

JUDGMENT OF THE COURT
8 July 1987 *

In Case 262/85

Commission of the European Communities, represented by Guido Berardis, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, also a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, acting as Agent, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adelaïde,

defendant,

APPLICATION for a declaration that, by not adopting within the prescribed period all the laws, regulations and administrative provisions needed to comply with Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Italian Republic has failed to fulfil its obligation under the EEC Treaty,

THE COURT,

composed of: Lord Mackenzie Stuart, President, C. Kakouris, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, T. Koopmans, K. Bahlmann, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: B. Pastor, Administrator

* Language of the Case: Italian.

having regard to the Report for the Hearing and further to the hearing on 17 September 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 December 1986,

gives the following

Judgment

- 1 By an application lodged at the Court Registry on 20 August 1985, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by not transposing into its internal legal order, fully and correctly, within the prescribed period Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (*Official Journal* 1979, L 103, p. 1) (hereinafter referred to as 'the directive'), the Italian Republic has failed to fulfil its obligations under the EEC Treaty.
- 2 Article 18 of the 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 on 6 April 1979, the prescribed period expired on 6 April 1981.
- 3 Having examined the provisions of the relevant Italian legislation and having formed the view that they did not wholly comply with the directive the Commission commenced the procedure provided for in Article 169 of the Treaty. After giving the Italian Republic formal notice to submit its observations, the Commission delivered a reasoned opinion on 16 October 1984. Having received no response to the reasoned opinion the Commission brought this action in which it raises six complaints against the Italian legislation in force.
- 4 The case concerns three provisions of Law No 968 of 27 December 1977 (*Gazzetta Ufficiale della Repubblica Italiana* No 3 of 4. 1. 1978) as twice amended by Decrees of the President of the Council of Ministers of 20 December 1979 (*Gazzetta*

Ufficiale della Repubblica Italiana No 1 of 2. 1. 1980) and 4 June 1982 (*Gazzetta Ufficiale della Repubblica Italiana* No 155 of 8. 6. 1982) (hereinafter referred to as 'the law'). It should be pointed out in this connection that, in Italian law, the regions have powers to adopt legislation and administrative measures concerning hunting within the limits arising from the principles established by the laws of the Italian State.

- 5 Reference is made to the Report for the Hearing for the background to the case, the provisions of the Italian legislation in question, 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.

The general obligations of the Member States under the directive

- 6 Before examining the various complaints submitted by the Commission, the provisions of and the obligations arising under the directive should be recalled in so far as they are relevant to the present case. In this regard, it should be stated at the outset that, as stated in Article 1, the directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States and covers the protection, management and control of those species and lays down rules for their exploitation. The directive is based on the consideration that effective bird protection, and in particular protection of migratory species, is typically a transfrontier environment problem entailing common responsibilities for the Member States (third recital in the preamble).
- 7 In order to institute an effective system of protection the directive lays down three types of provisions. First, it provides for general prohibitions against the killing, capturing, disturbing, keeping and marketing of birds and also against the destruction, damaging or removal of their nests and eggs (Article 5 and Article 6 (1)). Furthermore, Article 8 prohibits the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds, in particular the use of those listed in Annex IV (a) to the directive. Secondly, the directive provides for derogations from those general prohibitions for the bird species listed in the annexes to the directive. Thus, provided that certain conditions and limits are laid down and respected, Member States may authorize the marketing of the species listed in Annex III and the hunting of the species listed in

Annex II to the directive (Article 6 (2) to (4) and Article 7). It follows that, for the bird species which are not listed in those annexes, or if the conditions and limits provided for in the abovementioned articles are not fulfilled, the general prohibitions remain applicable. Thirdly, Article 9 of the directive authorizes the Member States to derogate from the general prohibitions and from the provisions concerning marketing and hunting. However, this possibility is subject to three conditions: first, the Member State must restrict the derogation to cases in which there is no other satisfactory solution; secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9 (1) (a), (b) and (c); thirdly, the derogation must comply with the precise formal conditions set out in Article 9 (2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. Although Article 9 therefore authorizes wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations.

