

JUDGMENT OF THE COURT (Second Chamber)

10 January 2006^{*}

In Case C-98/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 28 February 2003,

Commission of the European Communities, represented by U. Wölker, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and C. Schulze-Bahr, acting as Agents,

defendant,

^{*} Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Silva de Lapuerta, P. Küris and G. Arestis, Judges,

Advocate General: A. Tizzano,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 July 2005,

after hearing the Opinion of the Advocate General at the sitting on 24 November 2005,

gives the following

Judgment

- 1 By its application the Commission of the European Communities has brought an action for a declaration that:

— by failing, in respect of certain projects carried out outside special areas of conservation (“SACs”) within the meaning of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild

fauna and flora (OJ 1992 L 206, p. 7; 'the Directive'), to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) of that directive, whether or not such projects are capable of significantly affecting an SAC;

- by authorising emissions in an SAC, irrespective of whether they are likely to have a significant effect on that area;
- by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;
- by failing to ensure compliance with the criteria for derogation set out in Article 16 of the directive in the case of certain activities compatible with the conservation of the area;
- by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;
- by failing to notify fishery catch legislation and/or to ensure that such legislation contains adequate bans on fishing,

the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and (4) and Articles 12, 13 and 16 of the Directive.

Legal background

Community law

- 2 The aim of the Directive, in accordance with Article 2(1), is ‘to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies’.
- 3 Article 4 of the Directive lays down a procedure for designating sites as SACs, where species and habitats protected by the Directive are present.
- 4 As provided in the 10th recital in the preamble to the Directive, ‘an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future.’ That recital is expressed in Article 6(3) of the Directive which refers to subparagraph 4. Those subparagraphs provide:

‘3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in

combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

5 According to Article 12(1) of the Directive:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

6 Article 13 of the Directive provides that:

'1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV(b), prohibiting:

(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.

2. The prohibitions referred to in paragraph 1(a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.'

7 Article 16(1) of the Directive is worded as follows:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

- (a) in the interest of protecting wild fauna and flora and conserving natural habitats;
- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

- (d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

National law

- 8 The Federal Republic of Germany has, inter alia, transposed the Directive by the Federal Law on Nature protection of 21 September 1998 (Gesetz über Naturschutz und Landschaftspflege, BGBl. 1998 I, p. 2995) ('the BNatSchG 1998').
- 9 That law was subsequently repealed and replaced by the Federal Law on nature protection and countryside conservation of 25 March 2002 (Gesetz über Naturschutz und der Landschaftspflege, BGBl. 2002 I, p. 1193) ('the BNatSchG 2002').
- 10 Paragraph 34(1) of the BNatSchG 2002 transposed into German law the duty laid down in the first sentence of Article 6(3) of the Directive to subject projects to an assessment of their implications for protected sites, for the purposes of the Directive.

11 Paragraph 10(1)(11) of the BNatSchG 2002 defines the concept of 'projects within the meaning of the law' as follows:

- '(a) projects and measures planned within a site of Community importance or a European site for the protection of birds, in so far as they are subject to a decision by an authority or to notification to an authority or that they are carried out by an authority, and
- (b) acts affecting nature and the countryside, within the meaning of Paragraph 18, in so far as they are subject to a decision by an authority or to notification to an authority or are carried out by an authority, and
- (c) installations subject to an authorisation under the Federal law on protection against pollution and the use of water, which are subject to an authorisation or to approval under the Law on water use,

in so far as, separately or in conjunction with other projects or plans, they are likely to have a significant effect on a site of importance to the Community or a European site for the protection of birds ...'

12 Paragraph 18 of the BNatSchG 2002 provides:

'1. Acts affecting nature and the countryside, within the meaning of this Law, are changes of form or use of surface areas or changes to the level of the water table connected to the surface soil stratum which may alter to a considerable extent the capacity and functioning of the ecosystem or the countryside.

2. The use of soil for the purpose of agriculture, forestry and fishing shall not constitute an intervention where it takes account of the objectives and the principles of nature protection and countryside conservation. The use of soil for the purposes of agriculture, forestry and fishing does not, in principle, undermine the objectives and principles set out above, provided that it complies with the conditions in Paragraph 5(4) to (6) and the rules of professional practice under the Law on agriculture forestry and fishing and Paragraph 17(2) of the Federal Law on soil protection.’

