Article 21 and, in fact, with effect from the drawing up of the national list?'

Pursuant to Article 4(5), the regime for the protection of special areas of conservation that is laid down in Article 6(2), (3) and (4) thereof applies to a site once it is placed, in accordance with the third subparagraph of Article 4(2), on the list of sites selected as sites of Community importance as adopted by the Commission under the procedure laid down in Article 21. The fact that, according to paragraph 1 of Annex III (Stage 2) to the Directive, all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance cannot render the protection regime prescribed in Article 6(2), (3) and (4) applicable to them before they appear, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission. The contrary proposition referred to by the Consiglio di Stato, that where a Member State has, as in the main proceedings, identified a site as hosting a priority habitat and has included it in the list proposed to the Commission pursuant to Article 4(1), that site must, in view of paragraph 1 of Annex III (Stage 2) to the Directive, be considered to be of Community importance and is therefore subject, pursuant to Article 4(5), to the protective measures referred to in Article 6(2), (3) and (4), cannot succeed. First, this proposition clashes with the wording of Article 4(5), which expressly links application of those protective measures to the fact that the site concerned has been placed, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission. Second, the proposition presupposes that, where a site has been identified by a Member State as hosting priority natural habitat types or priority species and has been referred to on the list proposed to the Commission pursuant to Article 4(1), the Commission is required to place it on the list of sites of Community importance which it adopts in accordance with the procedure laid down in Article 21 and is mentioned in the third subparagraph of Article 4(2). If that were the case, the Commission would be precluded, when establishing, in agreement with each Member State, a draft list of sites of Community importance within the meaning of the first subparagraph of Article 4(2), from contemplating not including on the draft list any site proposed by a Member State as hosting priority natural habitat types or priority species, even if it were to consider, notwithstanding the contrary opinion of the Member State concerned, that a given site did not host priority natural habitat types and/or species as referred to in paragraph 1 of Annex III (Stage 2) to the Directive. Such a situation would be contrary, in particular, to the first subparagraph of Article 4(2), read in conjunction with paragraph 1 of Annex III (Stage 2). It thus follows from the foregoing that, on a proper construction of Article 4(5), the protective measures prescribed in Article 6(2), (3) and (4) are required only as regards sites which, in accordance with the third subparagraph of Article 4(2), are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21. This does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1), as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission. If those sites are not appropriately protected from that moment, achievement of the objectives seeking the conservation of natural habitats and wild fauna and flora, as set out in particular in the

sixth recital in the preamble to the Directive and Article 3(1) thereof, could well be jeopardised. Such a situation would be particularly serious as priority natural habitat types or priority species would be affected, for which, because of the threats to them, early implementation of conservation measures would be appropriate, as recommended in the fifth recital in the preamble to the Directive. In the present instance, it should be remembered that the national lists of sites eligible for identification as sites of Community importance must contain sites which, at national level, have an ecological interest that is relevant from the point of view of the Directive's objective of conservation of natural habitats and wild fauna and flora. It is apparent, therefore, that in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures appropriate for the purpose of safeguarding that ecological interest.

The answer to the question referred must therefore be that:

– on a proper construction of Article 4(5), the protective measures prescribed in Article 6(2), (3) and (4) are required only as regards sites which, in accordance with the third subparagraph of Article 4(2), are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21;

– in the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.

On those grounds, the Court rules as follows:

On a proper construction of Article 4(5), the protective measures prescribed in Article 6(2), (3) and (4) of that Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2), are on the list of sites selected as sites of Community importance adopted by the Commission of the European Communities in accordance with the procedure laid down in Article 21. In the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of he Directive, required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.

C-6/04, Commission v. United Kingdom

Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Conservation of natural habitats – Wild fauna and flora

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62004J0006:EN:HTML

The method of transposing the Habitats Directive

The Commission alleges that the United Kingdom has not transposed the Habitats Directive appropriately into its legal order. In particular, the Commission submits that the United Kingdom has wrongly adopted a general clause for the purpose of filling any gaps in the specific provisions designed to transpose it.

The United Kingdom maintains that it has correctly transposed the Habitats Directive by adopting, for its transposition, legislation which contains not only specific requirements but also general duties and administrative procedures. Those general duties must be read together with the specific requirements of that legislation, which they supplement, thereby ensuring that the Directive is in fact implemented appropriately. The United Kingdom authorities rely in particular on regulation 3(2) and (4) of the 1994 Regulations, the equivalent provisions of which are, for Northern Ireland, regulation 3(2) and (4) of the 1995 Regulations and, for Gibraltar, section 17A of the 1991 Ordinance. Those provisions require ministers, nature conservation bodies and all competent public authorities to exercise their functions so as to secure compliance with the requirements of the Habitats Directive.

The Commission submits, on the other hand, that the general clauses pleaded by the United Kingdom are not sufficiently precise to ensure transposition into national law of the specific obligations imposed by the Directive. In order to determine the scope of their rights and obligations, individuals must refer to the Habitats Directive each time, a situation which does not meet the requirements of legal certainty or the conditions with regard to specificity, precision and clarity required under the settled case-law of the Court. The Commission adds that if the Court were to follow the logic of the United Kingdom's reasoning, the whole Directive could presumably have been transposed by such a general clause. This would be at odds with the requirement of specificity repeatedly noted in the case-law on the transposition of Directives.