- 8 In this context it is necessary to refer to Article 2 of the directive which requires the Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and from which it is therefore clear that the protection of birds must be balanced against other requirements. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation.
- 9 As regards the transposition of the directive into national law, it must be observed that this does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law; a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see the judgment of 23 May 1985 in Case 29/84 *Commission v Federal Republic of Germany* [1985] ECR 1661). However, a faithful transposition becomes particularly important in a case such as this in which the management of the common heritage is entrusted to the Member States in their respective territories.

First complaint: the list of birds which may be hunted

- 10 The Commission notes that Article 11 of the law mentions 11 bird species, not listed in Annex II to the directive, which may be hunted. However, according to Article 7 of the directive, only the species listed in Annex II may be hunted.
- 11 The Italian Government does not dispute that this complaint is well founded. It observes, however, that 2 of the 11 species in question (the jay and the magpie) were included in the list of birds which may be hunted because of their potentially harmful character. This derogation is therefore justified under the third indent of Article 9 (1) (a) of the directive.
- 12 In this regard, it should be stated that Article 7 of the directive authorizes Member States to allow hunting of the species listed in Annex II to the directive under certain conditions and within certain limits. It is clear from the general scheme of protection provided for in the directive that national legislation may not extend the list contained in Annex II indicating the bird species which may be hunted.
- 13 As regards the argument of the Italian Government concerning the third indent of Article 9 (1) (a) of the directive, it should be noted that that provision does indeed allow Member States to derogate from the general scheme of protection in a way which goes further than is provided for in Article 7. However, as stated above, such a derogation must comply with the three abovementioned conditions of Article 9.
- 14 In this regard the Italian Government has not put forward any evidence proving that it was necessary to include the jay and the magpie on the Italian list of birds which may be hunted in order to prevent serious damage to crops, livestock, forests, fisheries or water and that no other satisfactory solution existed. Neither has it indicated the reasons for which the listing of those species was, in its view, the only satisfactory solution to prevent serious damage. Finally, the provision in question does not specify the conditions of risk and the circumstances of time and place under which the derogation may be granted or the controls which will be carried out. Therefore, the inclusion of the jay and the magpie amongst the birds

which may be hunted cannot be justified by the third indent of Article 9 (1) (a) of the directive.

- 15 It must therefore be held that the first complaint is well founded.

Second complaint: the marketing of birds

- 16 The Commission points out that Article 11 of the law allows the marketing of all the species of birds which may be hunted. However, Article 6 of the directive prohibits trade in all live or dead birds or parts of such birds with the exception of the species listed in Annex III to the directive. Finally, the provisions of Article 6 (2) to (4) of the directive are not to be found in the Italian legislation.
- 17 The Italian Government does not dispute that the Italian rules are not entirely in accordance with the directive in this regard. It points out, however, that Article 20 (t) of the law prohibits the sale of woodcock and of dead birds smaller than thrushes, except starlings, sparrows and skylarks, during the period when the hunting of those birds is allowed.
- 18 It should be borne in mind in this regard that Article 6 (1) of the directive requires the Member States to impose a general prohibition on the marketing of all the birds covered by the directive, alive or dead, and of any readily recognizable parts or derivatives of such birds. Article 6 (2) provides that marketing is not to be prohibited in respect of the seven species referred to in Annex III/1, provided that the birds have been legally killed or captured or otherwise legally acquired. Since the list in Annex III/1 concerns only seven bird species, whereas the list of birds which may be hunted according to the national legislation includes 72 species, it is plain that the provision of Italian law in question does not comply with the requirements of the directive. Furthermore, it is clear from the protection to be afforded under the directive that it is intended to avoid a situation in which all the species that may be hunted may also be marketed because of the pressure which marketing may exert on hunting and consequently on the population level of the species in question. As regards the 10 species specified in Annex III/2, it is not disputed that the Italian legislation does not comply with the obligations arising under Article 6 (3) of the directive.

