

JUDGMENT OF THE COURT

28 February 1991 *

In Case C-57/89,

Commission of the European Communities, represented by Ingolf Pernice, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Regierungsdirektor in the Federal Ministry of Economic Affairs, acting as Agent, assisted by G. Leibrock, Regierungsrat in that Ministry, and by Joachim Sedemund, Rechtsanwalt, Cologne, and Albert Bleckmann, Professor of Law in the Westfälische Wilhelms Universität, Münster, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Emile-Reuter,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by S. J. Hay, of the Treasury Solicitor's Department, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for a declaration that by planning or undertaking works detrimental to the habitat of protected birds in special protection areas, contrary to Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of

* Language of the case: German.

wild birds, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

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

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing the oral argument of the parties at the hearing on 16 October 1990, at which the Federal Republic of Germany was represented by Albert Bleckmann and Mr Montag, and the United Kingdom by G. Barling, Barrister,

after hearing the Opinion of the Advocate General delivered at the sitting on 5 December 1990,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 28 February 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by planning or undertaking works detrimental to the habitat of protected birds in special protection areas, contrary to Article 4 of 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 Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

2 Article 4 of the directive is worded as follows:

- ‘1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

(Omissis)

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.
3. Member States shall send the Commission all relevant information so that it may take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 above form a coherent whole which meets the protection requirements of these species in the geographical sea and land area where this Directive applies.
4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.’

- 3 The application initially comprised two claims, the first concerning dredging and filling operations in the *Rysumer Nacken*, and the second concerning dyke-building operations carried out in the *Leybucht*.
- 4 With regard to the first claim, the Commission, at the hearing, formally acknowledged that the Rysumer Nacken is not covered by the regulation of the *Land* of Lower Saxony of 13 December 1985 creating the Niedersächsisches Wattenmeer National Park and that, consequently, the Rysumer Nacken is not designated as a special protection area. However, the Commission argues that that is a new argument put forward by the defendant in its rejoinder, so that the defendant must bear the costs relating to that point.
- 5 The German Government replies that the Commission was aware, even before the commencement of proceedings before the Court, of all the information concerning the legal status of the Rysumer Nacken, in particular of maps showing the boundaries of the national park. It is clear from those maps that the Rysumer Nacken is not designated as a special protection area. According to the German Government, the details it provided in its rejoinder do not therefore constitute a new argument.
- 6 The information regarding the extent of the protected areas in the Wattenmeer was supplied by the German Government in its letter of 6 September 1988 sent pursuant to Article 4(3) of the directive. At the time it lodged its application, the Commission had at its disposal *inter alia* the maps appended to the abovementioned regulation, defining the boundaries of the protected area. It is evident from that information that the Rysumer Nacken is not one of the sites designated as a special protection area. Consequently, since the withdrawal of this part of the application is not the consequence of the conduct of the German Government, the Commission must bear the costs relating thereto.
- 7 With regard to the dyke-building operations in the Leybucht, the Commission claims that they disturb birds which enjoy special protection under the provisions of Article 4(1) of the directive, in conjunction with Annex I, and damage the

habitat of the birds, which is designated as a special protection area. The Commission emphasizes that the first sentence of Article 4(4) of the directive requires Member States to take positive steps to avoid any deterioration or pollution of habitats as part of the management of special protection areas.

- 8 The Commission states that coastal defence measures such as the strengthening of a dyke are acceptable in the case of a threat to human life, but only on condition that the necessary measures are restricted to those which cause only the minimum necessary deterioration of the special protection area in question.
- 9 According to the Commission, those conditions have not been fulfilled in the present case. It is of the opinion that both the construction work in the Leybucht and its results entail deterioration in the living conditions of protected birds and the loss of land areas of considerable ecological importance, thereby leading to lower population densities for some of the species of birds listed in Annex I to the directive, in particular the avocet.
- 10 The German Government observes that according to the information sent to the Commission pursuant to Article 4(3) of the directive, the new line of the dyke in the Leybucht and the areas located on the landward side of the dyke are excluded from the special protection area. It states that the boundaries of the area in question are defined in the regulation creating the national park in such a way that the protected area extends only to the foot of the dyke, in the form it will have once the construction work in question has been completed.
- 11 According to the German Government, the sole purpose of the operations is to secure the safety of the dyke. It emphasizes that during the planning stage of the project at issue the competent authorities took account of all bird conservation requirements and balanced them against the requirements of coastal protection.

The German Government states that the new line of the dyke and the temporary disturbances caused by the works constitute the smallest possible interference for bird life in the Leybucht. It adds that the Commission has not furnished any evidence at all that the measures at issue significantly impair the protection of those birds.