Under the third paragraph of Article 249 EC, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods for implementing the Directive in question in domestic law. However, in accordance with settled case-law, while the transposition of a directive into domestic law does not necessarily require that the content of the Directive be incorporated formally and verbatim in express, specific legislation and, depending on its content, a general legal context may be adequate for the purpose, that is on condition that that context does indeed guarantee the full application of the Directive in a sufficiently clear and precise manner. In that regard, it is important in each individual case to determine the nature of the provision, laid down in a directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States. The United Kingdom's argument that the most appropriate way of implementing the Habitats Directive is to confer specific powers on nature conservation bodies and to impose on them the general duty to exercise their functions so as to secure compliance with the requirements of that Directive cannot be upheld. First, it is to be remembered that the existence of national rules may render transposition by specific legislative or regulatory measures superfluous only if those rules actually ensure the full application of the Directive in question by the national authorities. Second, it is apparent from the 4th and 11th recitals in the preamble to the Habitats Directive that threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Consequently, as the Advocate General has observed in point 11 of her Opinion, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories. It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that Directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by Articles 11, 12(4) and 14(2). However, it is apparent on examination of the legislation relied upon by the United Kingdom that it is so general that it does not give effect to the Habitats Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty and that it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the Directive and allow harmonised and effective implementation of the rules which it lays down. It follows that the general duties laid down by the United Kingdom legislation cannot ensure that the provisions of the Habitats Directive referred to in the Commission's application are transposed satisfactorily and are not capable of filling any gaps in the specific provisions intended to achieve such transposition. Consequently, there remains no need to consider the United Kingdom's arguments based on

the general duties contained in that legislation when analysing the specific complaints relied upon by the Commission.

The complaint alleging incomplete transposition of Article 6(2) of the Habitats Directive

In the light of information that the United Kingdom provided, the Commission, in its reply and at the hearing, abandoned its complaint alleging breach of Article 6(2) of the Habitats Directive with regard to England, Wales, Scotland and Northern Ireland, while maintaining it with regard to Gibraltar. The Commission submits that, by merely protecting designated sites from any operation with potential to cause disturbance without also ensuring that deterioration due to neglect or inactivity is avoided, the United Kingdom has failed to implement Article 6(2) fully in Gibraltar.

The United Kingdom, without genuinely contesting the Commission's line of argument, contends that only non-natural deterioration is to be avoided. In addition, it argues that the 1991 Ordinance set in place a complete and stringent enforcement regime. That regime adequately implements the Habitats Directive, particularly when it is read in conjunction with the general rule laid down in section 17A of the ordinance.

As to those submissions, it should first be noted that Article 6(2) of the Habitats Directive obliges the Member States to avoid the deterioration of natural habitats and the habitats of species. It is clear that, in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate. Second, at the end of the period laid down in the reasoned opinion, Article 6(2) of the Habitats Directive had not been formally reproduced in the legislation applicable in Gibraltar. Section 17G of the 1991 Ordinance, allowing the competent authorities to enter into site management agreements with the owners or occupiers of sites, appears to be the only provision applicable in Gibraltar for avoiding any deterioration. It is clear that this provision confers only a non-mandatory power on those authorities and that it is not such as to avoid deterioration, contrary to the requirements of Article 6(2) of the Habitats Directive. Accordingly, inasmuch as domestic law contains no express provision obliging the competent authorities to avoid the deterioration of natural habitats and the habitats of species, it involves an element of legal uncertainty as to the obligations with which those authorities must comply. It follows from the foregoing that, in any event, Article 6(2) of the Habitats Directive has not been transposed clearly, precisely and completely in Gibraltar.

The complaint alleging incomplete transposition of Article 6(3) and (4) of the Habitats Directive

The Commission submits that United Kingdom legislation does not properly transpose these provisions in three specific areas: water abstraction plans and projects, land use plans and, in respect of Gibraltar, the review of existing planning rights.

Water abstraction plans and projects

In the Commission's submission, no provision of domestic law requires water abstraction licences granted under Chapter II of Part II of the Water Resources Act 1991 to comply with the obligation, imposed by Article 6(3) of the Habitats Directive, to take account of the significant effects which water abstraction may have on sites forming part of a SAC. No such provisions exist in Northern Ireland or Gibraltar either. Thus, water abstraction activities, which may have a significant adverse effect on a SAC, are not fully covered or correctly controlled by the United Kingdom's implementing legislation. The Commission adds that in its letter of 27 November 2001 the United Kingdom had indicated that the relevant provisions of the 1994 Regulations would be amended in order to clarify the rules relating to water abstraction activities.

The United Kingdom contends, on the other hand, that it has set up, in conjunction with the general clauses, a system which enables potentially damaging operations to be determined in advance for each site.

As to those submissions, Article 6(3) of the Habitats Directive provides that any plan or project not directly connected with or necessary to the management of a site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the present case, it is not disputed that, at the end of the period laid down in the reasoned opinion, no legal provision expressly required water abstraction plans and projects to be subject to such an assessment. Furthermore, the system established by the United Kingdom legislation, inasmuch as it essentially provides that all water abstraction plans and projects which fall within the conditions laid down in Article 6(3) of the Habitats Directive are deemed in advance to be potentially

damaging for the site concerned, does not appear to be capable of ensuring compliance with the requirements of that provision. While this kind of advance assessment of potential risks can be based on concrete facts with regard to the site, that is not the case with regard to the projects themselves, contrary to the requirements of Article 6(3) of the Habitats Directive, under which an appropriate assessment of the project's implications for the site in question should be carried out. Consequently, in merely defining potentially damaging operations for each site concerned, the risk is run that certain projects which on the basis of their specific characteristics are likely to have an effect on the site are not covered. Nor is it possible to uphold the United Kingdom's argument that, as regards Scotland, the Water Environment and Water Services Act 2003 has laid down, as part of the transposition of 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), a framework for a comprehensive new system of water abstraction which introduces controls consistent with Article 6(2) and (3) of the Habitats Directive. The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes. Having regard to the foregoing, it must be found that the United Kingdom has not transposed Article 6(3) and (4) of the Habitats Directive correctly as regards water abstraction plans and projects.

