

JUDGMENT OF THE COURT

2 August 1993 *

In Case C-355/90,

Commission of the European Communities, represented by Ricardo Gosalbo Bono and Blanca Rodríguez Galindo, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Anecchino, of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Spain, represented by Carlos Bastarreche Sagües, Director General for Community Legal and Institutional Coordination, and Antonio Hierro Hernández-Mora, Abogado del Estado, responsible for representing the Spanish Government before the Court of Justice, acting as Agents, and subsequently by Alberto José Navarro González, Director General for Community Legal and Institutional Coordination, acting as Agent, and Antonio Hierro Hernández-Mora, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

defendant,

APPLICATION for a declaration that, by failing to take upkeep and management measures, in accordance with the ecological needs of habitats, or measures to re-establish biotopes which have been destroyed in the Santoña marshes in the Autonomous Community of Cantabria, by not classifying those marshes as a special protection area and by not taking appropriate steps to avoid pollution or deterioration of habitats in that area, the Kingdom of Spain has failed to fulfil its

* Language of the case: Spanish.

obligations under Articles 3 and 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,

composed of: O. Due, President, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Díez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: W. Van Gerven,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 April 1993

after hearing the Opinion of the Advocate General at the sitting on 9 June 1993,

gives the following

Judgment

1 By application lodged at the Court Registry on 30 November 1990, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by failing to take upkeep and management measures, in accordance with the ecological needs of habitats, or measures to re-establish biotopes which have been destroyed in the Santoña marshes in the Autonomous Community of Cantabria, by not classifying those marshes as a special protection area and by not taking appropriate steps to avoid pollution or deterioration of habitats in that area, the Kingdom of Spain has failed to fulfil its obligations under Articles 3 and 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 directive').

- 2 Article 3(1) of the directive provides that, in the light of economic and recreational requirements, 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.
- 3 Article 4(1) of the directive provides that 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. Member States are required to classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species of birds.
- 4 Article 4(2) of the directive provides that Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States are required to pay particular attention to the protection of wetlands and particularly to wetlands of international importance.
- 5 Lastly, Article 4(4) of the directive provides that, in respect of the protection areas referred to in paragraphs 1 and 2 of that article, Member States are to 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 that article.
- 6 The Commission considers that, as a result of a number of actions in the Santoña marshes, the Kingdom of Spain has failed to fulfil the obligations of protection arising under Articles 3 and 4 of the directive.

7 The Spanish Government rejects the Commission's allegations on both legal and factual grounds.

8 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

I — The interpretation of Articles 3 and 4 of the Directive

9 In the first place, the Commission considers that the Kingdom of Spain was under an obligation to comply with the provisions of the directive from 1 January 1986.

10 The Spanish Government contends that the obligations laid down in Articles 3 and 4 of the directive can, by their nature, be fulfilled only gradually, not immediately.

11 That argument must be rejected. In the first place, the Act concerning the conditions of accession of the Kingdom of Spain to the European Communities contains no specific provision on the applicability of the directive in that Member State, which was required under Article 395 of that Act to put into effect the measures necessary for it to comply with the directive from the date of accession. Moreover, the directive itself contains no indication of any specific time being allowed for the national authorities to fulfil the obligations laid down in Articles 3 and 4, for which, in common with all the provisions of the directive, the necessary transposition measures had to be taken within the two-year period prescribed by Article 18 of the directive.

- 12 Furthermore, the Commission gave the Spanish Government a considerable amount of time to fulfil those obligations. It did not bring the action until more than two years after the letter before action and almost five years after the Kingdom of Spain joined the Communities.
- 13 In the second place, the Commission claims that, as a result of the obligations arising under Articles 3 and 4 of the directive, specific measures must be taken to conserve the habitats of wild birds.
- 14 The Spanish Government contends, on the contrary, that those provisions merely impose an obligation to achieve a result, namely to secure the conservation of wild birds.
- 15 The Commission's view must be upheld on this point. Articles 3 and 4 of the directive require Member States to preserve, maintain and re-establish habitats as such, because of their ecological value. Moreover, it follows from the ninth recital in the preamble to the directive that the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. The obligations on Member States under Articles 3 and 4 of the directive therefore exist before any reduction in the number of birds or any risk of a protected species becoming extinct has materialized.
- 16 In the third place, the Commission claims that the obligations imposed by Article 4 of the directive are imperative.
- 17 The Spanish Government takes the view that the ecological requirements laid down in that provision must be subordinate to other interests, such as social and economic interests, or must at the very least be balanced against them.

