OPINION OF ADVOCATE GENERAL ALBER

delivered on 27 June 2002 [1]

I — Introduction

1. The Commission has brought the present infringement proceedings against the French Republic for breach of Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [2] ('the wild birds directive'). It is claiming, firstly, that overall the Member State has not, within the time-limit, classified in sufficient measure as special protection areas the territories which in accordance with the aforementioned provisions should have been classified as such and, secondly, that it has not, in particular, classified the Plaine des Maures (France) as a special protection area. (The sizes of the areas relevant to this case are stated *inter alia* in points 23 and 59.)

1 — Original language: German.

2 — OJ 1979 L 103, p. 1, as last amended by Commission Directive 97/49/EC of 29 July 1997 (OJ 1997 L 223, p. 9).

II — Relevant provisions

The wild birds directive

2. According to the first sentence of Article 1(1), the wild birds directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies.

3. Article 2 of the wild birds directive provides:

'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.'

4. Article 3 provides as follows:

'1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

(a) creation of protected areas;

(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;

(c) re-establishment of destroyed biotopes;

(d) creation of biotopes.'

5. Article 4 covers the special conservation measures that apply in particular to the species listed in Annex I and to migratory species not listed in that annex. It states:

'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.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

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 i[t] may take appropriate initiatives with a view of 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. ...'

III — Facts and procedure to date

6. The action for failure to fulfil obligations is based on two separate procedures. In Commission Case 97/2004, the Commission sent a letter of formal notice to the French Government dated 23 April 1998 relating to infringement of Article 4 of the wild birds directive, to which the French Government replied by letter of 13 November 1998. The Commission was claiming that the French authorities had failed to classify special protection areas for birds in sufficient measure in terms of number, of size and of diversity of species. Between November 1998 and 25 February 2000, France notified the Commission of classification of eight new special protection areas. In a letter dated 29 November 1999, the French Ministry of the Environment reported the increased endeavours made in association with prefects to transpose the wild birds directive, referring at the same time to the need to transpose Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the habitats directive') and to hunting requirements.

7. As the Commission took the view that these measures were not sufficient to over-

come the objections raised in the letter of formal notice, it sent a reasoned opinion to the French Government on 4 April 2000, setting a time-limit of two months. In a letter of 13 April 2001, the French Government reported the classification of two more protection areas measuring a total of 25 428 hectares.

8. In Case 92/4527, the Commission was dealing with a complaint made to it concerning the threat to the Plaine des Maures nature reserve caused by various construction projects, particularly the Bois de Bouis recreational park in Vidauban. On 22 June 1994, the Commission sent a letter of formal notice to the French Government alleging failure to comply with Articles 3 and 4 of the wild birds directive in relation to the Plaine des Maures. Until 1997, correspondence was exchanged between the Commission and the French Government in which the latter repeatedly stated its willingness to protect the Plaine des Maures site.

9. As the Commission took the view that France had nevertheless failed to comply with its obligations under the wild birds directive in relation to the Plaine des Maures, it sent a reasoned opinion to the French Government on 19 December 1997, setting a time-limit of two months. In a letter of 5 November 1998, the French Government reported the classification of an area of 879 hectares on the Plaine des Maures as a special protection area. The study on the designation of areas of importance for the conservation of birds in France (referred to as ZICOs)[3] designates 7 500 hectares of the Plaine des Maures as an area of special value for the conservation of birds.

10. By an application of 11 May 2001, lodged at the Court Registry on 16 May 2001, the Commission brought an action against the French Republic, claiming that the Court should:

— declare that by not classifying as special protection areas the territories most suitable for the conservation of the species of wild bird listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and for the conservation of migratory species of bird and, in particular, by not classifying as a special protection area a sufficiently large area of land on the Plaine des Maures, the French Republic has failed to fulfil its obligations under that directive and under the Treaty establishing the European Community;

— order the French Republic to pay the costs.

3 — French abbreviation for *zones importantes pour la conservation des oiseaux*.

11. The French Government recognises that it has to classify more protection areas in order to meet its obligation under Article 4 of the wild birds directive as it has already done by its classification of a further 3 658 hectares on the Plaine des Maures site. It nevertheless asks the Court to find that the obligation on Member States under Article 4 of the wild birds directive does not mean that every territory that is listed in the inventories cited by the Commission (such as the 1994 ZICO inventory or the 2000 IBA inventory)[4] must be classified as a protection area or else justification given for its non-classification.