Land use plans

The Commission submits that United Kingdom legislation does not clearly require land use plans to be subject to appropriate assessment of their implications for SACs in accordance with Article 6(3) and (4) of the Habitats Directive. According to the Commission, although land use plans do not as such authorise development and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land use plans must also be subject to appropriate assessment of their implications for the site concerned.

The United Kingdom accepts that land use plans can be considered to be 'plans and projects' for the purposes of Article 6(3) of the Habitats Directive, but it disputes that they can have a significant effect on sites protected pursuant to the Directive. It submits that they do not in themselves authorise a particular programme to be carried out and that, consequently, only a subsequent consent can adversely affect such sites. It is therefore sufficient to make just that consent subject to the procedure governing plans and projects.

As to those submissions, the Court has already held that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned. As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned. It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard.

Review of existing planning rights in Gibraltar

The Commission submits that, so far as concerns Gibraltar, the competent authorities do not comply with the requirements of Article 6(3) of the Habitats Directive in that they are not obliged to review whether existing planning permits affect sites protected under the Directive.

While it is true that such an obligation to carry out a subsequent review may be based on Article 6(2) of the Habitats Directive, the fact remains that Article 6(3) contains no provision obliging the Member States to carry out a review of that kind. On the contrary, it follows from the very wording of the latter provision that the procedure laid down must be applied before a Member State agrees to the carrying out of plans or projects likely to affect the site concerned. It follows that this part of the complaint alleging incomplete transposition of Article 6(3) and (4) of the Habitats Directive cannot be upheld.

The complaint alleging failure to transpose Articles 11 and 14(2) of the Habitats Directive

The Commission alleges that the United Kingdom has failed to transpose into domestic law the surveillance obligations set out in these provisions. It maintains that, until those obligations have been clearly assigned to the competent authorities, it will be unable to establish whether the required surveillance is actually being carried out. In support of this complaint, the Commission relies on the letter of 27 November 2001, in which the United Kingdom stated, first, that a surveillance obligation was implicitly imposed on the competent authorities and, secondly, that the 1994 Regulations, the 1995 Regulations and the 1991 Ordinance would be amended to provide greater legal certainty through provisions more specific than those of that legislation.

In the United Kingdom's submission, Articles 11 and 14(2) of the Habitats Directive simply provide that the Member States are to undertake surveillance, without imposing any specific requirement as to how it is to take place, or as to how such surveillance is to be provided for in national law. It further contends that the list of surveillance activities carried out in accordance with domestic legislation demonstrates that surveillance is being carried out effectively in the United Kingdom in accordance with Articles 11 and 14(2).

The Commission replies that it never asserted that no surveillance of the conservation status of natural habitats and species was undertaken in the United Kingdom. It contends, on the other hand, that the surveillance obligation is neither clearly implemented in that Member State nor clearly assigned to a particular authority of the latter.

With regard to those submissions, first, as has already been stated in paragraph 26 of this judgment, the surveillance obligation is fundamental to the effectiveness of the Habitats Directive and it must be transposed in a detailed, clear and precise manner. However, at the end of the period laid down in the reasoned opinion, no provision of domestic law imposed an obligation on the national authorities requiring the surveillance of natural habitats and species. Second, the United Kingdom's argument that the list of surveillance activities carried out proves that surveillance is undertaken effectively cannot be upheld. As the Court has already held, the fact, should it be established, that a practice is in conformity with the requirements of a directive which concern protection cannot constitute a reason for not transposing that Directive into the domestic law of the Member State concerned (see, to this effect, Case C-361/88 Commission v Germany, cited above, paragraph 24). Accordingly, inasmuch as it is common ground that United Kingdom domestic law does not contain any statutory duty requiring the national authorities to undertake surveillance of the conservation status of natural habitats and species, that domestic law involves an element of legal uncertainty. Hence, it is not guaranteed that surveillance of their conservation status is undertaken systematically and on a permanent basis. It follows that Articles 11 and 14(2) of the Habitats Directive have not been transposed completely, clearly and precisely in the United Kingdom.

The complaint alleging incorrect transposition of Article 12(1)(d) of the Habitats Directive

The Commission submits that the United Kingdom has not transposed correctly the obligation to take the requisite measures to establish a system of strict protection for certain animal species by prohibiting deterioration or destruction of their breeding sites or resting places. National legislation uses the verb 'to damage' instead of the word 'deterioration' used in Article 12(1)(d) of the Habitats Directive.

First, in the Commission's submission the use of the verb 'to damage' means that the effects of deterioration resulting from neglect or inactivity on the part of the competent authorities are not covered. However, in its reply, the Commission went back on this argument, accepting that the provision does not require breeding sites and resting places of the species concerned to be protected from deterioration due to neglect or inactivity on the part of the competent authorities. Accordingly, there is no longer any need to rule on this point.

Second, the Commission contends that by creating offences only for acts having the effect of harming or damaging the breeding sites or resting places of the species in question, without prohibiting their deterioration, the measures transposing the Habitats Directive introduce a condition, not provided for in Article 12(1)(d) thereof, linked to whether the harmful act is intentional. The United Kingdom does not dispute that Article 12(1)(d) of the Habitats Directive requires activities which would lead to the deterioration or destruction of the sites concerned to be prohibited. On the other hand, it contests the Commission's interpretation of the national legislation, according to which transposition of the Directive in the United Kingdom, with the exception of Gibraltar, is limited to deliberate or intentional acts. As to those submissions, it is settled case-law that in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove the allegation that the obligation has not been fulfilled and it may not rely on any presumption. Accordingly, inasmuch as the United Kingdom contends that its domestic law in force is consistent with Article 12(1)(d) of the Habitats Directive, it is for the Commission, in order to prove that that provision has not been transposed completely, to put before the Court the evidence or arguments necessary in order for it to determine that there has been such a failure to fulfil obligations. However, it does not appear from the documents before the Court