13 Paragraph 36 of BNatSchG 2002 entitled ‘Material nuisances’ provides:

‘If it is foreseeable that installations, subject to an authorisation under the Federal Law on protection against pollution, will cause emissions which, together with other installations or measures, will significantly affect, in the area of impact of that installation, the elements fundamentally necessary for the conservation of a site of Community importance or a European site for the protection of birds, and if the damage cannot be made good in accordance with Paragraph 19(2), the authorisation shall not be issued unless the conditions in the combined provisions of Paragraph 34 (3) and (4) are fulfilled. Paragraph 34(1) and (5) are applicable *mutatis mutandis*. Decisions shall be taken with the agreement of the authorities responsible for nature protection and conservation areas.’

14 The first sentence of Paragraph 39(2) of the BNatSchG 2002, entitled ‘Relationship with other legislative provisions’, provides:

‘The laws on the protection of plants, the protection of animals, protection against epizootic diseases and the laws on forests, hunting and fishing shall not be affected either by the provisions of this section or by the laws adopted pursuant thereto.’

15 Paragraph 42(1) and (2) of the BNatSchG 2002 are designed to transpose the prohibitions in Articles 12 and 13 of the Directive.

16 Paragraph 43 of the BNatSchG 2002, entitled 'Derogations', provides, in subparagraph 4, that 'the prohibitions laid down in Paragraph 42(1) and (2) shall not apply to acts intending to use land for the purposes of agriculture, forestry or fishing and carried out in accordance with good professional practice and the requirements laid down in Paragraph 5(4) to (6); acts intending to process the products obtained in the course of those activities; acts designed to implement an act authorised under Paragraph 19, or an assessment of the effect on the environment within the framework of the Law on the assessment of environmental impact; acts to implement a measure authorised under Paragraph 30; provided that animals and their nesting and incubation sites, habitats and resting places, and plant species which are specifically protected, are not intentionally damaged as a result.'

17 The Directive was also transposed in the Federal Republic of Germany by way of a number of sectoral laws, including the Law on plant protection of 14 May 1998 (Pflanzenschutzgesetz, BGBl. 1998 I, p. 971, 'the PflSchG'), which provides in Paragraph 6(1):

'Pesticides must be used in accordance with good professional practice. Use shall be prohibited if it is foreseeable that it will produce harmful effects on humans or animals or the water table, or that it will produce other serious harmful effects, in particular, on the balance of nature. The competent authority shall order the measures necessary in order to satisfy the requirements mentioned in the first two sentences of this subparagraph.'

Pre-litigation procedure

- 18 On 10 April 2000, the Commission sent a letter of formal notice to the Federal Republic of Germany inviting on it to submit its observations on the implementation of Article 6(3) and (4) and Articles 12, 13 and 16 of the Directive.
- 19 After examining the reply sent to it by the Federal Republic of Germany on 11 August 2000, the Commission issued a reasoned opinion on 25 July 2001, calling on that Member State to take the measures necessary to comply with that opinion within two months of the date of its notification.
- 20 In that reasoned opinion the Commission found, referring in particular to the BNatSchG 1998, that the Federal Republic of Germany had failed to take the measures necessary in order to transpose the abovementioned provisions of the Directive.
- 21 After the expiry of the period prescribed in the reasoned opinion, the Federal Republic of Germany, by letter of 21 November 2001, challenged the complaints raised by the Commission.
- 22 Subsequently the BNatSchG 2002 entered into force.
- 23 In those circumstances, the Commission decided to bring the present proceedings.

