

JUDGMENT OF THE COURT (Second Chamber)

8 June 2006 ^{*}

In Case C-60/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 14 December 2004, received at the Court on 10 February 2005, in the proceedings

WWF Italia and Others

v

Regione Lombardia,

intervening parties:

Associazione migratoristi italiani (ANUU),

THE COURT (Second Chamber)

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, R. Silva de Lapuerta (Rapporteur), P. Küris and J. Klučka, Judges,

^{*} Language of the case: Italian.

Advocate General: L.A. Geelhoed,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 15 December 2005,

after considering the observations submitted on behalf of:

- WWF Italia and the Lega per l'abolizione della caccia (LAC), by C. Linzola, avvocato,
- the Regione Lombardia, by P.D. Vivone and S. Gallonetto, avvocati,
- the Associazione migratoristi italiani (ANUU), by I. Gorlani and S.A. Pappas, avvocati,
- the Italian Government, by I.M. Braguglia, acting as Agent, and by A. Cingolo, avvocato dello Stato,
- the Commission of the European Communities, by M. van Beek and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2006,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 9 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) ('the Directive').
- 2 The reference was made in proceedings between WWF Italia and three other associations in the Regione Lombardia (Region of Lombardy) concerning the hunting of the finch (*Fringilla coelebs*) and brambling (*Fringilla montifringilla*) species for the 2003/04 hunting season.

Relevant provisions

Community law

- 3 Article 1 of the Directive provides that it covers the protection, management and control of all species of naturally occurring birds in the wild state and lays down rules for their exploitation.

4 For that purpose, the Directive requires the Member States to establish a general system of protection prohibiting, in particular, killing, capture or disturbance of the birds referred to in Article 1 and destruction of their nests.

5 Article 9 of the Directive authorises, however, certain derogations as follows:

'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 repopulation, 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 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.

...'

National law

- 6 Article 9 of the Directive was transposed into Italian law by Article 19 *bis* of Law No 157 of 11 February 1992 on wild homoiothermic fauna and hunting ([legge 11 febbraio 1992, n. 157], Norme per la protezione della fauna selvatica omeoterma e per il prelievo venatorio, Ordinary Supplement to GURI No 46 of 25 February 1992), as amended by Law No 221 of 3 October 2002 (GURI No 239 of 11 October 2002) ('Law No 157/92'), which provides:

'1. The regions shall regulate the exercise of the derogations provided for by [the] Directive ... in a manner consistent with the requirements of Article 9, the principles and objectives of Articles 1 and 2 of that directive and with the provisions of this law.

2. Derogations, in the absence of any other satisfactory solution, may be granted only for the purposes referred to in Article 9(1) of [the] Directive ... and must specify the species covered by them, the means, arrangements and methods authorised for hunting, the conditions of risk and the circumstances of time and place of the hunting, the number of animals which may be hunted per day and over the entire period, the controls and forms of supervision to which the hunting is subject and the bodies responsible for the same, without prejudice to Article 27(2). The persons authorised to hunt by way of derogation shall be designated by the regions, in agreement with the territorial hunting clubs ... and the Alpine areas.

3. The derogations referred to in paragraph 1 shall be valid for specified periods, following the opinion of the Istituto nazionale per la fauna selvatica [National Institute for Wild Fauna] (INFS) or institutions recognised at regional level, and may under no circumstances relate to species the numbers of which are in serious decline.

4. On a proposal by the Minister for Regional Affairs, in consultation with the Minister for the Environment and Town and Country Planning and following discussion in the Council of Ministers, the President of the Council of Ministers may, after giving the region concerned formal notice, annul the derogations adopted by the latter in breach of the provisions of this law and of [the] Directive

5. Each region shall submit, by 30 June of each year, a report on the application of the derogations referred to in this article to the President of the Council of Ministers, or where appropriate to the Minister for Regional Affairs, the Minister for the Environment and Town and Country Planning, the Minister for Agricultural and Forestry Policy, the Minister for Community Policy and the [INFS]; that report shall also be submitted to the competent parliamentary committees. Each year the Minister for the Environment and Town and Country Planning shall submit the report referred to in Article 9(3) of [the] Directive ... to the Commission of the European Communities ...'

7 The Regione Lombardia adopted Regional Law No 18 of 2 August 2002 ('Regional Law No 18/02') on the basis of Article 19 *bis* of Law No 157/92. Article 2(2) of that regional law authorises the hunting of the finch and brambling species.

8 Article 4 of that law provides that the president of the Giunta regionale della Lombardia (Regional Council of Lombardy), after hearing the INFS, is to adopt measures restricting or suspending the hunting authorised by that law should a deterioration become apparent in the population which is covered by the hunting derogation referred to in the aforementioned Article 2.