that the Commission has put forward evidence or arguments capable of proving that the transposition of that provision is limited to deliberate or intentional acts. On the contrary, it appears that the criminal offence provided for by United Kingdom domestic law, which punishes acts consisting in damaging or destroying a site, is a strict liability offence not in any way requiring the damage or destruction to be deliberate or intentional. In those circumstances, since the Commission has not proved that the United Kingdom, other than in respect of Gibraltar, has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive, this part of the complaint cannot be upheld. As regards Gibraltar, suffice it to state that the United Kingdom acknowledges that, by prohibiting only the deliberate damaging or destruction of breeding sites or resting places of the species concerned, the legislation applicable in Gibraltar does not satisfy the requirements of Article 12(1)(d). Accordingly this part of the complaint must be held to be well founded.

Third, the Commission states that the United Kingdom legislation as currently drafted would protect breeding sites and resting places only against activities having a direct effect on them, and does not take account of indirect impairment in accordance with the requirements of Article 12(1)(d) of the Habitats Directive. This argument cannot be upheld. The Commission has adduced no evidence capable of proving that the United Kingdom has failed to fulfil its obligations in this regard.

The complaint alleging incomplete transposition of Articles 12(2) and 13(1) of the Habitats Directive

The Commission submits that the national measures intended to transpose the prohibition on the keeping, transport, sale or exchange of specimens of animal and plant species fail to comply with the temporal limitation laid down in those Articles.

It need only be stated that the United Kingdom acknowledged, during the written procedure and at the hearing, that the derogations in force in its domestic law are broader than those envisaged by the Habitats Directive and that, consequently, the provisions in question have not been correctly transposed in that Member State.

The complaint alleging incorrect transposition of Article 12(4) of the Habitats Directive

The Commission submits that the United Kingdom's implementing measures contain no provision requiring the establishment of a monitoring system such as that required in Article 12(4), in respect of the incidental capture and killing of certain animal species. In the absence of further information the Commission is unable to establish whether such monitoring is in fact carried out.

It need only be stated that the United Kingdom, first, has acknowledged that national legislation contains no provision designed to establish such a monitoring system and, second, accepted in its letter of 27 November 2001 that national legislation had to be amended so that such monitoring is expressly established. In any event, it does not appear that such a measure was adopted within the period laid down in the reasoned opinion. Accordingly, the complaint alleging that Article 12(4) of the Habitats Directive has been transposed incorrectly must be held to be well founded.

The complaint alleging incorrect transposition of Article 15 of the Habitats Directive

The Commission complains that the United Kingdom has failed to comply with its obligations under Article 15 of the Habitats Directive. First, it criticises that Member State for having prohibited only the methods expressly listed in Annex VI(a) and (b) to the Directive, without imposing a general prohibition on the use of indiscriminate means. Second, the Commission submits that sections 1 and 10 of the Conservation of Seals Act prohibit the use of only two methods of killing seals, whilst providing for exemptions, in the form of licences granted by the Secretary of State, which appear to go beyond the derogations allowed by the Directive.

No general prohibition on all indiscriminate means

The Commission pleads that United Kingdom legislation contains no general prohibition on the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the relevant species of wild fauna. The national legislation does not therefore preclude the emergence of as yet unknown means of indiscriminate capture and killing.

The United Kingdom contends that Article 15 has been transposed by regulation 41 of the 1994 Regulations, regulation 36(2) of the 1995 regulations and section 17V(2) of the 1991 Ordinance. It states that those provisions

establish lists of every indiscriminate means of capture and killing of the protected species that is currently recorded in that Member State and that the lists are kept under review in order to be updated if necessary.

As to those submissions, Article 15 of the Habitats Directive provides that, in respect of the capture or killing of species of wild fauna listed in Annex V(a) thereto and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV(a), Member States are to prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species. That provision, as is apparent from its very wording, imposes a general obligation designed to prohibit the use of all indiscriminate means of capture or killing of the species of wild fauna concerned. In the present case, it is not in dispute that, at the end of the period laid down in the reasoned opinion, domestic law did not impose a general prohibition of that kind. Furthermore, the possibility of updating a list of prohibited methods is less effective than a general prohibition. Delay in updating the aforementioned lists would necessarily lead to lacunae in protection which are specifically intended to be prevented by means of the general prohibition in Article 15 of the Habitats Directive. This interpretation is all the more justified because domestic law contains no statutory duty to review the lists. In those circumstances, it is not in any way guaranteed that all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the protected species are prohibited in the United Kingdom. Therefore, it must be held that the United Kingdom has not transposed Article 15 of the Habitats Directive correctly as regards the prohibition on all indiscriminate means of capture or killing of the species of wild fauna concerned.

Conservation of Seals Act

A preliminary point to note is that in its reply the Commission withdrew its complaint relating to the Conservation of Seals Act, on the basis of the fact that the United Kingdom had undertaken in its defence to adopt amending legislation in that regard. However, in its rejoinder the United Kingdom considered it necessary to alert the Commission that it would await the outcome of the present proceedings before amending its legislation. It was in those circumstances that at the hearing the Commission wished to maintain this complaint, and the United Kingdom did not contest this. The Commission submits that, by prohibiting only two methods of killing seals and allowing licences to be granted on conditions which go beyond the derogations provided for by the Habitats Directive, the Conservation of Seals Act does not comply with Article 15.

According to the United Kingdom, such an interpretation of the Conservation of Seals Act is incorrect. The Act simply supplements regulation 41 of the 1994 Regulations, which transposes Article 15 of the Habitats Directive, and it therefore provides additional protection for the various seal species.