Admissibility of the action

- 24 The German Government argues, as a preliminary issue, that the Commission's action is inadmissible for failing to take sufficient account of the new provisions introduced by the BNatSchG 2002 or other specific national provisions. The latter ensure that the contested provisions are applied in accordance with the Directive.
- 25 In that connection, it must be observed that the issue of whether or not the Commission has taken account of certain legislative changes in the assessment of the compatibility of German law with the Directive relates to the substance of the proceedings and, therefore, to the merits of the case and not to its admissibility.
- 26 The fact that, in its originating application the Commission bases its pleas on certain provisions of the BNatSchG 2002, mentioning the earlier provisions of the BNatSchG 1998 between brackets, while the reasoned opinion referred only to those earlier provisions, is not capable of rendering the action inadmissible.
- 27 Although it is true that the subject-matter of an action brought under Article 226 EC is delimited by the pre-litigation procedure and that, accordingly, the originating application cannot be based on provisions other than those stated in that procedure, that requirement cannot, however, go so far as to make it necessary for the national provisions mentioned in the reasoned opinion and those in the application to be completely identical. Where a change in the legislation occurred between those two procedural stages, it is sufficient that the system established by the legislation contested in the pre-litigation procedure has, on the whole, been maintained by the

new measures which were adopted by the Member State after the issue of the reasoned opinion and have been challenged in the application (Case C-221/03 *Commission v Belgium* [2005] ECR I-8307, paragraphs 38 and 39).

28 In this case, the provisions of the BNatSchG 2002 to which the Commission refers in its originating application are almost identical to the provisions in the BNatSchG 1998 that it criticises in its reasoned opinion.

29 It follows that the action is admissible.

The merits

30 In support of its application the Commission raises six complaints.

The first complaint

Arguments of the parties

31 The Commission complains that the Federal Republic of Germany has failed to fully transpose Article 6(3) and (4) of the Directive into its national law in so far as the definition of 'project', in Paragraph 10(1)(11)(b) and (c) of the BNatSchG 2002, which applies to projects undertaken outside the SACs, is too restrictive and

excludes the duty to carry out an assessment of the implications of certain acts and other activities which are potentially harmful to protected sites.

32 As regards projects within the meaning of Paragraph 10(1)(11)(b) of the BNatSchG 2002, the Commission submits that since they include only acts affecting nature and the countryside, within the meaning of Paragraph 18, certain projects likely to have a significant effect on protected sites are not subject to a prior assessment of the implications for the site in accordance with Article 6(3) and (4) of the Directive. Paragraph 18(1) covers only changes of form or use of surface areas, but fails to take account of any other activities or measures which do not concern the surface area of a protected site or those which do not result in any change, even where they are likely to have a significant effect on such a site. In fact, the term 'project', within the meaning of Paragraph 10(1)(11)(b) of the BNatSchG 2002, which refers to acts carried out outside the SACs, is narrower than that in Paragraph 10(1)(11)(a), which concerns projects carried out within an SAC. In its definition of measures to be subject to an assessment of the implications, the Directive does not distinguish between measures taken outside or inside a protected site.

33 Moreover, Paragraph 18(2) of BNatSchG 2002 excludes from the term 'project' within the meaning of Paragraph 10(1)(11)(b) the use of soil for the purposes of agriculture, forestry and fishing, where that project takes account of the objectives and principles of nature protection and countryside conservation.

34 Furthermore, as regards Paragraph 10(1)(11)(c) of the BNatSchG 2002, the Commission criticises the fact that the definition of 'project' is limited, on one hand, to installations subject to authorisation under the Federal Law on protection against pollution (Bundes-Immissionsschutzgesetz, 'the BImSchG') and, on the other hand, to the use of water which is subject to authorisation or approval under the Law on water use (Wasserhaushaltsgesetz, 'the WHG'). Therefore, the installations

and uses of water not subject to authorisation or approval are excluded from the duty to carry out an assessment of the implications for the site laid down in Article 6 (3) of the Directive, regardless of whether or not they may have a significant impact on the protected sites.

35 The German Government submits, first of all, that the Commission interprets the term 'project' too widely, since it does not permit any limit on the duty to carry out an assessment of the implications that the activities referred to by German law may have on the sites. That term should be interpreted in the light of the specific definition in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

36 Next, the German Government contends that the term 'act', within the meaning of Paragraph 18(1) of the BNatSchG 2002, requires a case by case assessment in the light of the objectives of the Directive. Therefore, in practice, Paragraph 18(1) does not limit the term 'project' with the meaning of the Directive. Paragraph 18(1) does not require a change of form or use of the surface area, but that there be an act where an activity has an effect on the surface area which impacts on the protected site.