19 As far as concerns the reference by the Italian Government to Article 20 (t) of the law, the Commission correctly notes that Article 6 (1) of the directive prohibits the marketing of all species of birds irrespective of their size. Even if the Italian legislation does not therefore permit the marketing of all bird species which may be hunted, it must be held that Article 11, even in conjunction with Article 20 (t) of the law, does not constitute a complete transposition of the directive.

20 The second complaint must therefore be upheld.

Third complaint: hunting seasons

21 The Commission complains that in Article 11 of the law the Italian Government fixes the dates when hunting may begin without taking account of the rearing season, the various stages of reproduction and, in the case of migratory species, the return to their rearing grounds, as required by Article 7 (4) of the directive. In its reply to the defence the Commission has pointed out that the Italian legislation does not expressly prohibit hunting during the abovementioned periods. The hunting season begins on 18 August, a time when various species of nesting birds are either still in Italy or are traversing the Italian peninsula. In this respect the scientific community has proposed that the beginning of the hunting season should be fixed at a single date not earlier than the third Sunday in September. Hunting finishes on 10 March whereas migratory birds are still on their way to their rearing grounds from the first days of February. It has been requested that the closing of the hunting season should be fixed at a date not later than 31 January.

22 The Italian Government has stated in reply that Article 7 (4) of the directive does not specify particular dates on which the hunting season should begin or end. Article 11 of the law provides for different dates for the opening and closing of the hunting season for the various species precisely because their rearing seasons and stages of reproduction differ. As regards the birds' return to their rearing grounds, the abovementioned Decree of 20 September 1979 provided that the hunting of certain species of migratory birds was to end on 28 February and for other species on 10 March. The complaint is ill-founded because it does not address itself to the question whether the dates chosen for the opening and closing of the hunting season are appropriate.

- 23 As regards the question whether the complaint made in the pre-litigation procedure and set out in the application is well founded, it must be noted first of all that, contrary to the Commission's contention, the Italian legislation takes account, in the provisions of Article 11 of the law and the Decree of 20 September 1979, of the various periods mentioned in Article 7 (4) of the directive in which birds are to be protected. The Italian legislation does fix different dates for the opening and closing of the hunting season for the various species of birds having regard to their different rearing seasons and their different stages of reproduction and, in the case of migratory birds, their return to their rearing grounds. In this regard the Commission's complaint cannot be upheld.
- 24 As regards the complaint that the dates chosen in the Italian legislation for the opening and closing of the hunting season for certain species of birds are not appropriate, it must be noted that the Commission raised this point for the first time in its reply. Since this point extends the scope of the complaint made in the pre-litigation procedure and in the application, the question concerning the appropriateness of the dates chosen for the different hunting seasons must be disregarded.
- 25 In those circumstances the Commission's third complaint must be dismissed.

Fourth complaint: use of automatic and semi-automatic weapons

- 26 The Commission states that Article 9 of the law authorizes the use of repeating and semi-automatic weapons capable of firing three shots and that this provision of Italian law is not a correct application of Article 8 (1) of the directive and Annex IV thereto.
- 27 The Italian Government, on the other hand, contends that the provision in question provides for the fitting of a technical device in order to reduce the number of shots. That mechanism is intended to make it impossible to introduce more than two rounds of ammunition into the magazine whilst a third may be introduced directly into the firing chamber. The Italian rules are therefore not contrary to the provision in the directive.
- 28 Given those two diverging views, the wording of the Italian provision and of the provision in the directive must first be recalled. Article 9 of the law provides that

'hunting with a repeating or semi-automatic rifle fitted with a device preventing more than three shots from being fired' is allowed. However, Article 8 (1) of the directive, in conjunction with Annex IV (a) thereto, provides that Member States are to prohibit, in particular, semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition.