12. The submissions made by the parties will be returned to in the context of each of the legal questions raised.

IV — The head of claim alleging failure to comply with the wild birds directive as a whole

1. *Arguments of the parties*

13. The *Commission* claims that there has been an infringement of Article 4 of the wild birds directive because the French Republic has not classified special protection areas ('SPAs') within the meaning of that provision in sufficient measure, in terms of both the number and size of the areas and their diversity and ornithological quality. The Commission states that the French Government does not dispute this, even after the additional classifications made in the course of the procedure, which the Commission considers to be marginal. By 30 April 2001, a mere 116 SPAs had been classified, comprising an area of only 8 628 km^2, representing 1.6% of the entire area of France. The study on the designation of sites of importance for the conservation of birds in France (ZICO 1994, see point 34 below for details of the persons commissioning and compiling the study) identifies 285 sites covering a total area of 44 200 km^2 as such sites, corresponding to 8.1% of the entire area of France. The French Republic has therefore to date classified only 40.7% in terms of number, and 18.2% in terms of size, of the conservation areas listed in ZICO 1994. All in all, pro rata according to area of national territory, the area reserved for the conservation of birds is the smallest of all of the Member States.

14. Making reference to ZICO 1994 (and later in the proceedings to IBA 2000 as well), the Commission sets out in detail the sites where it considers that there are omissions. It argues that in the absence of scientific evidence to the contrary the French Government must classify as SPAs all of the sites listed in the 1994 ZICO (or 2000 IBA) inventory. This follows from the fact that, although the wild birds directive

4 — A study entitled 'Important Bird Areas in the European Community'.

does grant Member States a margin of discretion when classifying sites, they have to observe the conservation aims and requirements of the directive. They must therefore classify sites in sufficient measure, both quantitatively and qualitatively, having regard to the scientifically proven natural conditions so as to ensure the survival and reproduction of protected species. ZICO 1994 contains the best and most up-to-date data available in this respect. The IBA scientific inventory published in the year 2000 — and hence the most recent list — is, except for seven protection areas that are no longer listed, absolutely identical in substance to the 1994 ZICO inventory used as a basis by the Commission in the present proceedings and recognised by the French Government in its defence as being valid for France.

15. The assertion by the French Republic that ZICO 1994 is a preliminary, as yet imprecise, inventory is refuted by the fact that, as the French Ministry of the Environment itself says in the introduction, it was compiled to provide a solid scientific basis for the transposition of the directive. Since it was published by the French Ministry of the Environment, it is the French Government itself — and not the Commission — that has identified the territories most suitable for the conservation of birds, in accordance with the division of powers in the wild birds directive.

16. According to settled case-law of the Court of Justice, internal difficulties, such as the commitment of resources to setting up the Natura 2000 network or hunting requirements, are no justification for a failure to fulfil an obligation under Community law. The Court has also already ruled that it is not possible to avoid an obligation to classify protection areas by adopting other conservation methods. The principle of proportionality has been observed.

17. The *French Government* points out, firstly, that since 30 April 2001 it has classified 28 086 hectares of the massif de Fontainebleau as a further SPA and extended the Pinail and Moulière protection area by 4 326 hectares and the Plaine des Maures protection area by 3 658 hectares to 4 700 hectares, which on 17 July 2001 made a total of 117 SPAs, equivalent to 41% of the number of sites required under the 1994 ZICO inventory and 19% of the area of land required by it. The French Government does nevertheless concede that further efforts are needed to fulfil its obligations under the wild birds directive, and it will endeavour to make such efforts. The delays in its transposition have been unavoidable, however, in view of the duty arising from another directive to set up the Natura 2000 network and in view of the necessary statutory adjustments to hunting seasons.

18. It argues that the Commission nevertheless exceeds its powers and infringes the

principles of subsidiarity and proportionality if it requires all of the sites listed in the 1994 ZICO and 2000 IBA inventories to be classified as SPAs. Member States are not obliged to do so under the wild birds directive as it is for them in the exercise of their discretion to identify the most suitable territories. Although the Commission can complain that a Member State has classified too few sites overall or manifestly not the most suitable ones, it cannot complain, however, that it has failed to classify a particular site.