37 As regards the derogation laid down in Paragraph 18(2) of the BNatSchG 2002, the German Government submits that it is a mandatory requirement of that provision that the objectives and principles of nature protection and countryside conservation have been taken into consideration, so that the use of soil for the purposes of agriculture, forestry and fishing does not constitute a project which must be subject to an assessment of its implications.

38 Finally, as regards Paragraph 10(1)(11)(c) of the BNatSchG 2002, the German Government states that the installations which are not subject to authorisation or approval under the BImSchG must themselves comply with requirements which take account of the Directive. The BImSchG requires, inter alia, verification that serious environmental damage which is preventable by the state of current technology is in fact prevented, and that the damage that cannot be avoided by current technology is reduced to the minimum. As regards the use of water which does not require an authorisation under the WHG, the German Government contends, in particular, that such use concerns very small quantities of water, which is compatible with Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1). If uses which do not have any significant impact on the status of a body of water are not taken into consideration under Directive 2000/60 they cannot have any significant impact on neighbouring SACs.

Findings of the Court

39 According to the first sentence of Article 6(3) of the Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

40 The Court has already held that the requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (see Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, paragraph 54).

- 41 Therefore, the condition, to which the assessment of the implications of a plan or a project on a particular site is subject, which requires such an assessment to be carried out where there are doubts as to the existence of significant effects, does not permit that assessment to be avoided, as do Paragraph 10(1)(11)(b) of the BNatSchG 2002, read in conjunction with Paragraph 18, and Paragraph 10(1)(11)(c), in respect of certain categories of projects, on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected sites.
- 42 It should be noted, in particular, that Article 10(1)(11)(b) and (c) of the BNatSchG 2002 exclude from the assessment obligation (i) projects consisting of acts affecting nature and the countryside other than changes of form or use of surface areas or changes to the level of the water table connected to the surface soil stratum, and (ii) projects relating to installations or to use of water, on account of the fact that they are not subject to authorisation. It does not appear that those criteria excluding the duty to carry out an assessment are capable of ensuring that those projects are never likely have a significant effect on the protected sites.
- 43 As regards, in particular, installations not subject to authorisation under the BImSchG, the fact that that text requires verification, that serious environmental damage which may be prevented by current technology is in fact prevented, and that damage which cannot be prevented by current technology is reduced to the minimum, cannot be sufficient to ensure compliance with the duty laid down in Article 6(3) of the Directive. The duty of verification laid down by the BImSchG is not, in any event, capable of ensuring that a project relating to such an installation does not adversely affect the integrity of the protected site. In particular, the duty to verify whether serious environmental damage, which cannot be prevented by current technology, is reduced to the minimum, does not ensure that such a project will not give rise to such damage.

- 44 As regards the use of water not requiring an authorisation under the WHG, the fact that it concerns the use of small quantities of water does not in itself preclude the possibility that some of those uses are likely to have a significant effect on a protected site. Even assuming that such uses of water are not likely to have a significant effect on the status of a body of water, it does not follow that they are not likely to have a significant effect on neighbouring protected sites.
- 45 In the light of the foregoing, it must be held that the Federal Republic of Germany has failed to correctly transpose into its national law Article 6(3) of the Directive as regards certain projects undertaken outside the SACs.

The second complaint

Arguments of the parties

- 46 The Commission submits that Paragraph 36 of the BNatSchG 2002 does not correctly transpose Article 6(3) and (4) of the Directive, in so far as the authorisation for installations causing emissions is refused only where it is foreseeable that they directly affect an SAC situated in an area where those installations are operated.
- 47 It follows that material nuisances caused outside such an area are, however, not taken into account, contrary to those provisions of the Directive.

- 48 The German Government states that monitoring of material nuisance caused by air pollutants or noise from the area affected by the installation must be carried out on an individual basis taking account of local data and the various pollutants emitted by the installation. Further, in practice, an authorisation for a project involving material nuisance is issued only if it does not have any harmful effects on the areas protected by the Directive.

