

JUDGMENT OF THE COURT (Fifth Chamber)

18 March 1999 ^{*}

In Case C-166/97,

Commission of the European Communities, represented initially by Richard B. Wainwright, Principal Legal Adviser, and Jean-Francis Pasquier, a national civil servant on secondment to its Legal Service, and subsequently by Richard B. Wainwright and Olivier Couvert-Castéra, a national civil servant on secondment to its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by Kareen Rispal-Bellanger, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Romain Nadal, Assistant Foreign Affairs Secretary in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

^{*} Language of the case: French.

APPLICATION for a declaration that, by taking neither the special conservation measures for the habitats of birds in the Seine estuary nor the appropriate steps to avoid deterioration of those habitats, the French Republic has failed to fulfil its obligations under Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1),

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann, C. Gulmann (Rapporteur), L. Sevón and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: D. Loutherman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 October 1998,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1998,

gives the following

Judgment

By application lodged at the Court Registry on 30 April 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by taking neither the special conservation measures for the habitats of birds in the Seine estuary nor the appropriate steps to avoid deterioration of those habitats, the French Republic has failed to fulfil its obligations under Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) (hereinafter the 'Wild Birds Directive').

Article 4 of the Wild Birds Directive provides:

'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.

3. ...

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.'

Article 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) (hereinafter 'the Habitats Directive'), provides that the obligations arising under Article 6(2), (3) and (4) thereof '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 recognised 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'.

Article 6(3) and (4) of the Habitats Directive provides:

'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.'

- 5 Article 23(1) of the Habitats Directive provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification. Since the directive was notified in June 1992, that period expired in June 1994.

- 6 On 23 December 1992, the Commission sent the French Government a formal letter in which it raised a complaint of failure to comply, *inter alia*, with the Wild Birds Directive in relation to the Seine estuary. In that letter the Commission expressed the view that the special protection area (hereinafter 'SPA') created in 1990 was too small to satisfy ornithological requirements and that the protection regime for that SPA, as defined by an agreement entered into on 11 April 1985 by the Ministry of the Environment with the Autonomous Ports of Le Havre and Rouen (hereinafter 'the Agreement'), was inadequate. The Commission also stated that the construction of a plant for the deposit of titanogypsum adjacent to the SPA was incompatible with the Wild Birds Directive.

- 7 Whilst acknowledging the great biological importance of the Seine estuary, the French Government replied, on 18 November 1993, that it regarded the existing protection regime as being adequate to guarantee compliance with the commitment it had entered into, on creating the SPA, to preserve bird habitats. It denied that the deposit of titanogypsum could constitute an infringement of the Wild Birds Directive, since it was located outside the SPA.

8 The Commission found those explanations inadequate and, on 3 July 1995, sent the French Republic a reasoned opinion in which it stated that, by taking neither the special conservation measures for the bird habitats in the Seine estuary nor the appropriate steps to avoid deterioration of those habitats, that Member State had failed to fulfil its obligations under Article 4 of the Wild Birds Directive. It requested the French Republic to adopt the necessary measures to comply with the reasoned opinion within two months of its notification.

9 By letter of 19 October 1995, the French Government replied that the Agreement was merely a transitional measure; it was therefore intended, as a first step, to adopt a decree creating a nature reserve, which would swiftly ensure permanent 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.

The substance of the case

10 The Commission complains, first, that the French Republic failed to classify a sufficiently large SPA in the Seine estuary and, secondly, that it failed to adopt for the SPA classified in 1990 a legal regime that would enable the conservation objectives pursued by the Wild Birds Directive to be attained and, thirdly, that it failed to take the appropriate steps to avoid deterioration of the Seine estuary by allowing a titanogypsum plant to be built there jeopardising the birds' habitat in the estuary.

The extent of the SPA

- 11 The Commission states that 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 Wild 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 Wild 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 importante 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.
- 12 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.
- 13 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 (see, *inter alia*, Case C-259/94 *Commission v Greece* [1995] ECR I-1947, at paragraph 5 and Case C-214/96 *Commission v Spain* [1998] ECR I-7661, at paragraph 18).

14 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 Wild Birds Directive.

15 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 Wild Birds Directive. Consequently, as regards this point, the Commission's application must be allowed.

The legal protection regime of the SPA created in 1990

16 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. More specifically, 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 Wild Birds Directive. Moreover, no other measure designed to provide the SPA with an adequate legal protection regime has been adopted.

17 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 Wild Birds Directive. The SPA thus enjoys the benefit of a diversified and effective protection regime.

