

JUDGMENT OF THE COURT (Sixth Chamber)

11 September 2001 \*

In Case C-71/99,

**Commission of the European Communities**, represented by G. zur Hausen and P. Stancanelli, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Federal Republic of Germany**, represented by W.-D. Plessing and C.-D. Quasowski, acting as Agents,

defendant,

APPLICATION for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph of Article 4(1) of Council

\* Language of the case: German.

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), together with the information on each site required by the second subparagraph of Article 4(1) thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive,

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, V. Skouris, R. Schintgen, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,  
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2001,

gives the following

## Judgment

- 1 By application lodged at the Court Registry on 1 March 1999, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph 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'), together with the information on each site required by the second subparagraph of Article 4(1) thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

### Community law

- 2 According to Article 2, the aim of the directive is to contribute towards biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies.
- 3 Article 3(1) and (2) of the directive provides:

'1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.'

- 4 A 'site' is defined by Article 1(j) of the directive as a geographically defined area whose extent is clearly delineated. Article 1(k) of the directive defines a 'site of Community importance' as being a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000, and/or contributes significantly to the maintenance of biological diversity within the biogeographical region or regions concerned. For animal species ranging over wide areas, sites of Community importance are to correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction.

- 5 The procedure governing the designation of special areas of conservation ('SACs'), which is laid down in Article 4 of the directive, consists of four stages. First, each Member State must propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II native to its territory the sites host (Article 4(1)). Second, the Commission, on the basis of the lists of the

Member States and in agreement with each of them, must establish a draft list of sites of Community importance (Article 4(2), first and second subparagraphs). Third, the list of sites selected as sites of Community importance must be adopted by the Commission in accordance with the procedure laid down in Article 21 of the directive (Article 4(2), third subparagraph, and 4(3)). Fourth, Member States are required to designate sites of Community importance as SACs (Article 4(4)).

- 6 With more specific regard to the first stage, Article 4(1), first subparagraph, of the directive requires Member States to propose the list of sites there mentioned on the basis of the criteria set out in Annex III (Stage 1) to the directive and relevant scientific information.
  
- 7 Annex III (Stage 1), Parts A and B, to the directive sets out the following criteria:

*‘A. Site assessment criteria for a given natural habitat type in Annex I*

(a) Degree of representativity of the natural habitat type on the site.

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

- (c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.
- (d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

*B. Site assessment criteria for a given species in Annex II*

- (a) Size and density of the population of the species present on the site in relation to the populations present within national territory.
- (b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.
- (c) Degree of isolation of the population present on the site in relation to the natural range of the species.
- (d) Global assessment of the value of the site for conservation of the species concerned.'

8 Under Annex III (Stage 1), Part C, to the directive, Member States are required, on the basis of the criteria set out in Annex III (Stage 1), Parts A and B, to classify the sites which they propose on the national list as sites eligible for identification

as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

- 9 Under the second subparagraph of Article 4(1) of the directive, the list of sites proposed must be transmitted to the Commission within three years of notification of the directive, together with information on each site. This information must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1), and must be provided in a format established by the Commission in accordance with the procedure laid down in Article 21 of the directive ('the format').
- 10 Since the directive was notified on 10 June 1992, Member States ought to have transmitted the list of proposed sites and the information on those sites to the Commission before 11 June 1995.
- 11 The format was established only by Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1997 L 107, p. 1). That decision was notified to the Member States on 19 December 1996 and published in the *Official Journal of the European Communities* on 24 April 1997.

### Pre-litigation procedure

- 12 Having failed to receive from the German authorities either the full list of sites hosting the natural habitat types and native species referred to in Annexes I and II

to the directive respectively or the information on those sites, and in the absence of any other information indicating to it that the Federal Republic of Germany had adopted the measures necessary to meet its obligations under Article 4 of the directive, the Commission, on 4 March 1996, put the German Government on formal notice to submit its observations on that matter within two months, in accordance with the procedure laid down in Article 169 of the EC Treaty.

- 13 The German authorities informed the Commission on 8 August 1996 that, under German law, the power to select sites eligible for designation as SACs is vested in the *Länder*. In view of the fact that the *Länder* had informed them that they would designate those areas only once the directive had been implemented in national law, the German authorities stated that they were not as yet in a position to submit the full list of national sites eligible for designation as SACs.
- 14 By letters of 30 September 1996, 24 January 1997, 28 January 1997 and 11 June 1997, the German authorities sent to the Commission a number of lists of sites in the *Länder* of Bayern and Sachsen-Anhalt.
- 15 Bearing in mind the fact that the format had not been available until 19 December 1996, the Commission sent to the German Government on 3 July 1997 an additional letter of formal notice in which it reiterated its criticism of that Government for having failed to send to it the full list of the sites and site information and called on it to submit, within one month, its observations on that infringement of Article 4(1) of the directive. The Commission stressed in particular the need to use the format for transmission of the relevant data.