As to those submissions, first, as has been held above, regulation 41 of the 1994 Regulations does not transpose Article 15 of the Habitats Directive correctly. Therefore, the United Kingdom's argument that the Conservation of Seals Act supplements regulation 41 of the 1994 Regulations cannot be upheld. Second, even if the Conservation of Seals Act were to supplement the 1994 Regulations, it could be interpreted as meaning that only the two methods expressly mentioned by it are prohibited. In those circumstances, the Conservation of Seals Act involves an element of legal uncertainty as to the methods of killing seals which are prohibited in the United Kingdom and it therefore does not ensure that Article 15 of the Habitats Directive is transposed correctly. It follows from the foregoing that the complaint relating to incorrect transposition of Article 15 of the Habitats Directive must be upheld.

The complaint alleging incorrect transposition of Article 16 of the Habitats Directive

First, the Commission submits that the body of national provisions establishing derogations from Articles 12, 13, 14 and 15(a) and (b) of the Habitats Directive, which are set out in particular in regulation 40 of the 1994 Regulations, regulation 35 of the 1995 Regulations and section 17U of the 1991 Ordinance, does not comply with the two conditions specified in Article 16. The Commission observes that, as provided in Article 16, a derogation may be granted only if there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.

It need only be stated (i) that the United Kingdom has accepted that any derogation granted pursuant to Article 16 must necessarily fulfil the two aforementioned conditions and (ii) that although that Member State has admitted that those conditions are not reproduced in the national legislation, no amendment designed to remedy that breach of obligations had been made at the end of the period laid down in the reasoned opinion. This part of the complaint must therefore be upheld.

Second, the Commission submits that the specific derogations set out in regulations 40(3)(c) and 43(4) of the 1994 Regulations and in the equivalent provisions of the 1995 Regulations and the 1991 Ordinance go beyond the scope of Article 16 of the Habitats Directive. It states that the prohibitions laid down in order to transpose Articles 12, 13 and 16 are not applicable where the act in question is the result of a lawful operation.

The United Kingdom contends that since it transposed the requirements of Articles 12 and 13 of the Habitats Directive by making their infringement a criminal offence, it is necessary to exclude the application of such an offence in cases where persons act without criminal intent.

As to those submissions, Article 16 of the Habitats Directive defines in a precise manner the circumstances in which Member States may derogate from Articles 12, 13, 14 and 15(a) and (b) thereof, so that Article 16 must be interpreted restrictively. Furthermore, Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the Directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16. The derogation at issue in the present case authorises acts which lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, where those acts are as such lawful. Therefore such a derogation, founded on the legality of the act, is contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16 thereof. Having regard to the foregoing, the action must be held well founded in this regard.

Failure to apply the Habitats Directive beyond the territorial waters of the United Kingdom

The Commission alleges that the United Kingdom has limited the application of the provisions which transpose the Habitats Directive into national law to just national territory and United Kingdom territorial waters. It contends that within their exclusive economic zones the Member States have an obligation to comply with Community law in the fields where they exercise sovereign powers and that the Directive therefore applies beyond territorial waters. In particular, the Commission complains that the United Kingdom has not complied in its exclusive economic zone with its obligation to designate SACs under Article 4 or the obligation to provide species protection laid down in Article 12.

The United Kingdom, without contesting the validity of this complaint, states, first, that in 2001 it adopted appropriate legislation so far as concerns the petroleum industry, namely the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001, and second, that it has prepared suitable legislation to extend the application of the Habitats Directive's requirements to the marine area beyond its territorial waters.

It is common ground between the parties that the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive is to that extent applicable beyond the Member States' territorial waters. It follows that the Directive must be implemented in that exclusive economic zone. Furthermore, it is common ground that the legislation to which the United Kingdom refers in its letter of 27 November 2001, which extends the application of the measures designed to transpose the requirements of the Habitats Directive beyond United Kingdom territorial waters, had not yet been adopted at the end of the period laid down in the reasoned opinion. Consequently, the only national legislation in force at the end of that period was the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001. It is clear that those regulations concern only the petroleum industry and are therefore not capable by themselves of transposing the Habitats Directive beyond United Kingdom territorial waters. The Commission's action must accordingly be held well founded in this regard.

Annex

All judgements sorted by the date of publication

Judgment of the Court of 8 July 1987. - Commission of the European Communities v Kingdom of Belgium. - Conservation of wild birds. - Articles 5, 6, 7 and 9 of the Birds Directive - Case 247/85.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61985J0247:EN:HTML

Judgment of the Court of 8 July 1987. - Commission of the European Communities v Italian Republic. - Conservation of wild birds. - Articles 6, 7, 8 and 9 of the Birds Directive - Case 262/85.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61985J0262:EN:HTML

Judgment of the Court of 17 September 1987. - Commission of the European Communities v Federal Republic of Germany. - Conservation of wild birds. - Articles 5 and 9 of the Birds Directive - Case 412/85.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61985J0412:EN:HTML

Judgment of the Court of 13 October 1987. - Commission of the European Communities v Kingdom of the Netherlands. - Conservation of wild birds. - Articles 6 and 9 of the Birds Directive - Case 236/85.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61985J0236:EN:HTML

Judgment of the Court of 27 April 1988. - Commission of the European Communities v French Republic. - Conservation of wild birds. Articles 5, 7, 8 and 9 of the Birds Directive - Case 252/85.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61985J0252:EN:HTML

Judgment of the Court of 15 March 1990. - Commission of the European Communities v Kingdom of the Netherlands. - Conservation of wild birds. - Articles 5, 6, 7, 8 and 9 of the Birds Directive - Case C-339/87.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61987J0339:EN:HTML

Judgment of the Court (Sixth Chamber) of 23 May 1990. - Criminal proceedings against Gourmetterie Van den Burg. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Free movement of goods - Prohibition on the importation of birds. - Articles 6 and 14 of the Birds Directive - Case C-169/89.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61989J0169:EN:HTML

Judgment of the Court of 3 July 1990. - Commission of the European Communities v Federal Republic of Germany. - Failure of a Member State to fulfil its obligations - Articles 5, 8 and 9 of the Birds Directive - Case C-288/88.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61988J0288:EN:HTML

Judgment of the Court of 17 January 1991. - Commission of the European Communities v Italian Republic. - Failure to comply with a directive - Conservation of wild birds. - Article 7 of the Birds Directive - Case C-157/89.