- 18 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 (see, in particular, Case C-60/96 *Commission v France* [1997] ECR I-3827, at paragraph 15 and Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031, at paragraph 36).
- 19 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.
- 20 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 Wild Birds Directive.
- 21 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 Wild 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 (see, to this effect, Case C-355/90 *Commission v Spain* [1993] ECR I-4221, at paragraphs 28 to 32).

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 Wild 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 Wild Birds Directive.

It is not disputed that, as the Commission has pointed out, the Brotonne Nature Reserve mentioned in paragraph 17 of this judgment 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 Wild Birds Directive.

- 26 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 Wild Birds Directive. The Commission's application must therefore be allowed on this point also.

The titanogypsum plant at Le Hode

- 27 The Commission states that this plant, its appurtenances, and the access road to the site, were built in wet prairies within the ZICO mentioned in paragraph 11 of this judgment which are very important for the staging, feeding and breeding of numerous endangered and migratory species of wild birds. The Commission maintains that these lands should therefore have been included within the Seine estuary SPA in accordance with Article 4(1) and (2) of the Wild Birds Directive, and that the harm occasioned by the abovementioned constructions, taken as a whole, is incompatible with the conservation requirements set out in the first sentence of Article 4(4) of that directive.

- 28 The Commission submits that, even assuming that the effects produced by those constructions cannot be assessed by reference to that provision because they are situated outside the SPA, the French Republic should nevertheless be held to have failed to fulfil its obligations under the second sentence of Article 4(4) of the Wild Birds Directive. That provision requires Member States to take all reasonable steps to avoid irreparable deterioration so that the site can later be classified as an SPA, and to respect the conservation objectives for the site arising from Article 4. The French Republic ought therefore to have chosen the site which would have

given rise to the least harm from the point of view of the conservation objectives for the SPA, that is to say, the area to the west of the wet prairies, which is of no ornithological interest.

In addition, the Commission states that no assessment of the titanogypsum plant's implications for the SPA was carried out in accordance with Article 6(3) of the Habitats Directive. Nor could the plant be justified for imperative reasons of overriding public interest under Article 6(4) of that directive. In the present case, the requisite conditions for applying that provision are lacking because there is no overriding public interest, there are no compensatory measures, and there are alternative solutions.

The French Government points out, first, that the titanogypsum plant construction project was the subject of two impact studies carried out in 1991 and 1993, the second of which found that there would be no significant deterioration in the habitat of the species concerned. This was confirmed by an independent assessor following a public inquiry into the operation of the plant, conducted in December 1994 and January 1995.

What is more, the mere fact that the site of the titanogypsum plant was included in one of the ZICOs registered by the French authorities does not imply any obligation to classify it as an SPA. The lands classified as ZICOs are not, according to the French Government, all of the same ornithological value for the purposes of the obligations under the Wild Birds Directive. Thus, it is clear from the study carried out by the Regional Environmental Department ('Direction Régionale de l'Environnement', hereinafter 'DIREN') that the site chosen for the construction of the plant was not amongst the most important sites in the Seine estuary as

regards the preservation of biodiversity. The French Government points out that, in any case, the Commission has not adduced any scientific evidence to show that the site should have been classified as an SPA.

- 32 The French Government also claims that the storage of synthetic gypsum at the plant at Le Hode does not contravene the conservation requirements of Article 4 of the Wild Birds Directive because the product is not eco-toxic, its storage up to a height of 25 metres is not such as to disturb the migratory behaviour of birds, the discharges into the Seine are not very pollutant and the commissioning of the plant has caused the volume of road traffic to increase by only 2.3%.
- 33 Lastly, the French Government states that significant measures have been adopted to avoid any deterioration of habitats or of species on the site.
- 34 As regards the alleged infringement of Article 6(3) and (4) of the Habitats Directive, it should be pointed out that, as has been observed in paragraph 3 of this judgment, the obligations set out in those provisions replace, as from a specified date, those set out in the first sentence of Article 4(4) of the Wild Birds Directive.
- 35 The documents before the Court show that work on the construction of the plant started before the Habitats Directive was adopted.
- 36 Even assuming that, in applying to the Court for a declaration that the French Republic has failed to fulfil its obligations under Article 4 of the Wild Birds Directive, the Commission was also referring to Article 6(3) and (4) of the Habitats Directive, it would be necessary, in order to define the extent of that complaint,

to determine with precision the date from which, according to the Commission, the conduct of the French authorities has contravened the obligations arising under Article 6(3) and (4) of the Habitats Directive.

37 Since the application contains no particulars on this point, the complaint alleging infringement of Article 6(3) and (4) of the Habitats Directive must be rejected.