Findings of the Court

- 49 Since, under Paragraph 36 of the BNatSchG 2002, the authorisation of installations causing emissions is refused only where they appear likely to affect a protected site situated in the area of impact particularly of those installations, installations whose emissions affect a protected site situated outside such an area may be authorised without taking account of the effects of those emissions on such a site.
- 50 In that connection, it must be held that the system established by German law, so far as it covers emissions within an area of impact, as defined in technical circulars in accordance with general criteria on installations, do not appear to be capable of ensuring compliance with Article 6(3) and (4) of the Directive.
- 51 In the absence of established scientific criteria, which have not been mentioned by the German Government, which would a priori rule out emissions affecting a protected site situated outside the area of impact of the installation concerned having a significant effect on that site, the system put in place by national law in the field in question is not, in any event, capable of ensuring that the projects or plans relating to installations causing emissions which affect protected sites situated outside their area of impact do not adversely affect the integrity of those sites, within the meaning of Article 6(3) of the Directive.

- 52 Accordingly, it must be held that Article 6(3) of the Directive has not been properly transposed.

The third complaint

- 53 The Commission complains that the Federal Republic of Germany has failed to properly transpose the obligation in Article 12(1)(d) of the Directive to take the requisite measures to establish a system of strict protection for certain animals by prohibiting the deterioration or destruction of breeding sites or resting places. The Commission argues that that provision requires Member States to prohibit not only deliberate acts but also non-deliberate ones. It submits that Paragraph 43(4) of the BNatSchG 2002 fails to comply with Article 12(1)(d) of the Directive, in so far as it authorises a number of derogations from the rules protecting the sites 'provided that animals, including their nesting or incubation sites, habitat or resting places ... are not intentionally affected'.
- 54 The German Government observes that the transposition of Article 12(1)(d) of the Directive is limited over the whole territory of the Federal Republic of Germany to deliberate acts, which, it argues, is in accordance with that provision since it does not require inclusion of non-deliberate destruction or deterioration of those sites in the system of protection that it establishes. An interpretation which also prohibits non-deliberate acts is, in any event, contrary to the principle of proportionality.
- 55 The Court has already held that the acts referred to in Article 12(1)(d) of the Directive include non-deliberate acts (see *Commission v United Kingdom*, paragraphs 73 to 79). By not limiting the prohibition laid down in Article 12(1)(d) of the Directive to deliberate acts, which it has done in respect of acts referred to in

Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding grounds or resting places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts.

- 56 In those circumstances the complaint alleging that Article 12(1)(d) of the Directive has not been properly transposed must be accepted.

The fourth complaint

- 57 The Commission complains that the Federal Republic of Germany inserted in Paragraph 43(4) of the BNatSchG 2002 two derogations to the prohibitions laid down in Paragraph 42(1), which do not sufficiently take account of the conditions to which the derogations authorised by Article 16 of the Directive are subject. More specifically, the Commission refers to derogations in German law to the systems for the protection of species to which implementing measures for an act authorised in accordance with Paragraph 19 of the BNatSchG 2002 and implementing measures authorised under Paragraph 30 of that law are entitled.
- 58 The German Government replies that the acts and measures which are the subject of the two derogations laid down in Paragraph 43(4) of the BNatSchG 2002 are subject to administrative decisions and that in order to adopt such decisions the competent authorities are, in any event, bound to observe the conditions laid down in Article 16 of the Directive.

- 59 It is clear from the 4th and 11th recitals in the preamble to the Directive that the threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Accordingly, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see *Commission v United Kingdom*, paragraph 25)
- 60 It follows that, in the context of the Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise (see *Commission v United Kingdom*, paragraph 26).
- 61 Accordingly, even assuming that the two derogations at issue in this case must be the subject of administrative decisions, on the issuing of which the competent authorities do in fact comply with the conditions to which Article 16 of the Directive subjects the authorisation of derogations, the fact remains that Paragraph 43(4) of the BNatSchG 2002 does not provide a legal framework consistent with the derogatory regime established by Article 16. That provision of national law does not submit the grant of the two derogations in question to all of the conditions laid down in Article 16 of the Directive. In that connection, it is sufficient to state that Paragraph 43(4) of the BNatSchG 2002 provides as the sole condition for authorisation for those derogations that animals, including their nesting or incubation sites, habitat or resting places and plant species which are particularly protected must not be subject to deliberate harm.