The main proceedings and the questions referred for a preliminary ruling

- 9 By their action before the national court, the applicants in the main proceedings seek to obtain annulment, following suspension of its effects, of Decision No 14250 of the Giunta regionale della Lombardia of 15 September 2003 concerning the hunting of certain numbers of wild birds belonging to the finch and brambling species during the 2003/04 hunting season. That decision was adopted on the basis of Article 2(2) of Regional Law No 18/02.
- 10 In two memoranda dated 14 May and 24 June 2003, the INFS took the view that the maximum quota which may be hunted in the entire territory of Italy for the 2003/04 hunting season was 1 500 000 specimens of the finch species and 52 000 specimens of the brambling species.
- 11 A number of Italian regions then allocated the quotas of the species which may be hunted. Accordingly, on the basis of the agreements which were reached, the Regione Lombardia was allocated a hunting quota of 360 000 finches and 32 000 bramblings.
- 12 Before the national court, the applicants submitted that the authorisation for the hunting derogation granted by the Regione Lombardia was unlawful, substantiating their claim with the following considerations:
 - that authorisation provides that specimens of the species concerned may be used as decoys although they are both protected species;

— it is the result of the allocation between only five regions of a maximum quota laid down by the INFS at national level;

— the controls required by Article 9 of the Directive to ensure compliance with the maximum hunting quotas were not stipulated.

13 The applicants in the main proceedings also claimed that Article 19 *bis* of Law No 157/92 is contrary to the Directive in so far as it confers on the regions the power to regulate the application of the derogations provided for in the Directive without establishing the manner in which the maximum quota of specimens which may be hunted in the entire national territory is to be set and enforced.

14 The defendant in the main proceedings stated, for its part, that Article 19 *bis* of Law No 157/92 confers on the regions responsibility for regulating hunting by way of derogation from the system of protection established by the Directive after obtaining the compulsory non-binding opinion of the INFS or of other institutions recognised at regional level.

15 The Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) doubts that Article 19 *bis* of Law No 157/92 ensures the effective application of Article 9(1)(c) of the Directive. It observes that that provision makes determination of the maximum quota of specimens which may be hunted subject to the non-binding, but compulsory, opinion of the INFS or other institutions recognised at regional level, without providing for a system capable of setting that quota in a binding manner for the entire national territory or for any suitable machinery for determining the allocation between the regions of the national quota which may be hunted. Finally, that court takes the view that on account of the length

of the procedure it entails, the system for verifying the compatibility of regional measures with national and Community rules does not fulfil the requirement of celerity associated with the need to avoid unlawful hunting during the brief period (about 40 days) in which the derogation applies.

- 16 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is [the] Directive ... to be interpreted as meaning that, irrespective of the internal allocation of powers between the State and the regions laid down by national systems, the Member States must prepare implementing provisions governing all situations considered deserving of protection by the same, in particular as regards ensuring that hunting derogations do not exceed the small numbers laid down in Article 9(1)(c)?

(2) As regards in particular the numbers covered by hunting derogations, should [the] Directive ... be interpreted as meaning that the national implementing provision must refer to a criterion which is determined or can be determined, and even entrusted to qualified technical bodies, so that the exercise of hunting derogations is governed by criteria objectively establishing a quantitative level which may not be exceeded at national or regional level, having regard to the various environmental conditions which may prevail?

(3) Does the national provision in Article 19 *bis* of Law No 157/92, by requiring the obligatory, but non-binding, opinion of the INFS to determine that criterion without, however, providing for a process for reaching agreement between the

regions on the binding determination of the distribution for each species of the numerical limits of hunting derogations set at national level as small numbers, constitute a proper application of Article 9 of [the] Directive ...?

- (4) Is the procedure for verifying the compatibility with Community provisions of the hunting derogations authorised by the Italian regions under Article 19 *bis* of Law No 157/92, preceded by a period of notice and therefore requiring fixed periods of time, which are also necessary for the adoption and publication of the measure, during which the brief period of hunting derogations itself may expire, suitable for ensuring effective application of [the] Directive ...?

Admissibility of the questions referred for a preliminary ruling

- ¹⁷ The Regione Lombardia and the Associazione migratoristi italiani (ANUU) challenge the admissibility of the questions referred for a preliminary ruling on the ground that the national court asked the Court, *inter alia*, to rule on the relevance and lawfulness of the allocation of powers within the Italian Republic. Moreover, the questions referred by that court concern the compatibility of national provisions with Article 9 of the Directive.