Not available in English, see:

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61989J0157

Judgment of the Court of 17 January 1991. - Commission of the European Communities v Italian Republic. - Failure by a Member State to fulfil its obligations - Conservation of wild birds. - Article 4 of the Birds Directive - Case C-334/89.

Not available in English, see:

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61989J0334

Judgment of the Court of 28 February 1991. - Commission of the European Communities v Federal Republic of Germany. - Conservation of wild birds - Construction work in a special protection area. - Articles 2 and 4 of the Birds Directive - Case C-57/89.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61989J0057:EN:HTML

Judgment of the Court of 6 February 1992. - Commission of the European Communities v Kingdom of the Netherlands. - Failure of a Member State to fulfil its obligations - Failure to comply with a judgment of the Court. - Article 171 of the EEC Treaty - Case C-75/91.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61991J0075:EN:HTML

Judgment of the Court of 23 March 1993. - Commission of the European Communities v Federal Republic of Germany. - Failure to fulfil obligations - Failure to comply with a judgment of the Court. - Article 171 of the EEC Treaty - Case C-345/92.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61992J0345:EN:HTML

Judgment of the Court of 2 August 1993. - Commission of the European Communities v Kingdom of Spain. - Conservation of wild birds - Special protection areas. - Articles 3 and 4 of the Birds Directive - Case C-355/90.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61990J0355:EN:HTML

Judgment of the Court of 19 January 1994. - Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique. - Reference for a preliminary ruling: Tribunal administratif de Nantes - France. - Conservation of wild birds - Hunting season. - Article 7 of the Birds Directive - Case C-435/92.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61992J0435:EN:HTML

Judgment of the Court (Third Chamber) of 8 February 1996. - Criminal proceedings against Didier Vergy. - Reference for a preliminary ruling: Tribunal de grande instance de Caen - France. - Prohibition of sale - Specimen born and reared in captivity. - Articles 1, 2, 5, 6 and 9 of the Birds Directive - Case C-149/94.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61994J0149:EN:HTML

Judgment of the Court (Third Chamber) of 8 February 1996. - Criminal proceedings against Godefridus van der Feesten. - Reference for a preliminary ruling: Gerechtshof 's-Hertogenbosch - Netherlands. – Scope of the Directive - Protected species - Application of the Directive to a subspecies not occurring naturally in the wild in the European territory of the Member States. - Articles 1 and 14 of the Birds Directive - Case C-202/94.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61994J0202:EN:HTML

Judgment of the Court (Fifth Chamber) of 7 March 1996. - Associazione Italiana per il World Wildlife Fund, Ente Nazionale per la Protezione Animali, Lega per l'Ambiente - Comitato Regionale, Lega Anti Vivisezione - Delegazione Regionale, Lega per l'Abolizione della Caccia, Federnatura Veneto and Italia Nostra - Sezione di Venezia v Regione Veneto. - Reference for a preliminary ruling: Tribunale amministrativo regionale per il Veneto - Italy. - Hunting - Conditions for exercise of the Member States' power to derogate. - Articles 5, 7 and 9 of the Birds Directive - Case C-118/94.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61994J0118:EN:HTML

Judgment of the Court of 11 July 1996. - Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds. - Reference for a preliminary ruling: House of Lords - United Kingdom. - Delimitation of Special Protection Areas - Discretion enjoyed by the Member States - Economic and social considerations - Lappel Bank. - Articles 2, 3 and 4 of the Birds Directive and Articles 6 and 7 of the Habitats Directive - Case C-44/95.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61995J0044:EN:HTML

Judgment of the Court of 12 September 1996. - Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, intervener: Fédération royale ornithologique belge ASBL. - Reference for a preliminary ruling: Conseil d'Etat - Belgium.- Prohibition of capture - Derogations. - Articles 3 and 4 of the Birds Directive and Articles 6 and 7 of the Habitats Directive - Case C-10/96.

http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996J0010

Judgment of the Court (Fifth Chamber) of 26 June 1997. - Commission of the European Communities v Hellenic Republic. - Failure to fulfil obligations - Failure to transpose the Habitats Directive. - Article 169 of the EEC Treaty - Case C-329/96.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61996J0329:EN:HTML

Judgment of the Court (Fifth Chamber) of 11 December 1997. - Commission of the European Communities v Federal Republic of Germany. - Failure to fulfil obligations - Failure to transpose the Habitats Directive. - Article 189 of the EEC Treaty and Article 23 of the Habitats Directive - Case C-83/97.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61997J0083:EN:HTML

Judgment of the Court of 19 May 1998. - Commission of the European Communities v Kingdom of the Netherlands. - Conservation of wild birds - Special protection areas. - Article 4 of the Birds Directive - Case C-3/96.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61996J0003:EN:HTML

Judgment of the Court (Fifth Chamber) of 18 March 1999. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Special protection areas. - Article 4 of the Birds Directive - Case C-166/97.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61997J0166:EN:HTML