- 62 Therefore, the complaint alleging that Article 16 of the Directive has not been properly transposed into German law must be accepted.

The fifth complaint

- 63 The Commission refers to Paragraph 6(1) of the PflSchG, which prohibits the use of pesticides if it is foreseeable that they will produce effects harmful to human or animal health or the water table, or has other seriously harmful effects, in particular, on the balance of nature, the latter also covering plant and animal species within the meaning of Paragraph 2(6) of the PflSchG. The Commission argues that, by that prohibition, the Federal Republic of Germany has failed to transpose Articles 12, 13 and 16 of the Directive in a sufficiently clear and precise manner.
- 64 The German Government contests the merits of that complaint, arguing that the provision referred to by the Commission contains a general prohibition which facilitates compliance with the prohibitions laid down in Articles 12 and 13 of the Directive. It also refers to the fact that, according to Paragraph 6(1) of the PflSchG, pesticides must be used in accordance with good professional practice, and that the competent authority may order the measures necessary to fulfil the requirements also mentioned in that provision.
- 65 In that connection, as was pointed out in paragraph 60 of this judgment, the Member States are, in the context of the Directive, under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise.

- 66 According to settled case-law, Articles 12, 13 and 16 of the Directive form a coherent body of provisions (see, *Commission v United Kingdom*, paragraph 112). Articles 12 and 13 require Member States to establish a system of strict protection for animal and plant species.
- 67 Paragraph 6(1) of the PflSchG, by listing the situations in which the use of pesticides is prohibited, does not express in a clear, specific and strict manner the measures laid down in Articles 12 and 13 of the Directive which prohibit protected species from being adversely affected.
- 68 In particular, it does not appear that the prohibition on using pesticides, where it is foreseeable that it will produce seriously harmful effects on the balance of nature, is as clear, precise and strict as the prohibition on the deterioration of breeding sites or resting places of protected animals laid down in Article 12(1)(d) of the Directive or the prohibition of the deliberate destruction in the wild of protected plants laid down in Article 13(1)(a) of the Directive.
- 69 Accordingly, the fifth complaint must be accepted in so far as it concerns Articles 12 and 13 of the Directive.

The sixth complaint

Arguments of the parties

70 The Commission complains that the Federal Republic of Germany has infringed Articles 12 and 16 of the Directive by failing to notify it of the fishery catch legislation or by failing to ensure that those provisions contain adequate bans on fishing.

71 The Commission argues that the legislation in three Länder is not in accordance with the Directive. Thus, in Bavaria, the fish known by the scientific name *coregonus oxyrhynchus* does not feature among the species protected all year round. In Brandenburg, that species and the mollusc *unio crassus* are not protected. In Bremen, the legislation does not include in the list of fishing bans the three species which must be protected in that Land, namely, the two species previously mentioned and the fish *acipenser sturio*. Furthermore, that legislation expressly authorises fishing of specimens of *acipenser sturio* which are at least 100 cm long and specimens of the species *coregonus oxyrhynchus* which are at least 30 cm long. Moreover, no information is available on any fishing bans in the Länder of Berlin, Hamburg, Mecklenburg-West Pomerania, Lower Saxony, North Rhine-Westphalia, Saarland, Saxony and Saxe-Anhalt. It cannot, therefore, be held that the legislation in those Länder contains the fishing bans necessary to satisfy the provisions of Articles 12 and 16 of the Directive.

72 The German Government contends that, although Federal law authorises the Länder to lay down more specific provisions on the right to fish, those provisions

must nevertheless be interpreted in accordance with the Directive. Where the provisions of the Länder on fishing contravene the protection of the species of fish and shellfish legally required by Community law, they are void on account of an infringement of Federal law. To that effect, the BNatSchG 2002 is a law which overrides the legislation of the Länder. The fishing ban laid down in Paragraph 42 (1)(1) of the BNatSchG 2002, which also concerns the species mentioned in Annex IV of the Directive is therefore applicable. Therefore, it is not necessary to notify the provisions of the Länder on that matter.