- 12 With regard to the interpretation of Article 4(4) of the directive, the German Government claims that that provision requires a balance to be struck between the various public interests likely to be affected by the management of a special protection area, so that the Member States must have a wide discretionary power in this field.
- 13 The United Kingdom considers that the Commission has not established that the project at issue has a significant effect within the meaning of the first sentence of Article 4(4) of the directive. It states that that condition must be interpreted as meaning that the deterioration of a special protection area must be such as to threaten the survival or reproduction of protected species within their area of distribution. In the United Kingdom's view, the material supplied by the Commission does not appear sufficient to support the conclusion that the operations in the Leybucht involve such deterioration.
- 14 The United Kingdom emphasizes the importance of the evidence supplied by the defendant which shows that the works at issue will significantly improve ecological conditions in the Leybucht. It considers that it is legitimate, when assessing whether a particular project will cause deterioration to a special protection area and whether any such deterioration will be significant, to consider whether the works will at the same time bring compensatory ecological improvements.
- 15 In the submission of the United Kingdom, within the context of Article 4(4) of the directive account can be taken of other important public interest considerations, including those referred to in Article 2 of the directive. It considers that the Member States must be able to take into account the interests of persons living in or around a special protection area.

- 16 Reference is made to the Report for the Hearing for a fuller account of 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.
- 17 With regard to the boundaries of the special protection area in question, it must be pointed out that the boundary of the Leybucht is defined by the regulation creating the national park and the maps appended thereto. Although the plan of the area does include a reference to the regional planning scheme, the legal measure designating the special protection area nevertheless sets out its precise territorial delimitation, constituted by the present line of the dyke. The displacement of the dyke towards the sea as part of the coastal defence project thus entails a reduction in the protected area.
- 18 Consequently, in order to resolve this dispute it is necessary to settle a number of questions of principle concerning the obligations of the Member States under Article 4(4) of the directive in relation to the management of the special protection areas. It must be determined whether — and if so, under what conditions — the Member States are authorized to reduce the size of a special protection area and to what extent other interests may be taken into account.
- 19 With regard to the powers of the Member States to review in that way a decision to classify an area as a special protection area, it must be stated that a reduction in the geographical extent of a protected area is not expressly envisaged by the terms of the directive.
- 20 Although the 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 pursuant to Article 4(1) of the directive, they do not have the same discretion under Article 4(4) of the directive in modifying or reducing the extent of the areas, since they have themselves acknowledged in their declarations that those areas contain the most suitable environments for the species listed in Annex I to the

directive. If that were not so, the Member States could unilaterally escape from the obligations imposed on them by Article 4(4) of the directive with regard to special protection areas.

- 21 That interpretation of Article 4(4) of the directive is borne out, moreover, by the ninth recital in the preamble, which underlines the special importance which the directive attaches to special conservation measures concerning the habitats of the birds listed in Annex I in order to ensure their survival and reproduction in their area of distribution. It follows that the power of the Member States to reduce the extent of a special protection area can be justified only on exceptional grounds.
- 22 Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In that context the interests referred to in Article 2 of the directive, namely economic and recreational requirements, do not enter into consideration. As the Court pointed out in its judgments in Case 247/85 (*Commission v Belgium* [1987] ECR 3029) and Case 262/85 (*Commission v Italy* [1987] ECR 3073), that provision does not constitute an autonomous derogation from the general system of protection established by the directive.
- 23 With regard to the reason put forward in this case, it must be stated that the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum and involve only the smallest possible reduction of the special protection area.
- 24 With regard to the part of the project concerning the Leyhörn area, the line of the dyke was influenced by considerations relating not only to coastal protection but also to the concern to ensure that fishing vessels from Greetsiel had access to the harbour. In the light of the principles for the interpretation of Article 4(4) of the directive set out above, to take account of such an interest is in principle incompatible with the requirements of the provision.

- 25 However, that part of the project has at the same time specific positive consequences for the habitat of birds. Once the works are completed it will be possible to close two navigation channels which cross the Leybucht, with the result that the Leybucht will be left in absolute peace. Moreover, the decision approving the proposed works envisages a strict protection scheme for the Leyhörn area. The dyke which previously protected the Hauener Hooge site will be opened, thus once more exposing an extensive area to tidal movements and allowing the formation of salt meadows of considerable ecological importance.
- 26 The desire to ensure the survival of the fishing port of Greetsiel could thus be taken into account in order to justify the decision on the line of the new dyke because there were the abovementioned offsetting ecological benefits, and solely for that reason.
- 27 Finally, the disturbance arising from the construction work itself does not exceed what is necessary to carry it out. The information concerning the number of avocets in that sector of the Wattenmeer shows, moreover, that during the period in question there was no significant change, within the meaning of Article 4(4) of the directive, in population trends for that species. Furthermore, the Commission has not supplied any other evidence relating to population trends for protected species.
- 28 It follows from the foregoing that the application must be dismissed.

Costs

- 29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs, including the costs of the intervener and those relating to the application for interim measures.

On those grounds,

THE COURT

hereby:

- (1) Dismisses the application;
- (2) Orders the Commission to pay the costs, including the costs of the intervener and those relating to the application for interim measures.

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

Delivered in open court in Luxembourg on 28 February 1991.

J.-G. Giraud
Registrar

O. Due
President