Judgment of the Court (Fifth Chamber) of 25 November 1999. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Special protection areas. - Articles 2 and 4 of the Birds Directive - Case C-96/98.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998J0096:EN:HTML

Judgment of the Court (Fifth Chamber) of 6 April 2000. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Conservation of natural habitats and of wild fauna and flora. - Article 6 of the Habitats Directive - Case C-256/98.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998J0256:EN:HTML

Judgment of the Court of 7 November 2000. - The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust. - Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court) - United Kingdom. - Conservation of natural habitats and of wild fauna and flora - Definition of the boundaries of sites eligible for designation as special areas of conservation - Discretion of the Member States - Economic and social considerations - Severn Estuary. - Articles 2, 3 and 4 of the Habitats Directive - Case C-371/98.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998J0371:EN:HTML

Judgment of the Court (Sixth Chamber) of 7 December 2000. - Commission of the European Communities v French Republic. - Failure of Member State to fulfil its obligations - Conservation of wild birds - Special protection areas. - Article 4 of the Birds Directive and Articles 6 and 7 of the Habitats Directive - Case C-374/98.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998J0374:EN:HTML

Judgment of the Court (Sixth Chamber) of 7 December 2000. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Hunting periods. - Article 7 of the Birds Directive - Case C-38/99.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61999J0038:EN:HTML

Judgment of the Court (Sixth Chamber) of 17 May 2001. - Commission of the European Communities v Italian Republic. - Failure by a Member State to fulfil its obligations - Directive 79/409/EEC - Conservation of wild birds - Admissibility. – Articles 5, 7 and 9 of the Birds Directive - Case C-159/99.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61999J0159:EN:HTML

Judgment of the Court (Sixth Chamber) of 11 September 2001. - Commission of the European Communities v Ireland. - Failure by a Member State to fulfil its obligations - Conservation of natural habitats - Conservation of wild fauna and flora - List of sites - Site information. - Article 4 of the Habitats Directive - Case C-67/99.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61999J0067:EN:HTML

Judgment of the Court (Sixth Chamber) of 11 September 2001. - Commission of the European Communities v Federal Republic of Germany. - Failure by a Member State to fulfil its obligations - Conservation of natural habitats - Conservation of wild fauna and flora - List of sites - Site information. - Article 4 of the Habitats Directive - Case C-71/99.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61999J0071:EN:HTML

Judgment of the Court (Sixth Chamber) of 11 September 2001. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Conservation of natural habitats - Conservation of wild fauna and flora - List of sites - Site information. - Article 4 of the Habitats Directive - Case C-220/99.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61999J0220:EN:HTML

Judgment of the Court (Sixth Chamber) of 30 January 2002. - Commission of the European Communities v Hellenic Republic. - Failure by a Member State to fulfil its obligations - Directive 92/43/EEC - Conservation of natural habitats and of wild fauna and flora - Protection of species. - Article 12 of the Habitats Directive - Case C-103/00.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62000J0103:EN:HTML

Judgment of the Court (Sixth Chamber) of 13 June 2002. - Commission of the European Communities v Ireland. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Special protection areas. - Articles 3 and 4 of the Birds Directive and Article 6 of the Habitats Directive - Case C-117/00.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62000J0117:EN:HTML

Judgment of the Court (Sixth Chamber) of 26 November 2002. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Classification as special protection areas - Plaine des Maures. - Article 4 of the Birds Directive - Case C-202/01.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62001J0202:EN:HTML

Judgment of the Court (Sixth Chamber) of 5 December 2002. - Commission of the European Communities v Kingdom of Belgium. - Failure by a Member State to fulfil its obligations - Conservation of natural habitats - Wild fauna and flora - Incomplete transposition. - Articles 1, 4, 5, 6, 7, 12, 13, 14, 15, 16, 22 and 23 of the Habitats Directive - Case C-324/01.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62001J0324:EN:HTML

Judgment of the Court (Sixth Chamber) of 13 February 2003. - Commission of the European Communities v Grand Duchy of Luxemburg. - Failure by a Member State to fulfil its obligations - Conservation of natural habitats - Wild fauna and flora. - Articles 1, 4, 5, 6, 7, 12, 13, 14, 15, 16, 22 and 23 of the Habitats Directive - Case C-75/01.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62001J0075:EN:HTML

Judgment of the Court (Sixth Chamber) of 27 February 2003. - Commission of the European Communities v Kingdom of Belgium. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Special protection areas. - Article 4 of the Birds Directive and Articles 6 and 7 of the Habitats Directive - Case C-415/01.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62001J0415:EN:HTML

Judgment of the Court (Sixth Chamber) of 6 March 2003. - Commission of the European Communities v République de Finlande. - Protection of wild birds and their habitats - Special protection areas. - Article 4 of the Birds Directive - Case C-240/00.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62000J0240:EN:HTML

Judgment of the Court (Sixth Chamber) of 20 March 2003. - Commission of the European Communities v Italian Republic. - Failure of a Member State to fulfil obligations - Special protection areas - Conservation of wild birds. - Article 4 of the Birds Directive - Case C-378/01.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62001J0378:EN:HTML

Judgment of the Court (Third Chamber) of 20 March 2003. - Commission of the European Communities v Italian Republic. - Failure of a Member State to fulfil obligations - Conservation of natural habitats - Wild fauna and flora. - Articles 5, 6 and 7 of the Habitats Directive - Case C-143/02.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62002J0143:EN:HTML

Judgment of the Court of 24 June 2003. - Commission of the European Communities v Portuguese Republic. - Failure of a Member State to fulfil its obligations - Conservation of natural habitats and wild birds. - Articles 2, 4, 6, 7, 8 and 12 of the Birds Directive and Articles 1, 3, 6, 10, 11 and 12 of the Habitats Directive - Case C-72/02.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62002J0072:EN:HTML