- 16 By letter of 21 October 1997, the German authorities sent a list of sites in the *Land* of Schleswig-Holstein. By letter of 27 October 1997 they reiterated the special features of their national law, under which competence in this matter is conferred on the *Länder*. They pointed out in this regard that, since the transposing legislation had still not been adopted, the *Länder* did not intend to forward the complete list of sites which they were considering for selection.
- 17 Forming the view that its correspondence with the German authorities did not allow it to conclude that the Federal Republic of Germany had forwarded a complete list of sites hosting the natural habitat types and native species referred to respectively in Annexes I and II to the directive, together with the information relating to those sites, the Commission, in accordance with Article 169 of the EC Treaty, sent to that Member State on 19 December 1997 a reasoned opinion calling on it to comply therewith within two months of its notification.
- 18 By letters of 28 January 1998, 13 and 19 March 1998, 10 and 22 September 1998 and 14, 20 and 27 October 1998, the German authorities sent further lists of sites in the *Länder* of Hessen, Thüringen, Bayern, Sachsen-Anhalt, Saarland, Hamburg, Rheinland-Pfalz, Bremen, Niedersachsen and Berlin. Further, by letters of 25 March 1998, 7 April 1998, 11 May 1998 and 23 June 1998, they forwarded files on the sites previously notified to the Commission. Finally, by letters of 14 and 15 April 1998, they sent to the Commission a schedule proposing a timetable for the measures envisaged by each *Land* for compliance with the obligations arising under Article 4(1) of the directive.
- 19 Since it formed the view that the material thus forwarded did not allow it to conclude that the Federal Republic of Germany had brought an end to the infringement in question, the Commission decided to bring the present action before the Court.

## Findings of the Court

*The first plea in law*

20 With regard to the obligation to transmit the site list referred to in Article 4(1), first subparagraph, of the directive, the Commission points out that each Member State's contribution to the setting up of a coherent European ecological network depends on the representation on its territory of the natural habitat types and species' habitats listed in Annexes I and II to the directive respectively. It is clear from a combined reading of Article 4(1) of and Annex III to the directive that Member States enjoy a certain margin of discretion when selecting sites for inclusion in the list. The exercise of that discretion is, however, in the Commission's view, subject to compliance with the following three conditions:

- only criteria of a scientific nature may guide the choice of the sites to be proposed;
  
- the sites proposed must provide a geographical cover which is homogeneous and representative of the entire territory of each Member State, with a view to ensuring the coherence and balance of the resulting network. The list to be submitted by each Member State must therefore reflect the ecological variety (and, in the case of species, the genetic variety) of the natural habitats and species present within its territory;
  
- the list must be complete, that is to say, each Member State must propose a number of sites which will ensure sufficient representation of all the natural

habitat types listed in Annex I and all the species' habitats listed in Annex II to the directive which exist on its territory.

- 21 The Commission states that it instituted the present proceedings with a view to securing a declaration that the German national list was manifestly inadequate, and that such inadequacy far exceeded the margin of discretion conferred on Member States. Such inadequacy is evident with regard to the situation existing when the period set in the reasoned opinion expired, and even though the German authorities have, since then, forwarded several other lists of sites, the infringements of which they stand accused still persist. The Commission submits in this connection that a comparison between the proposals of the German authorities and the scientific data provided by those authorities, in particular the manual entitled 'Das europäische Schutzgebietssystem Natura 2000' edited by the *Bundesamt für Naturschutz* (Federal Office for Nature Protection) amply demonstrates the true nature of those infringements. The German national list does not therefore, in the Commission's opinion, satisfy the criteria referred to in Article 4(1) of the directive, read in conjunction with Annex III thereto.
- 22 The German Government acknowledges that, when the period set in the reasoned opinion expired, it had not forwarded all of the sites which it intended to include on the list of sites mentioned in the first subparagraph of Article 4(1) of the directive. However, it submits, first, that compliance with the obligation to forward such a list under the first subparagraph of Article 4(1) of the directive was conditional on the Member States' receiving the format, which is the first document to define the information enabling relevant sites to be selected. Consequently, the period provided for compliance with that obligation could have begun to run, at the earliest, only from notification of the format and had not yet expired at the date on which the action was brought.
- 23 Second, the German Government contends that the directive confers on the Member States a wide margin of discretion in regard to selection of the sites for inclusion on the list to be forwarded to the Commission. The Member States are

therefore entitled to notify only those sites which they consider to be appropriate and necessary for the establishment of a coherent European network of SACs, on the basis of technical criteria and having regard to the objectives of the directive. The national level, it argues, is the most appropriate one at which to carry out an adequate selection among the sites hosting the natural habitats and species' habitats referred to respectively in Annexes I and II to the directive. The Member States, it argues, are better informed as to the sites present within their territory.