- 18 That argument cannot be accepted. It is clear from the Court's judgment in Case C-57/89 *Commission v Germany* [1991] ECR I-883 that, in implementing the directive, Member States are not authorized to invoke, at their option, grounds of derogation based on taking other interests into account.
- 19 With respect more specifically to Article 4 of the directive, the Court held in that judgment that, in order to be acceptable, such grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In particular, the interests referred to in Article 2 of the directive, namely economic and recreational requirements, do not enter into consideration. In this connection, the Court held in Case 247/85 *Commission v Belgium* [1987] ECR 3029 and Case 262/85 *Commission v Italy* [1987] ECR 3073 that that provision does not constitute an autonomous derogation from the general system of protection established by the directive.
- 20 In the fourth place, the Commission claims that it is possible for a Member State to infringe both Article 4(1) and (2), relating to the classification of a territory as a special protection area, and Article 4(4) of the directive, which concerns the protection measures relating to such an area.
- 21 According to the Spanish Government, a Member State cannot be accused of having infringed both those provisions at the same time, because the protection measures cannot be implemented until the decision has been taken to classify a territory as a special protection area.
- 22 That line of reasoning must be rejected. The objectives of protection set out in the directive, as expressed in the ninth recital in its preamble, could not be achieved if Member States had to comply with the obligations arising under Article 4(4) only in cases where a special protection area had previously been established.

- 23 Lastly, with respect to the relationship between Articles 3 and 4 of the directive, it must be borne in mind that the first of those provisions imposes obligations of a general nature, namely the obligation to ensure a sufficient diversity and area of habitats for all the birds referred to in the directive, while the second contains specific obligations with regard to the species of birds listed in Annex I and migratory species not listed in that annex. As it is undisputed that both categories of birds are found in the Santoña marshes, it will be sufficient to consider the Commission's complaints in the light of the provisions of Article 4 of the directive.

II — The obligation to classify the Santoña marshes as a special protection area pursuant to Article 4(1) and (2) of the directive

- 24 The Commission claims that the Santoña marshes are not only a habitat that is essential for the survival of several species in danger of extinction within the meaning of Article 4(1) of the directive but also wetlands of international importance for regularly occurring migratory species in that area within the meaning of Article 4(2).
- 25 The Spanish Government recognizes the ecological value of the area. It points out that the Santoña and Noja marshes were classified as nature reserves by Law No 6 of 27 March 1992, because of the importance of those wetlands as habitats for many species of animals. However, it considers that the national authorities have a margin of discretion with regard to the choice and delimitation of special protection areas and the timing of their classification as such.
- 26 That argument cannot be accepted. Although Member States do have a certain margin of discretion with regard to the choice of special protection areas, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the directive, such as the presence of birds listed in Annex I, on the one hand, and the designation of a habitat as a wetland area, on the other.

- 27 In this connection, it is common ground that the Santoña marshes are one of the most important ecosystems in the Iberian peninsula for many aquatic birds. The marshes serve as a wintering area or staging post for many birds on their migrations from European countries to the southern latitudes of Africa and the Iberian peninsula itself. The birds observed in the area include various species that are becoming extinct, in particular the spoonbill, which feeds and rests in the Santoña marshes in the course of its migrations. Moreover, it emerged from the case file and at the hearing before the Court that the area in question is regularly visited by 19 of the species listed in Annex I to the directive and at least 14 species of migratory birds.
- 28 As to the classification of the Santoña marshes as a nature reserve by Law No 6 of 27 March 1992, this cannot be regarded as satisfying the requirements laid down in the directive, either in respect of the territorial extent of the area or as regards its legal status as a protected area.
- 29 In this connection, it must be observed first of all that the nature reserve does not cover the whole of the marshes, since an area of 40 000 square metres is excluded. Yet that land is of particular importance for aquatic birds in danger of extinction within the meaning of Article 4(1)(a) of the directive, since a steady reduction in the space available for nesting has been observed in the other marshland areas close to the coast.
- 30 Next the necessary protection measures have not been defined even for the marshes within the classified area. Indeed, it appears from the case file that the plan for the management of nature reserves provided for in Article 4 of the Law has not been approved by the competent authorities. Yet that plan is of the utmost importance for the protection of wild birds because it intended to identify activities which will give rise to a change in the ecosystems of the area.

