JUDGMENT OF THE COURT
19 May 1998 *

In Case C-3/96,

Commission of the European Communities, represented by W. Wils, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by M. A. Fierstra and J. S. van den Oosterkamp, Deputy Legal Advisers in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

defendant,

supported by

Federal Republic of Germany, represented by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and S. Maass, Regierungsrätin in that ministry, acting as Agents, D-53107 Bonn,

intervener,

* Language of the case: Dutch.

APPLICATION for a declaration that, by failing sufficiently to designate special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), the Kingdom of the Netherlands has failed to comply with its obligations under that directive and Articles 5 and 189 of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents of Chambers), J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, G. Hirsch and P. Jann, Judges,

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 9 October 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 5 January 1996 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing sufficiently to designate special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April

1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, hereinafter 'the Directive'), the Kingdom of the Netherlands had failed to fulfil its obligations under that directive and Articles 5 and 189 of the EC Treaty.

2 By order of the President of the Court of 15 July 1996 the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the defendant State.

3 Article 2 of the Directive provides that Member States are to 'take the requisite measures to maintain the population of [all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies] 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'.

4 Article 3 of the Directive provides:

'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.'

Article 4(1) of the Directive reads as follows:

'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.'

6 Annex I to the Directive was replaced by the Annex to Commission Directive 85/411/EEC of 25 July 1985 amending Directive 79/409 (OJ 1985 L 233, p. 33).

7 Since it considered in particular that the Kingdom of the Netherlands had not classified a sufficient number of special protection areas (hereinafter 'SPAs') for the species of birds referred to in Annex I to the Directive, the Commission, on 25 September 1989, gave the Netherlands Government formal notice to submit its observations within two months.

8 By letter of 29 December 1989 the Netherlands Government denied the alleged infringement. It submitted essentially that it was not in breach of its obligations under Article 4(1) of the Directive, in that it had classified as SPAs a sufficient number of suitable territories for conservation of the species referred to in Annex I, taking into account the balance between the interests of conservation of protected species and economic and recreational interests, and that it had also introduced other instruments for the protection of birds.

9 Since those explanations did not cause it to alter its position on the alleged failure to fulfil obligations, the Commission sent the Netherlands Government on 14 June 1993 a reasoned opinion requiring the Kingdom of the Netherlands, within two months from notification of the opinion, to take the necessary action on the complaint of not having classified as SPAs sufficient territories to ensure effective protection of the species mentioned in Annex I to the Directive.

10 The Netherlands Government states that it replied to the reasoned opinion by letter of 1 December 1993. The Commission asserts, however, that it never received that reply.

Admissibility

11 The Kingdom of the Netherlands challenges the admissibility of the application on several grounds.

Failure to take account of reply by the Kingdom of the Netherlands to the reasoned opinion

12 The Netherlands Government submits that, by omitting to take account of its reply to the reasoned opinion, the Commission failed to respect its right to a fair hearing, so that the action is inadmissible.

13 The Commission replies that, even supposing it did receive that letter, the fact that its application to the Court does not take account of the Netherlands Government's reply to the reasoned opinion cannot constitute a ground of inadmissibility. The period set in the reasoned opinion serves merely to give the Member State to which it is addressed a last opportunity to conform with the Commission's point of view. Besides, the only new element in the letter, which was brought to its knowledge during the present proceedings, was the statement that three more territories had been classified as SPAs in the meantime. The Commission says that it did in fact take that into account in its application.

14 The Court points out that the procedure laid down in Article 169 of the Treaty comprises two consecutive stages, the pre-litigation or administrative stage and the contentious stage before the Court (see the order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 15).

15 Under the first paragraph of Article 169, '[i]f 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'.

16 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, within the period prescribed in that opinion (see *inter alia* Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraph 13, and Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 11).

17 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 (see the order in *Commission* v *Spain*, cited above, paragraph 17, and the judgment in Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 15).

18 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 (see Case 154/85 *Commission* v *Italy* [1987] ECR 2717, paragraph 6).

19 In the present case, it is not disputed that the reasoned opinion and the procedure leading up to it were properly conducted.

20 In those circumstances, even assuming that the contentious procedure was opened by a Commission application which took no account of any new matters of fact or law put forward by the Member State concerned in its reply to the reasoned opinion, that State's right to a fair hearing has not been infringed. It is fully open to the State to raise those matters in the contentious procedure, to begin with in its first pleading in defence. It will be for the Court to examine their relevance for the outcome of the action for failure to fulfil obligations.