- ¹⁸ In that regard, it must be borne in mind that, in accordance with settled case-law, although in a reference for a preliminary ruling the Court cannot give a ruling either on questions which fall within the national law of the Member States or on the

compatibility of national provisions with Community law, it can, however, supply a ruling on the interpretation of Community law so as to enable the national court to decide the case before it (see, inter alia, Case C-150/88 *Parfümerie-Fabrik 4711* [1989] ECR I-3891, paragraph 12, and Case C-124/99 *Borawitz* [2000] ECR I-7293, paragraph 17).

- 19 The matter would admittedly be different if it were apparent that the provision of Community law referred to the Court for interpretation was incapable of applying (see, inter alia, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 40). That is, however, not the case.
- 20 It is apparent from the wording of the questions referred for a preliminary ruling and the grounds of the decision making the reference that the national court is seeking an interpretation of Article 9(1)(c) of the Directive as regards the conditions for the exercise by the Member States of the derogations for which that provision provides. That court seeks in particular clarification on the scope of that provision in the light of its application in a decentralised State structure.
- 21 As appears also from the decision making the reference, that interpretation of Article 9(1)(c) of the Directive is likely to provide the national court with the information necessary for it to be able to rule on the main proceedings.
- 22 In those circumstances, the reference for a preliminary ruling must be regarded as admissible.

The questions referred for a preliminary ruling*The first question*

- 23 By that question, the national court seeks to ascertain, essentially, whether the national provisions transposing the Directive must govern all the situations subject to the system of protection laid down by that directive, in particular the condition in Article 9(1)(c) thereof that any hunting derogations must be restricted to 'small numbers' of birds.
- 24 In that respect, it should be noted, first, that the Court has held that the criteria on the basis of which the Member States may derogate from the prohibitions laid down by the Directive must be set out in national provisions which are sufficiently clear and precise, given that a faithful transposition becomes particularly important in a case in which the management of the common heritage is entrusted to the Member States in respect of their respective territories (see to that effect, *inter alia*, Case 247/85 *Commission v Belgium* [1987] ECR 3029, paragraph 9, and Case 252/85 *Commission v France* [1988] ECR 2243, paragraph 5).
- 25 It is also important to note that, in exercising their powers concerning the grant of derogations, in accordance with Article 9 of the Directive the authorities of the Member States must take account of various criteria which relate to geographic, climatic, environmental and biological factors and, in particular, to the situation regarding the species' reproduction and total annual mortality rate owing to natural causes.

- 26 As to those criteria, the Court pointed out in Case C-79/03 *Commission v Spain* [2004] ECR I-11619, paragraph 36, and Case C-344/03 *Commission v Finland* [2005] ECR I-11033, paragraph 53, that, according to the document entitled 'Second report [of the Commission] on the application of Directive 79/409/EEC on the conservation of wild birds' of 24 November 1993 (COM(93) 572 final), 'small numbers' are 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. The Court stated in that regard that those quantities are based on the work of the ORNIS Committee for the Adaptation to Technical and Scientific Progress under the Directive, instituted under Article 16 of the latter and consisting of representatives of the Member States.
- 27 It is also clear from the judgments cited above in *Commission v Spain*, paragraph 41, and *Commission v Finland*, paragraph 54, that although the percentages referred to above are not legally binding, they can none the less constitute, by reason of the scientific value of the work of the ORNIS Committee and the absence before the Court of any element of scientific proof to the contrary, a basis of reference for assessing whether a derogation granted under Article 9(1)(c) of the Directive complies with that provision (see by analogy, in respect of the relevance of scientific data in the field of ornithology, Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031, paragraphs 69 and 70, and Case C-374/98 *Commission v France* [2000] ECR I-10799, paragraph 25).
- 28 It follows that, irrespective of the internal allocation of powers prescribed by the national legal system, the Member States are required to provide for a legislative and regulatory framework ensuring that the hunting of birds is carried out only in compliance with the condition relating to 'small numbers' laid down in Article 9(1)(c) of the Directive, and on the basis of strict scientific data, irrespective of the species concerned.

- 29 The answer to the first question must therefore be that Article 9(1)(c) of the Directive 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.

The second question

- 30 By that question, the national court is uncertain, essentially, about the level of precision which must characterise national implementing provisions in respect of the technical criteria on the basis of which a quota corresponding to ‘small numbers’ of birds may be fixed under Article 9(1)(c) of the Directive.
- 31 It should be noted that the 11th recital in the preamble to the Directive states that the condition relating to ‘small numbers’ to which authorised hunting derogations must be restricted cannot be determined by reference to an absolute criterion but must be related to the population level of the species concerned and its annual reproduction and mortality rates.
- 32 In that respect, the Court has stated that derogations under Article 9 of the Directive may be granted only if it is ensured that the population of the species concerned is maintained at a satisfactory level. If that condition is not fulfilled, hunting of birds cannot, in any event, be considered judicious and, accordingly, acceptable for the purposes of the 11th recital in the preamble to the Directive (see, to that effect, Case C-182/02 *Ligue pour la protection des oiseaux and Others* [2003] ECR I-12105, paragraph 17).