- 73 The German Government states that it will ensure that the provisions of the Länder on fishing will be amended forthwith, in so far as they do not comply with the conditions of the Directive and Federal law, as is the case, for example, of the legislation of the Land Bremen, which is complained of by the Commission.

Findings of the Court

- 74 It is common ground in this case that *coregonus oxyrhynchus*, *unio crassus* and *acipenser sturio*, which feature in Annex IV(a) to the Directive, are species found in Germany.

- 75 Those species must therefore be subject, in accordance with Article 12(1)(a) of the Directive, to a system of strict protection prohibiting all forms of deliberate capture or killing of members of those species in the wild.

- 76 It is clear from the file that, when the period set down in the reasoned opinion expired, Bremen's legislation authorised, inter alia, the capture of fish all year round so long as no fishing bans were issued. *Coregonus oxyrhynchus* is not the subject of a fishing ban. In Brandenburg neither that species nor *unio crassus* are the subject of a fishing ban. As to Bremen's legislation, the German Government has acknowledged that it is not in accordance with the Directive.
- 77 Although it is true, as the German Government observes, that Paragraph 42(1) of the BNatSchG 2002 prohibits, inter alia, the capture and killing of the animal species covered by a system of strict protection, such as those mentioned in paragraph 74 of this judgment, the fact remains that, under the first sentence of Paragraph 39(2) of that law on the protection of animals, hunting and fishing are not affected by the provisions of that section. That section includes Paragraph 42 of the BNatSchG 2002.
- 78 In those circumstances, it must be stated that the legislative framework existing in Germany, in which regional provisions which infringe Community law coexist with a Federal law which complies with it, does not ensure effectively, and in a clear and precise manner, in respect of the three animal species at issue in this case, the strict protection required by Article 12(1)(a) of the Directive, with respect to the prohibition of all forms of deliberate capture and killing of specimens of those species in the wild.
- 79 In this case, it is established that German law is not in accordance with Article 12(1)(a) of the Directive and does not fulfil the conditions for derogation laid down in Article 16 of the Directive.

80 As regards the rules on fishing in the other Länder, which have not been communicated to the Commission, it cannot be held that they do not satisfy the provisions of Articles 12 and 16 of the Directive, since no information is available on any fishing bans in those Länder, particularly since, as was stated in Paragraph 77 of this judgment, Paragraph 42(1)(1) of the BNatSchG 2002 prohibits the capture and killing of specimens of the species *coregonus oxyrhynchus*, *union crassus* and *acipenser sturio*.

81 In that connection, it must be observed that Article 23(3) of the Directive provides that Member States are to communicate to the Commission the main provisions of national law which they adopt in the field covered by this Directive. However, the Commission has not based its action on that provision.

82 It follows that the sixth complaint must be accepted within the limits set out in the preceding paragraphs of this judgment.

83 Accordingly, the Court finds that:

- by failing, in respect of certain projects carried out outside the SAC within the meaning of Article 4(1) of the Directive, to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) of the Directive whether or not such projects are capable of significantly affecting such an SAC;

- by authorising emissions in an SAC, irrespective of whether they are likely to have a significant effect on that area;
- by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;
- by failing to ensure compliance with the criteria for derogation set out in Article 16 of the Directive in the case of certain activities compatible with the conservation of the area;
- by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;
- by failing to ensure that legislation on fishing contains adequate bans on catches,

the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and Articles 12, 13 and 16 of the Directive.

Costs

84 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

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

1. — **By failing, in respect of certain projects carried out outside special areas of conservation within the meaning of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) of that directive, whether or not such projects are capable of significantly affecting a special area of conservation;**
- **by authorising emissions in a special area of conservation, irrespective of whether they are likely to have a significant effect on that area;**
- **by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;**

- **by failing to ensure compliance with the criteria for derogation set out in Article 16 of Directive 92/43 in the case of certain activities compatible with the conservation of the area;**
- **by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;**
- **by failing to ensure that legislation on fishing contains adequate bans on catches,**

the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and Articles 12, 13 and 16 of Directive 92/43.

2. Orders the Federal Republic of Germany to pay the costs.

[Signatures]