38 As regards the alleged infringement of the first sentence of Article 4(4) of the original version of the Wild Birds Directive, it is clear from the case-law of the Court that Member States must comply with the obligations arising *inter alia* under that provision, even where the area in question has not been classified as an SPA, provided that it should have been so classified (see *Commission v Spain*, cited above, at paragraph 22).

39 It follows that any infringement of the first sentence of Article 4(4) of the Wild Birds Directive presupposes that the area in question is one of 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).

40 It is settled case-law that, in proceedings under Article 169 of the Treaty for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information necessary to enable it to determine whether the obligation has been fulfilled (see, *inter alia*, Case 96/81 *Commission v Netherlands* [1982] ECR 1791, at paragraph 6 and Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, at paragraph 59).

- 41 It is appropriate, therefore, first to consider whether the Commission has furnished proof that the site where the plant and its appurtenances are situated satisfies the requirement specified in paragraph 39 of this judgment.
- 42 Clearly, the mere fact that the site in question was included in the inventory of ZICOs does not prove that it ought to have been classified as an SPA. The French Government has stated, without being contradicted by the Commission, that that inventory is no more than an initial survey of the country's ornithological wealth and covers areas in which there is a wide variety of environments and, in some cases, a human presence and not all of which are of an ornithological interest such as to require that they be regarded as the most suitable territories in number and size for the conservation of birds.
- 43 As for the Commission's argument that the site in question is comprised of wet prairies which are very important for the staging, feeding and breeding of numerous protected species, it is clear from the documents before the Court that the plant is situated in a preferred nesting or feeding area of a number of the species listed in Annex I to the Wild Birds Directive. However, the site in question covers only a small part of that nesting and feeding area.
- 44 According to the study by the Museum of Natural History cited by the French Government, on which the impact study carried out in 1993 was based and whose conclusions the Commission has not disputed, none of the rarest species in the region would suffer directly from the titanogypsum treatment project, notwithstanding the fact that the loss of 35 hectares signifies a real loss of habitat for the wild birds that used to breed there.

- 45 Admittedly, a study published by the DIREN in April 1995 concluded that the part of the estuary dealt with in the study would have merited classification as a nature reserve, particularly in view of its importance for bird wildlife.
- 46 However, even though it was published after the titanogypsum treatment plant had been completed and though it covered the site of the plant, the DIREN study did not specifically deal with that site.
- 47 In the light of the evidence considered as a whole, therefore, it does not appear that the Commission has proved to the requisite legal standard that the site in question is one of the most suitable territories for the conservation of the protected species.
- 48 As to the alleged infringement of the second sentence of Article 4(4) of the Wild Birds Directive, it should be observed that the Commission has not shown that the French Republic did not endeavour to avoid pollution or deterioration of the habitat where the titanogypsum treatment plant was constructed.
- 49 As regards pollution, the Commission has acknowledged that the plant has not had any significant impact on the environment. As regards deterioration of the habitat, the French Government had already stated, during the pre-litigation procedure, that the site for the plant had been chosen after careful examination of a number of potential sites for the storage of titanogypsum and lengthy discussion of those sites with interested parties in the localities concerned, in particular persons engaged in the protection of birds. The Commission has confined itself to claiming that the French Republic ought to have chosen for the plant in question the site which would have given rise to the least harm from the point of view of the conservation objectives of the SPA, that is to say, the area to the west of the wet prairies,

which is of no ornithological interest. Moreover, it should be observed that the complaint in the application which relates to the second sentence of Article 4(4) of the Wild Birds Directive was not pursued and examined by the Commission in the further course of the proceedings before the Court.

50 It follows that the complaint alleging infringement of Article 4(4) of the Wild Birds Directive must be rejected.

51 In light of the foregoing, it must be held that, by failing to classify as an SPA a sufficiently large area of the Seine estuary and by failing to adopt measures to provide the SPA with an adequate legal regime, the French Republic has failed to fulfil its obligations under Article 4(1) and (2) of the Wild Birds Directive.

52 The remainder of the application must be dismissed.

Costs

53 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under the first subparagraph of Article 69(3), the Court may order that the costs be shared or that the parties bear their own costs if the parties are successful on some heads and unsuccessful on others. Since the Commission has been only partially successful, the parties should be ordered to bear their own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by failing to classify as a special protection area a sufficiently large area of the Seine estuary and by failing to adopt measures to provide the classified special protection area with an adequate legal regime, the French Republic has failed to fulfil its obligations under Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;
2. Dismisses the remainder of the application;
3. Orders the parties to bear their own costs.

Puissochet

Jann

Gulmann

Sevón

Wathelet

Delivered in open court in Luxembourg on 18 March 1999.

R. Grass

J.-P. Puissochet

Registrar

President of the Fifth Chamber