24 Third, the German Government challenges the scientific sources to which the Commission referred in order to demonstrate that the German Government had forwarded an incomplete list. It contends that the manual mentioned in paragraph 21 of the present judgment is in no wise the German reference list, and is not even a scientifically certain basis of assessment.

25 It must first be stated that the obligation to forward the list of sites mentioned in the first subparagraph of Article 4(1) of the directive was not conditional on adoption of the format. The format is not the first text to have defined the information allowing Member States to select the relevant sites. Once the directive had been notified, the Member States were aware of all the selection criteria to be taken into consideration. Article 4(1) of the directive requires each Member State to propose, on the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, a list of sites indicating which types of natural habitat under Annex I and which native species under Annex II to the directive they host. It follows from Annex III (Stage 1) to the directive that the relevant criteria are the degree of representativity of the natural habitat type on the site, the area of the site covered by the natural habitat type and its degree of conservation, the size and density of the population of the species present on the site, their degree of isolation, the degree of conservation of their habitats and, finally, the comparative value of the sites.

26 Next, although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1) of the directive, that

Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the directive.

27 It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive (Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 22).

28 Only in that way, moreover, is it possible to realise the objective, set out in the first subparagraph of Article 3(1) of the directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i) of the directive, read in conjunction with Article 2(1) thereof, that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies (*First Corporate Shipping*, cited above, paragraph 23).

29 Finally, it must be borne in mind that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned

opinion. The Court cannot therefore take account of any subsequent changes (see, *inter alia*, Case C-266/99 *Commission v France* [2001] ECR I-1981, paragraph 38).

- 30 When the period laid down in the reasoned opinion expired on 19 February 1998, the content of the German national list sent to the Commission was manifestly inadequate, far exceeding the margin of discretion which Member States enjoy in drawing up the list of sites mentioned in Article 4(1), first subparagraph, of the directive. In accordance with the case-law cited in the preceding paragraph of the present judgment, the lists of sites communicated to the Commission after the expiry of that period are irrelevant for purposes of the present action.
- 31 It must therefore be concluded that, by failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1) of the directive, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

### *The second plea in law*

- 32 With regard to the obligation to transmit information on the sites eligible for designation as SACs, the German Government does not deny its failure to forward that information by the expiry of the period laid down in the reasoned opinion, but argues that the preparatory work necessary for collating information on the sites to be proposed, for the completion of which Member States had a three-year period, could not practically begin until the end of 1996, when the format had been notified to the Member States.

- 33 The Commission submits that the obligation to transmit the site information was to be met before 11 June 1995. Even if certain Member States which already had the list of proposed sites and relevant information before 11 June 1995 wished to await adoption of the format, they could, after the format was notified on 19 December 1996, rapidly have incorporated that information in the format and forwarded it to the Commission.
- 34 The Commission adds that, in order to take account of the late adoption of the format, it extended the pre-litigation procedure by addressing an additional letter of formal notice to the Federal Republic of Germany on 3 July 1997, well after the date on which the format was notified. The German authorities were thus fully in a position to meet their obligation to transmit the information on each site. When the period laid down in the reasoned opinion expired on 19 February 1998, the Federal Republic of Germany had not sent to the Commission the information on the sites to be proposed.
- 35 It is necessary first to point out that, even though the Commission had initially sent to the German Government a letter of formal notice on 4 March 1996, that is to say, before the format was notified, it sent to that Government a new letter of formal notice, following notification of the format, giving it a new period within which to comply with Article 4(1), second subparagraph, of the directive.
- 36 Next, it must be noted that, following notification of the directive on 10 June 1992, the Member States were aware which types of information they would be required to collate for purposes of transmission within three years of that notification, that is to say, by 11 June 1995. They also knew that this information had to be provided on the basis of the format once it had been drawn up by the Commission. Article 4(1), second subparagraph, of the directive expressly states that the information to be transmitted, in a format established by the

Commission, must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1).

- 37 The period which the Commission gave to the German Government for meeting its obligation to include on the format the site information, which it was required to have at its disposal prior to 11 June 1995, must therefore be regarded as reasonable. From 19 December 1996, the date on which the format was notified, to 19 February 1998, when the period laid down in the reasoned opinion expired, the German Government benefited from a period of more than one year to carry out that specific operation.
- 38 Since the German Government acknowledges that, when the period laid down in the reasoned opinion expired, it had not transmitted to the Commission, in the format, the information on the sites to be proposed, it must be held that, by failing to transmit to the Commission, within the prescribed period, the information relating to the sites on the list mentioned in the first subparagraph of Article 4(1) of the directive, pursuant to the second subparagraph of Article 4(1) thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

## Costs

- 39 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 Federal Republic of Germany must be ordered to pay the costs.



On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph 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, together with the information on those sites required by the second subparagraph of Article 4(1) thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive;
2. Orders the Federal Republic of Germany to bear the costs.

Gulmann

Skouris

Schintgen

Macken

Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2001.

R. Grass

C. Gulmann

Registrar

President of the Sixth Chamber