- 31 Since measures as essential as those determining the management of the area or governing the use of the marshes and the activities carried out there have not been adopted, the requirements of the directive cannot be held to have been satisfied.
- 32 It must therefore be held that the Kingdom of Spain has failed to fulfil its obligations under Article 4(1) and (2) of the directive by not classifying the Santoña marshes as a special protection area.

III — The obligation to protect the Santoña marshes pursuant to Article 4(4) of the directive

A — The second section of the road between Argoños and Santoña

- 33 The Commission claims that the new route followed by the C-629 road between Argoños and Santoña results not only in a considerable reduction in the surface area of the Santoña marshes but also in disturbances affecting the peaceful nature of the area and consequently the wild birds protected by the provisions of the directive.
- 34 The Spanish Government explains that the new road is necessary to improve access to the town of Santoña. Also, the new route is the best of various possible alternatives, mainly because it affects only a small proportion of the total surface area of the marshes.
- 35 These explanations cannot be accepted. As the Court stressed in Case C-57/89 *Commission v Germany*, although Member States do have a certain discretion with regard to the choice of the territories which are most suitable for classification as special protection areas, they do not have the same discretion under Article 4(4) of the directive in modifying or reducing the extent of those areas.

- 36 The Court finds in this connection that the construction of the new section of road C-629 between Argoños and Santoña involves a reduction in the surface area of the marshland, an effect that, moreover, is aggravated by the erection of a number of new buildings near this new section of road. These operations have resulted in the loss of refuge, rest and nesting areas for birds. In addition to the disturbances caused by the road works, the action in question has modified the ebb and flow of the tide, causing this part of the marshland to silt up.
- 37 Since, regard being had to the considerations of principle set out above, such action cannot be justified by the need to improve access to the municipality of Santoña, the complaint must be upheld.

B — The industrial estates at Laredo and Colindres

- 38 The Commission considers that the establishment of industrial estates at Laredo and Colindres is resulting in the disappearance of a substantial part of the marshland, namely the area adjoining the mouth of the Asón river, also known as the Asón or Treto estuary. The filling-in of land adjoining these sites is also alleged to affect the ebb and flow of the tide in the bay.
- 39 The Spanish Government explains that the competent authorities have abandoned the idea of establishing these industrial estates as they were originally planned.
- 40 The Court takes note of the written and oral statements of the Spanish Government to the effect that the industrial estates at Laredo and Colindres have not been established and the municipalities concerned have abandoned the idea of carrying out those two projects as they were originally planned.

- 41 Although it is no longer proposed to carry out those projects, the fact remains that, after the Kingdom of Spain joined the Communities, the local authorities re-sealed the dykes previously built round the land earmarked for the industrial estates. Nor is it disputed that no steps have so far been taken to demolish those dykes, even though the local authorities have acknowledged their harmful impact on the aquatic environment and have undertaken to demolish them. Accordingly, it must be held that there has been a failure to fulfil obligations in this respect.