21 The first plea of inadmissibility must therefore be rejected.

Nature of the obligation laid down in Article 4(1) of the Directive

22 The Netherlands Government submits, second, that the alleged infringement consists not of a single act or omission but rather of a group of infringements of an obligation to take individual classification decisions. In order to guarantee the right to a fair hearing, it is essential in law to establish infringements of Article 4(1) of the Directive territory by territory. The Government submits essentially that the Commission is complaining that it failed generally to fulfil its obligations under Article 4(1), without first having engaged in an exchange of views with it on the specific complaints on which the action is founded.

23 According to the Commission, the submission that infringements of Article 4(1) of the Directive can only be established territory by territory is incorrect. An infringement may equally well be established if it is apparent that a Member State has clearly classified as SPAs many fewer habitats than required by ornithological criteria.

24 As the Advocate General notes in point 14 of his Opinion, since this plea of inadmissibility concerns the proper interpretation of Article 4(1) of the Directive and goes to the substance of the Commission's complaints, it should be examined in connection with the merits of the present action.

New matters

25 The Netherlands Government submits, third, that it was at the stage of its application to the Court that the Commission raised for the first time the complaint concerning the insufficient total area and quality of the areas classified as SPAs, as well as the specific complaints concerning the failure to classify the Friesian IJsselmeer coast and the Hooge Platen on the Western Scheldt, so preventing the defendant State from reacting at the pre-litigation stage. The same is true as regards the complaint that freshwater lakes and marshes and moorland were classified as SPAs only to a very limited extent. Those complaints are therefore inadmissible.

26 The Netherlands Government further submits that the report listing important areas for birds in the Netherlands (*Review of Areas Important for Birds in the Netherlands*, December 1994, hereinafter 'IBA 94'), published after the reasoned opinion had been sent to it, is not to be taken into consideration in the present proceedings, as the Government was not able to comment on it in the pre-litigation procedure.

27 The Commission replies that the alleged new pleas are in fact merely examples or developments of the single plea which has been consistently relied on since the beginning of the procedure, namely that the Netherlands has not designated sufficient SPAs from the point of view of Article 4(1) of the Directive. In the Commission's contention, Article 4(1), by providing that Member States are to classify as SPAs the most suitable territories in number and size for the conservation of the

species mentioned in Annex I to the Directive, implies an obligation which is not only quantitative but also qualitative, in that the obligation of result under that provision means that each Member State must designate SPAs of sufficient number, area and variety to ensure the survival and reproduction of all the species of birds mentioned in Annex I which are on its territory.

28 The Commission also contends that it substantiated its allegations on the basis of an ornithological study published in 1989 (*Inventory of Important Bird Areas in the European Community*, July 1989, hereinafter 'IBA 89'), its reliance on IBA 94 being altogether redundant.

29 In so far as an application refers to complaints which were not the subject-matter of the pre-litigation procedure, it is inadmissible (see, to that effect, Case 298/86 *Commission* v *Belgium* [1988] ECR 4343, paragraph 10, and Case C-274/93 *Commission* v *Luxembourg* [1996] ECR I-2019, paragraph 11).

30 In the present case the Commission referred expressly, in both the letter of formal notice and the reasoned opinion, to the obligation of the Kingdom of the Netherlands to ensure that the number and size of classified areas in the Member States are in accordance with Article 4(1) of the Directive. The plea of inadmissibility must therefore be rejected, in so far as it concerns the complaint that the Kingdom of the Netherlands did not classify a sufficient total area of SPAs.

31 As to the Commission's complaint that the SPAs classified by the Kingdom of the Netherlands were qualitatively insufficient, and more specifically that freshwater lakes and marshes and moorland have been classified as SPAs only to a limited extent, it must be stated that while, in order to comply with Article 4(1), Member

States must classify as SPAs sufficient territories, in terms of quantity and quality, to ensure conservation of the species listed in Annex I, it does not follow that a complaint that a Member State has not classified sufficient SPAs from the point of view of that provision necessarily covers the qualitative aspect of the obligation in question.