29 From a comparison of those provisions it may be concluded that Article 9 of the law does in fact prohibit weapons capable of discharging more than three rounds of ammunition. Moreover, it is undisputed that the directive does not prohibit the insertion of a third round of ammunition into the gun's firing chamber. Therefore, legislation authorizing weapons capable of firing three consecutive rounds is not contrary to the directive, provided that it is ensured that the magazines of those weapons can hold only two rounds of ammunition. It must be noted in this regard that the Italian provision clearly restricts the use of weapons to those which can discharge only three consecutive rounds. Since a round of ammunition may be in the gun's firing chamber, the reference in the Italian provision in question to a device preventing more than three shots from being fired is sufficient to guarantee that the magazine cannot hold more than two rounds of ammunition. In those circumstances, Article 9 of the law must be regarded as providing a proper guarantee of the full implementation of Article 8 (1) of the directive.

30 The fourth complaint of the Commission is therefore unfounded.

Fifth complaint: the powers given to the regions to permit the capture and sale of migratory birds

31 According to the Commission, Article 18 (2) of the law is incompatible with Articles 7 and 8 of the directive in so far as it confers on the Italian regions a wide power to authorize the capture by any method and the sale of migratory birds even in the close season.

32 The Italian Government denies that the provision in question confers a wide discretion on the regions and maintains that the regions may not depart from the wording of the law and of the directive. They must lay down precise rules governing arrangements for capturing migratory birds. The use of birds for recre-

ational purposes at fairs and traditional markets is possible under Article 2 of the directive. Finally, migratory species may be captured only in limited numbers fixed in advance for each species. This provision is therefore a derogation provided for by Article 9 (1) of the directive.

- 33 That difference of view necessitates an initial clarification of the scope of the complaint, which must be understood as not objecting to the power to regulate hunting conferred on the regions or to the legislative and administrative provisions adopted by the regions. The complaint only concerns the fact that Article 18 (2) of the law does not transpose, or require the regions to take into account, the obligations and requirements of the directive concerning methods of hunting migratory birds, the sale of migratory birds and hunting seasons for such birds.
- 34 Article 18 (2) of the law provides that, after consulting a particular scientific institute, the regions may operate, or authorize the operation, by means of specific regulations, of arrangements for capturing and selling migratory birds with a view to their being kept. To that end, they may authorize the use of means and arrangements for capturing birds, fix their own trapping seasons and draw up a list of birds which may be hunted even outside the periods when hunting is allowed under Article 11 of the law. However, Article 18 states that migratory birds may only be captured with a view to their being kept for use as live decoys in cover-shooting or for recreational purposes in traditional fairs and markets. Such species may be trapped in limited numbers previously fixed for each species.
- 35 In this regard it must be noted that Article 18 (2) gives the regions the power to regulate the hunting seasons for migratory birds and the means, arrangements or methods for their capture without taking into account the requirements of Articles 7 and 8 of the directive.
- 36 The Italian Government puts forward three arguments on this point; first, that the rule-making power may only be exercised in consultation with a scientific institute; secondly, that the provisions of Article 18 of the law are justified under Article 2 of the directive; and thirdly that that provision could be authorized under Article 9 (1) (c) of the directive.

- 37 As regards the first argument, it must be stated that, even though the regions are obliged to consult a scientific institute before implementing their rules, the opinion of the institute is not binding and therefore that obligation does not guarantee that the requirements of the directive will be respected. As regards the second argument, it must be stressed that Article 2, as observed above, is not an independent derogation from the obligations and requirements of the directive.
- 38 As regards the third argument concerning Article 9 (1) (c) of the directive, that provision authorizes Member States to derogate, *inter alia*, from Articles 7 and 8 in order to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers. It is clear that the capture and sale of birds, even outside the hunting season, with a view to keeping them for use as live decoys or for recreational purposes in fairs and markets may constitute judicious use authorized by Article 9 (1) (c).
- 39 However, it must be observed first of all that the provision concerned makes no reference to Article 9 (1), which provides that a derogation from Articles 7 and 8 of the directive may be granted only if there is no other satisfactory solution. Secondly, Article 18 of the law, which authorizes the regions to permit the use of means and arrangements for capturing birds, to fix the periods in which capturing is permitted and to draw up the list of birds which may be hunted, does not, contrary to the requirements of Article 9 (2) of the directive, specify the means, arrangements or methods authorized for the capture or killing of birds, the circumstances of time and place under which the derogations may be granted or the species covered by the derogations. Such criteria and conditions are necessary to ensure that the derogation is applied in a strictly controlled and selective manner. Since Article 18 (2) of the law does not itself establish the criteria and conditions provided for in Article 9 (2) of the directive or require the regions to take account of those criteria and conditions, it introduces an element of uncertainty as regards the obligations which the regions must observe when adopting their regulations. Therefore, there is no guarantee that the capture of certain species of birds will be limited to the strict minimum, that the period of capture will not coincide unnecessarily with periods in which the directive aims to provide particular protection or that the means, arrangements or methods for capture are not large-scale, non-selective or capable of causing the local disappearance of a

