

JUDGMENT OF THE COURT
17 January 1991 *

In Case C-157/89

Commission of the European Communities, represented by Eugenio de March and Thomas Van Rijn, members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Ivo Braguglia, Avvocato dello Stato, acting as Agent, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by authorizing the hunting of various species of birds during the rearing season and during the various stages of reproduction and the hunting of various migratory species during their return to their rearing grounds, the Italian Republic has failed to fulfil its obligations under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Official Journal, L 103, p. 1),

* Language of the case: Italian.

THE COURT

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet and F. A. Schockweiler, Judges,

Advocate General: W. Van Gerven

Registrar: H.-A. Rühl, Principal Administrator,

having regard to the Report for the Hearing and further to the hearing on 11 October 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 November 1990,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 2 May 1989, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, by authorizing the hunting of various species of birds during the rearing season and during the various stages of reproduction and the hunting of various migratory species during their return to their rearing grounds, the Italian Republic has failed to fulfil its obligations under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Official Journal, L 103, p. 1).
- 2 The Commission maintains that the Italian legislation on hunting is incompatible with the second and third sentences of Article 7(4) of the Directive in so far as that legislation authorizes, first, the hunting of certain birds as from 18 August, even though the species concerned are still at the stage of reproduction and rearing at that date, and, secondly, the hunting of certain migratory birds until 28 February or 10 March, depending on the species, even though at those dates birds of the

species in question are already flying over Italy on their way back to their rearing grounds.

- 3 The Commission refers in support of its allegations to a number of scientific publications, and in particular to Cramps & Simmons, *Handbook of the Birds of Europe, the Middle East and North America*, and to a report concerning the spring migration of birds which was drawn up by the Istituto Nazionale di Biologia della Selvaggina (Bologna).
- 4 Reference is made to the Report for the Hearing for the relevant legislation and the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

- 5 The Italian Government considers that the complaints set out in the application have already been rejected by the Court in the judgment of 8 July 1987 in Case 262/85 *Commission v Italian Republic* [1987] ECR 3073, with the result that they may not be raised for a second time.
- 6 In response the Commission argues that in this case it is not seeking a declaration that, in fixing the dates for the opening of the hunting season, the Italian legislation did not take account of the various periods mentioned in Article 7(4) of the Directive during which birds must be protected, but a declaration that the dates chosen by the Italian Government for the various hunting seasons do not comply with the requirements of that provision. In Case 262/85, the Commission raised that complaint in the reply. Consequently it was dismissed by the Court simply because it had not been raised during the pre-litigation procedure or in the application.
- 7 The Italian Government's objection cannot be upheld. It appears from the aforementioned judgment that the complaint concerning the need to prohibit hunting during certain periods was disregarded in that case on procedural grounds. Accordingly, the Court did not rule on whether that complaint was well-founded.

Substance

- 8 The Italian Government argues in the first place that the Italian legislation complies with the requirements laid down in the second and third sentences of Article 7(4) of the Directive, since, on the one hand, most fledglings of the species in question normally have become independent of their parents by 18 August and, in the second place, depending on the species, the migratory birds in question normally do not fly over Italy in substantial numbers before 28 February or 10 March.
- 9 The Italian Government also maintains that the reference works cited by the Commission are general and do not take account of the special features of the situation in Italy. In its view, the Commission has not proved the relevance of the ornithological data given therein as far as the species referred to in the application are concerned.
- 10 Lastly, the Italian Government points out that 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.

Questions relating to matters of principle

- 11 The Italian Government's argument accordingly raises three questions relating to matters of principle: the scope of the second and third sentences of Article 7(4) of the Directive, the nature of the scientific information which is satisfactory evidence as regards wild birds, and the question as to the extent to which the transposition of the aforementioned provision into national law may be ensured by the regional authorities of a Member State.
- 12 As far as the first question is concerned, that is to say the interpretation of the second and third sentences of Article 7(4) of the Directive, it appears from the documents before the Court that 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. Thus, 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. Likewise, 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.

- 13 The question is therefore whether a Member State may authorize hunting to take place as from the time when the majority of the young birds of a given species is no longer dependent on the parent birds for food and so long as most birds of a given migratory species are not yet flying over the territory of that Member State towards their rearing grounds, or whether the national legislature has to add to the habitual reproduction and breeding period and to the migration period an additional period designed to take account of the variations mentioned above.
- 14 In this connexion, it must be pointed out that the second and third sentences of Article 7(4) of the Directive are designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat. Consequently, 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 characterized 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.
- 15 As far as the second question is concerned, that is to say the nature of the evidence to be adduced in this field and the relevance of the scientific publications cited by the Commission, it is common ground that the reference works in question are authoritative in the field of wild birds. As for the Italian Government's argument to the effect that the data submitted by the Commission do not relate specifically to the situation in Italy, it must be observed that where is no specific literature available relating to the territory of the Member State concerned the Commission may refer to ornithological works dealing with a general area of distribution which includes that Member State. Moreover, the Italian Government has not produced alternative scientific studies in order to challenge the data provided by the Commission.

- 16 As for the third question, which is concerned with whether the Directive may be regarded as having been implemented because it is open to the Italian regions to derogate from the hunting seasons laid down by the national legislation and, subject to certain conditions, to prohibit or restrict hunting, it must be 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.
- 17 Indeed, as appears from the Court's judgments of 8 July 1987 in Case 247/85 *Commission v Belgium* [1987] ECR 3029 and in Case 262/85 *Commission v Italy* [1987] ECR 3073, 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.

The complaint relating to the opening of the hunting season for four species as from 18 August

- 18 The Commission maintains that the national provisions authorizing the hunting of the coot, the moorhen, the mallard and the blackbird as from 18 August are incompatible with the second sentence of Article 7(4) of the Directive, on the ground that the reproduction and rearing period for those species has not yet finished on that date.
- 19 It must be held that, 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.
- 20 It appears from the foregoing that, except as regards the blackbird, the Commission's first complaint must be upheld.

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

- 21 Secondly, the Commission considers that the national provisions authorizing 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) of the Directive.
- 22 For its part, the Italian Government argues that 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.
- 23 It is sufficient to observe that 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.
- 24 It must be observed that, 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.
- 25 As for the various species, it must however be held that non-compliance with the Directive has not been made out sufficiently as regards two of them, namely the redshank and the curlew, since it is stated in the aforementioned report that the

redshank does not cross Italian territory until the first half of March and that the curlew crosses Italian territory in late March/early April.

- 26 It follows from the foregoing that, except as regards the redshank and the curlew, the Commission's second complaint must be upheld.
- 27 It must therefore be held that, by authorizing the hunting of various species of birds during the rearing season and the various stages of reproduction and of various migratory species during their return to their rearing grounds, the Italian Republic has failed to fulfil its obligations under Council Directive 79/409 of 2 April 1979 on the conservation of wild birds.

Costs

- 28 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has failed in most of its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- (1) Declares that, by authorizing the hunting of various species of birds during the rearing season and the various stages of reproduction and of various migratory species during their return to their rearing grounds, the Italian Republic has failed to fulfil its obligations under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

(2) Orders the Italian Republic to pay the costs.

Due	Mancini	O'Higgins	Rodríguez Iglesias	
Díez de Velasco	Slynn	Kakouris	Joliet	Schockweiler

Delivered in open court in Luxembourg on 17 January 1991.

J.-G. Giraud
Registrar

O. Due
President