Judgment of the Court (Sixth Chamber) of 16 October 2003. - Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement. - Reference for a preliminary ruling: Conseil d'Etat - France. - Conservation of wild birds - Opening and closing dates for hunting - Derogations. - Articles 7, and 9 of the Birds Directive - Case C-182/02.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62002J0182:EN:HTML

Judgment of the Court (Sixth Chamber) of 6 November 2003. - Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. - Failure of a Member State to fulfil obligations - Conservation of natural habitats - Wild fauna and flora. - Articles 12 and 16 of the Habitats Directive - Case C-434/01.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62001J0434:EN:HTML

Judgment of the Court (Second Chamber) of 29 January 2004. - Commission of the European Communities v Republic of Austria. - Failure of a Member State to fulfil obligations - Conservation of natural habitats - Wild fauna and flora - Habitat of the corncrake - Wörschacher Moos special protection area. - Article 4 of the Birds Directive and Articles 6 and 7 of the Habitats Directive - Case C-209/02.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62002J0209:EN:HTML

Judgment of the Court (Grand Chamber) of 7 September 2004. - Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij. - Reference for a preliminary ruling: Raad van State - Netherlands. - Conservation of natural habitats and of wild flora and fauna - Concept of "plan' or "project' - Assessment of the implications of certain plans or projects for the protected site. - Article 6 of the Habitats Directive - Case C-127/02.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62002J0127:EN:HTML

Judgment of the Court (Second Chamber) of 9 December 2004. - Commission of the European Communities v Kingdom of Spain. - Failure of a Member State to fulfil obligations - Conservation of wild birds - Hunting. - Articles 8 and 9 of the Birds Directive - Case C-79/03.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0079:EN:HTML

Judgment of the Court (Second Chamber) of 13 January 2005. - Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma Friuli Venezia Giulia. - Reference for a preliminary ruling: Consiglio di Stato - Italy. - Conservation of natural habitats - Wild fauna and flora - National list of sites eligible for identification as sites of Community importance - Conservation measures. - Articles 4, 6 and 21 of the Habitats Directive - Case C-117/03.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0117:EN:HTML

Judgment of the Court (Second Chamber) of 14 April 2005. - Commission of the European Communities v Kingdom of the Netherlands. - Failure by a Member State to fulfil its obligations - Conservation of wild birds - Conservation of natural habitats - Failure to transpose within the prescribed periods. - Article 4 of the Birds Directive and Articles 1, 2, 6, 7, 11, 14 and 15 of the Habitats Directive - Case C-441/03.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0441:EN:HTML

Judgment of the Court (Second Chamber) of 9 June 2005. - Commission of the European Communities v Kingdom of Spain. - Conservation of wild fauna - Wild birds - Hunting periods - Hunting of woodpigeon during return journey in the province of Guipúzcoa. - Articles 7 and 9 of the Birds Directive - Case C-135/04.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62004J0135:EN:HTML

Judgment of the Court (Second Chamber) of 20 October 2005. - Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. - Failure of a Member State to fulfil obligations - Conservation of natural habitats - Wild fauna and flora. - Article 249 of the EC Treaty and Articles 6, 11, 12, 13, 14, 15 and 16 of the Habitats Directive - Case C-6/04.

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62004J0006:EN:HTML

Judgment of the Court (Second Chamber) of 15 December 2005 - Commission of the European Communities v Republic of Finland - Conservation of wild birds - Spring hunting of certain aquatic birds - Article 9 of the Birds Directive - Case C-344/03

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0344:EN:HTML

Judgment of the Court (Second Chamber) of 10 January 2006 - Commission of the European Communities v Federal Republic of Germany - Failure of a Member State to fulfil obligations - Conservation of natural habitats - Wild fauna and flora - Assessment of the implications of certain projects on a protected site - Protection of species – Articles 6, 12, 13 and 16 of the Habitats Directive - Case C-98/03

http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0098:EN:HTML

Judgment of the Court (Fifth Chamber) of 27 October 2005. - Commission of the European Communities v Hellenic Republic - Protection of wild birds and their habitats - Special protection areas - Messolongi Lagoon - Article 4 of the Birds Directive - Case C-166/04.

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Judgment of the Court (Second Chamber) of 18 May 2006. - Commission of the European Communities v Kingdom of Spain - Conservation of natural habitats and of wild fauna and flora – Protection of species – Hunting using stopped snares in private hunting areas - Article 12 of the Habitats Directive - Case C-221/04.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0221:EN:HTML

Judgment of the Court (Fifth Chamber) of 16 March 2006. - Commission of the European Communities v Hellenic Republic - Conservation of natural habitats and of wild fauna and flora - Protection of Species - Article 12 of the Habitats Directive - Case C-518/04.

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Judgment of the Court (Second Chamber) of 8 June 2006. - WWF Italia and Others v Regione Lombardia. - Reference for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia – Italy - Derogations from the system of protection- Conservation of wild birds – Protected species – Birds of the finch and brambling species- Articles 9 of the Birds Directive - Case C-60/05.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0060:EN:HTML

Judgment of the Court (Second Chamber) of 13 July 2006. - Commission of the European Communities v Portuguese Republic. - Failure of a Member State to fulfil obligations - Conservation of wild birds – Special protection area – Alteration without scientific basis - Articles 4 of the Birds Directive - Case C-191/05.

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-191/05&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

Index

G

H

I

K

L

M

N

O

P

R

S

T

W

Y

European Commission

Nature and biodiversity case

Ruling of the European Court of Justice

Luxembourg: Office for Official Publications of the European Communities

2006 — 128 pp. — 21 x 29.7 cm

ISBN 92-79-02561-9

KH-76-06-192-EN-C

ISBN 92-79-02561-9