species. It follows that the essential elements of Article 9 of the directive have not been transposed completely, clearly and unequivocally into the Italian rules.

- 40 Therefore, the Commission's fifth complaint must be upheld.

Sixth complaint: the use of migratory birds as live decoys

- 41 In the formal notice, the reasoned opinion and its application, the Commission complains that Article 18 of the law also authorizes the use of migratory birds as live decoys for hunting, in breach of Article 8 of the directive. In its reply it explained that the complaint was not that Article 18 authorizes the use of live decoys but that Article 18 does not prohibit the blinding and mutilation of birds used as decoys.
- 42 In reply to that point the Italian Government has stated that Article 18 (2) of the law only authorizes the use of migratory birds as live decoys but does not authorize the blinding or mutilation of those birds. Article 20 (o) of the law expressly prohibits the use of blinded live decoys. The point made in the reply is, in its view, an inadmissible extension of the original complaint.
- 43 As regards the argument of the Italian Government alleging an inadmissible extension of the complaint, it must be stated that, in its application, the Commission repeated verbatim the complaint which it had already made in the pre-litigation procedure, namely that Article 8 of the directive had not been transposed into the Italian rules. In its reply the Commission pointed out that, through its reference to Annex IV to the directive, Article 8 of the directive prohibits the use not only of blinded live decoys but also of mutilated live decoys. Although the complaint formulated by the Commission in the pre-litigation procedure and in the application was unfortunately very brief, it nevertheless contains all the information which the Italian Government needed to understand the complaint made against it and to defend itself. All the information needed to assess the scope of the complaint is given: the provision infringed, namely Article 8 of the directive, the rule of national law considered to be contrary to that

provision, namely Article 18 of the law, and the basis of the complaint, namely the granting of authorization contrary to the provisions of Article 8. The objection of inadmissibility raised by the Italian Government cannot therefore be upheld.

44 As regards the substance of the complaint, it must be noted that Article 18 (2) of the law allows the regions to authorize the use of migratory birds as live decoys in cover-shooting and Article 20 (o) prohibits only the use of blinded live decoys. It therefore follows that Article 18 (2) in conjunction with Article 20 (o) of the law does not expressly prohibit the regions from authorizing the keeping and *a fortiori* the use of migratory species as mutilated live decoys in cover-shooting. Such use is prohibited by the directive.

45 The Commission's complaint must therefore be upheld.

46 It must therefore be held that, by not adopting within the prescribed period all the laws, regulations and administrative provisions needed to comply with Council Directive 79/409 of 2 April 1979 on the conservation of wild birds, the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

Costs

47 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, according to the first subparagraph of Article 69 (3), the Court may order the parties to bear their costs in whole or in part if each party succeeds on some heads and fails on others. Since the Commission has succeeded only in some of its claims, each party should be ordered to pay its own costs.

On those grounds,

THE COURT

hereby:

- (1) Declares that, by not adopting within the prescribed period all the laws, regulations and administrative provisions needed to comply with Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Italian Republic has failed to fulfil its obligations under the EEC Treaty;
- (2) Orders each party to bear its own costs.

Mackenzie Stuart	Kakouris	O'Higgins	Schockweiler
Bosco	Koopmans	Bahlmann	Joliet
			Rodríguez Iglesias

Delivered in open court in Luxembourg on 8 July 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President