32 It appears that in the course of the pre-litigation stage the Commission based its complaint against the Kingdom of the Netherlands on the alleged insufficient number and size of the territories classified as SPAs by that State, in other words a quantitative insufficiency. By contrast, the alleged qualitative insufficiency of the SPAs classified by that State was raised for the first time in the present case when the contentious procedure was initiated.

33 The action must therefore be declared inadmissible in this respect.

34 As to the references to the Friesian IJsselmeer coast and the Hooge Platen on the Western Scheldt, these do not constitute a separate new complaint inasmuch as they serve merely as examples to illustrate the alleged infringement and are taken from the list, annexed to the letter of formal notice and the reasoned opinion, of areas which the Commission considers suitable for classification as SPAs. Those references are therefore permissible, in that they do not require the Court to rule specifically on the question whether those two areas must be classified as SPAs.

35 As to the reference to IBA 94, it should be noted, first, that that report, which dates from December 1994, draws up a list of areas which must, according to the scientific criteria accepted by the Commission, be classified as SPAs in the Netherlands.

36 Second, 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 (see, in particular, Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 15).

37 There is nothing in the documents before the Court to show that IBA 94 relates to a period prior to the expiry of the time allowed to the defendant State to comply with the reasoned opinion of 14 June 1993. On any view, therefore, the present action is inadmissible in so far as it refers to IBA 94 in order to prove the existence of the alleged infringement of the Directive.

38 In those circumstances, the action must be declared admissible within the limits described above.

Substance

39 The Commission observes, to begin with, that it follows from Article 4(1) of the 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.

40 It states that, with respect to the Netherlands, 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.

41 The Commission points out that 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.

42 In any event, 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 of the Directive.

43 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.

44 According to the Commission, the obligation to classify is infringed if a Member State manifestly disregards the number and area of the territories listed in IBA 89. That is the case where a Member State designates as SPAs only less than half the sites listed by IBA 89, with respect to both the number of sites and their total area.

45 In the Commission's submission, 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*.

46 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) of the Directive 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.

47 The Netherlands Government next observes that the Member States have a margin of discretion in implementing Article 4(1) of the Directive. 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.

48 On this point, the Netherlands Government observes that the previous cases before the Court all related to whether a Member State should have classified a particular site as an SPA. In the present case, however, the Commission has not shown, let alone proved, that in implementing Article 4(1) the Kingdom of the Netherlands exceeded the limits of its discretion in any specific cases.

49 The Netherlands Government further contends that, 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 of the Directive.

50 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.

51 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) of the Directive and those which are designated as SPAs by the Member State concerned.

52 The Netherlands Government observes, moreover, that 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.

53 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.

54 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) of the Directive. 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.

55 It must first be observed that, contrary to the contention of the Kingdom of the Netherlands, Article 4(1) of the Directive 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.

56 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 (see Case C-334/89 *Commission* v *Italy* [1991] ECR I-93, paragraph 10).

57 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 of the Directive in respect in particular of the species listed in Annex I (see Case C-44/95 *R* v *Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraph 23), *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.

58 Besides, as the Advocate General points out in point 33 of his Opinion, 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) of the Directive, might not be achieved.

59 Second, it must be pointed out that the economic requirements mentioned in Article 2 of the Directive may not be taken into account when selecting an SPA and defining its boundaries (see *Royal Society for the Protection of Birds*, paragraph 27).

60 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 (see Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 26).

61 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.

62 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.

63 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) of the Directive.

64 Consequently, the Netherlands Government's argument that the Commission must establish, territory by territory, specific infringements of that provision cannot be accepted.

65 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.

66 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.

67 Moreover, throughout the pre-litigation procedure and also in its defence and rejoinder, it stressed that when designating SPAs it had, under Article 2 of the Directive, 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.

68 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.

69 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.

70 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.

71 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.

72 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) of the Directive cannot be regarded as satisfied.

73 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) of the Directive, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

Costs

74 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of the Netherlands has been essentially unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, Member States and institutions which intervene are to bear their own costs.

On those grounds,

THE COURT,

hereby:

1. **Declares that, by classifying as special protection areas territories whose number and total area are clearly smaller than the number and total area of the territories suitable for classification as special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;**

2. **Orders the Kingdom of the Netherlands to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Schintgen Moitinho de Almeida

Kapteyn Murray Edward

Hirsch Jann

Delivered in open court in Luxembourg on 19 May 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President