C — The aquaculture facilities

- 42 The Commission takes issue with the granting of authorization by the Spanish authorities to a fishermen's association to farm clams in the middle of the marshes, as well as the projects for other aquaculture operations in the estuary.
- 43 The Spanish Government emphasizes the economic interest of this activity and contends that it has only a small impact on the ecological situation of the marshes.
- 44 In this connection, it should be stressed that the installation of aquaculture facilities, which not only reduce the surface area of the marshland and cause variations in the natural sedimentation processes there, but also modify the structure of the existing marsh bed, has the effect of destroying the particular vegetation of those areas, which is an important source of food for the birds.
- 45 As has already been observed, considerations relating to the economic problems caused by the decline in the industrial and fishery sectors in the region, which are, moreover, contradicted by the fact that other projects have been abandoned because they were not profitable, cannot justify a derogation from the protection requirements laid down in Article 4(4) of the directive.

- 46 As the area affected by the activity in question is by no means negligible and the activity in question has caused a significant deterioration in the habitat and the quality of the living conditions of the birds in the middle of the Santoña marshes, it must be concluded that the complaint is well founded.

D — The tipping of solid waste

- 47 The Commission claims that the tipping of solid waste affects the currents produced by the interaction of the tides and the waters from the rivers and consequently causes a significant change in the physical and chemical parameters of the marshes.

- 48 The Spanish Government explains that the problem was solved in 1988. It claims that measures were taken under the plan for the management of urban solid waste from the municipalities in the Santoña bay area. Only a small amount of illegal tipping took place until 1990.

- 49 It emerged during the hearing before the Court that authorized tipping of waste ceased in 1988, that is to say before the Commission delivered its reasoned opinion. The complaint must therefore be rejected as inadmissible.

E — The discharge of waste water

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

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

52 That argument must be rejected. The discharge of waste water containing dangerous toxic substances is highly detrimental to the ecological conditions in the Santoña marshes and has a significant effect on the quality of the water in the area.

53 In view of the fundamental importance of the quality of that water to the marshlands, the Kingdom of Spain is under a duty, where necessary, to provide systems for treating waste in order to prevent pollution of those habitats. The failure to fulfil obligations in this respect is therefore made out.

F — The in-filling works at Escalante and the activities of the Montehano quarry

54 The Commission claims that the in-filling operations carried out on marshland by the municipality of Escalante, together with the exploitation of the quarry and the tipping of unused material into the marshes, have reduced the extent of the protected area.

55 The Spanish Government observes that these allegations refer to facts that occurred before Spain joined the Community. The tipping of this material into the marshes was prohibited in 1986 and is therefore now illegal.

56 It must be noted that neither the time nor the extent of the contested operations at the edge of the marshland were clarified at the hearing before the Court. It is consequently impossible to determine whether and to what extent in-filling works and tipping of material from the quarry in question into the marshland have taken place since 1986. However, it is not disputed, on the one hand, that the works carried out by the municipality of Escalante were completed in 1986 and no authorization has been granted for any further work and, on the other, that the activities of the Montehano quarry are controlled and the tipping of dry matter into the marshes has been definitively prohibited. This complaint must therefore be rejected.

G — All the complaints under III

- 57 It follows from the foregoing considerations that, as a result of the abovementioned actions, with the exception of those described in the allegations under III — D and F, the Kingdom of Spain has failed to fulfil its obligations under Article 4(4) of the directive by not taking appropriate steps to avoid pollution or deterioration of habitats in the Santoña marshes.
- 58 It must therefore be held that, by not classifying the Santoña marshes as a special protection area and by not taking appropriate steps to avoid pollution or deterioration of habitats in that area, contrary to the provisions of Article 4 of the directive, the Kingdom of Spain has failed to fulfil its obligations under the Treaty.

Costs

- 59 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Spain has failed in all essential respects, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by not classifying the Santoña marshes as a special protection area and by not taking appropriate steps to avoid pollution or deterioration of habitats in that area, contrary to the provisions of Article 4 of Council

Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Kingdom of Spain has failed to fulfil its obligations under the EEC Treaty;

2. Orders the Kingdom of Spain to pay the costs.

Due

Zuleeg

Murray

Mancini

Schockweiler

Moitinho de Almeida

Grévisse

Diez de Velasco

Kapteyn

Delivered in open court in Luxembourg on 2 August 1993.

J.-G. Giraud

O. Due

Registrar

President