- 33 In those circumstances, and in order to permit the competent authorities to resort to the derogations laid down in Article 9 of the Directive only in a manner which complies with Community law, the national legislative and regulatory framework must be designed in such a way that the application of the derogating provisions set out there is consonant with the principle of legal certainty.
- 34 As is apparent from Case C-118/94 *Associazione italiana per il WWF and Others* [1996] ECR I-1223, paragraphs 23, 25 and 26, the relevant national legislation applicable must specify the criteria for the derogation in a clear and precise manner and require the authorities responsible for applying them to take account of those criteria. In respect of exceptional arrangements, which must be interpreted strictly and impose on the authority taking the decision the burden of proving that those conditions are present for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of the Directive.
- 35 Furthermore, according to the decision making the reference there are significant variations in numbers between the various bird populations, so that any decision derogating from the system of protection required by the Directive must take account of the situation of the species at issue.
- 36 The answer to the second question must therefore be that national implementing provisions concerning the 'small numbers' referred to in Article 9(1)(c) of the Directive 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.

The third question

- 37 By that question, the national court seeks an interpretation of Article 9(1)(c) of the Directive concerning the question as to how the competent authorities of the Member States are to ensure that, upon application of that provision, the maximum number of birds of a given species which may be hunted is not exceeded in the entire national territory. In particular, the national court seeks to ascertain whether that provision must be interpreted as meaning that it gives rise to an obligation to set up consultation between the entities within a State which are responsible for granting authorisations for hunting derogations so that allocation of the number of birds which may be hunted for all those entities can be fixed in a binding manner.
- 38 In that respect, it should be borne in mind that the Court has held that, in the field of 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 (see, *inter alia*, Case C-339/87 *Commission v Netherlands* [1990] ECR I-851, paragraph 28).
- 39 It follows, moreover, from Case C-157/89 *Commission v Italy* [1991] ECR I-57, paragraphs 16 and 17, that a situation in which national provisions implementing the Directive do not ensure that the authorities within a State which are responsible for applying them are required to take account of those criteria would be contrary to the principle of legal certainty.
- 40 Accordingly, where the application of Article 9(1)(c) of the Directive is delegated to entities within a State, the applicable legislative and regulatory framework must

ensure that the amount of hunting of birds which may be authorised by those entities remains, for the entire national territory, within the limit of 'small numbers' imposed by that provision.

- 41 In the light of the foregoing considerations, the answer to the third question must be that, upon implementation of Article 9(1)(c) of the Directive, 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 fourth question

- 42 By that question, the national court raises the question of the possible requirement of maximum time periods within which administrative decisions related to the control of hunting derogations and compliance with their conditions should be taken. In particular, that court seeks to ascertain whether Article 9(1)(c) of the Directive must be interpreted as precluding a control procedure for authorisations of hunting derogations in respect of birds which includes a preliminary notice stage and requires fixed periods of time during which the brief period in which that hunting is authorised may expire.
- 43 In that respect, it should be observed that the Court has held, in paragraph 28 of Case 252/85 *Commission v France*, that national implementing legislation must guarantee that the hunting of birds is carried out on a strictly controlled and selective basis. That means that effective controls are exercised during the periods referred to by the decisions derogating from the system of protection laid down by the Directive.

- 44 It follows that the relevant national procedural framework applicable must guarantee not only that the lawfulness of decisions granting authorisations derogating from the system of protection laid down by the Directive may be verified in a timely manner but also that the conditions attached to those decisions are complied with.
- 45 However, a control mechanism under which annulment of a decision authorising a hunting derogation adopted in breach of Article 9 of the Directive or declaration of a breach of the conditions attached to a decision authorising such hunting would take effect only on expiry of the period laid down for carrying out that hunting would render redundant the system of protection established by the Directive.
- 46 As the Advocate General rightly observed in point 62 of his Opinion, the power to intervene in a timely and effective manner in situations in which decisions of the competent authorities lead or threaten to lead to a result inconsistent with the protection requirements of the Directive may be deduced from the guarantee concerning compliance with the maximum numbers of birds which may be hunted under the system of derogation established by Article 9(1)(c) of the Directive.
- 47 The answer to the fourth question must therefore be that 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 the Directive, 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.

Costs

- ⁴⁸ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. 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.
2. 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.

3. **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.**

4. **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.**

[Signatures]