19. This is apparent from the judgment of the Court of Justice in Case C-166/97 *Commission* v *France* [1999] ECR I-1719 and from the fact that the 1994 ZICO inventory just provides an overall picture, from which the State is not to deviate by greatly reducing the number of sites. ZICO 1994 is not a record of the most suitable territories for the conservation of birds. It cannot be concluded from the fact that the French authorities have worked from this inventory, or been involved in its publication, that it has been acknowledged to be binding. The sweeping approach of the inventory can also be seen from the fact that it includes areas cultivated by man which, as such, cannot be considered the most suitable territories for the conservation of birds. It would be excessive to also have to classify, out of the total of 285 sites, the 223 that ZICO 1994 describes as 'areas of heightened interest for the conservation of birds' and as 'of particular interest', as the fact that sites are graded according to their different degrees of interest demonstrates. The question that must be asked, therefore, is whether the site can actually be of distinct help to the conservation of birds. Nor can one overlook the fact that, of the 116 species of birds listed in Annex I to the directive, 100 are protected on at least one site.

20. The French Government also claims that every SPA classified by it within a ZICO is the part that is most suitable for the conservation of birds. Evaluation of the extent of classification must therefore be based on the number of ZICOs listed in the inventory and not on size. Nor is the percentage of the entire area of the country that the protected areas represent a proper criterion.

21. The use of the words 'in particular' in the third subparagraph of Article 4(1) indicates that classifications other than classification as SPAs would also satisfy the requirements of the directive. The Commission must also have regard to the principle of proportionality as well as other interests.

2. *Analysis*

22. The Commission's complaint against the French Republic is that it has not in

sufficient measure, qualitatively or quantitatively, classified as SPAs the territories most suitable, according to ornithological criteria and reliable scientific investigations, for the conservation of the species concerned. It sets out in detail the particular territories concerned, which are listed in both the French 1994 ZICO inventory and in the 2000 IBA study as sites that have been identified as important areas for the conservation of wild birds.

23. The difference between the target figure and the figure actually achieved is considerable if one takes the 1994 ZICO inventory as just a rough yardstick: 285 sites named in the inventory as areas of importance for the conservation of birds (ZICOs), covering a total area of 44 200 km^2 and representing 8.1% of the entire country, as against 116 SPAs classified by France with an area of 8 628 km^2, which corresponds to 1.6% of the entire country.

24. The French Government has not disputed these figures and concedes that it has not classified sites as SPAs in sufficient measure, either in number or in size. It would therefore be possible, at this juncture, immediately to make the declaration of failure to fulfil an obligation sought by the Commission, as the Court found in paragraph 63 of its judgment in *Commission* v *Netherlands*: [5]

'Thus where it appears that a Member State has classified as SPAs sites the number and total area of which are manifestly less than the number and total area of the sites considered to be the most suitable for conservation of the species in question, it will be possible to find that that Member State has failed to fulfil its obligation under Article 4(1) of the Directive.'

25. If, however, it is wished to establish the precise extent of the failure on the part of the French Republic to fulfil its obligation, having regard to the fact that the Commission expects the French Republic to classify as SPAs all of the ZICOs named in the 1994 ZICO or 2000 IBA study, it will be necessary to examine the exact extent of the duties that are imposed on Member States under the wild birds directive.

26. The first question is whether, by using the words 'in particular' (... shall classify *in particular* the most suitable territories... as special protection areas...), the last subparagraph of Article 4(1) also envisages a classification other than classification as

5 — Case C-3/96 [1998] ECR I-3031.

SPAs, as presumed by the French Government. In *Commission* v *Netherlands*, cited above, the Court of Justice stated as follows, in paragraphs 55 to 58:

'It must first be observed that, contrary to the contention of the Kingdom of the Netherlands, Article 4(1) of the Directive requires Member States to classify as SPAs the most suitable territories in number and size for the conservation of the species mentioned in Annex I, an obligation which it is not possible to avoid by adopting other special conservation methods.

It follows from that provision, as interpreted by the Court, that if such species occur on the territory of a Member State, it is obliged to define *inter alia* SPAs for them (see Case C-334/89 *Commission* v *Italy* [1991] ECR I-93, paragraph 10).

Such an interpretation of the obligation to classify SPAs is moreover consistent with the system of specifically targeted and reinforced protection laid down by Article 4 of the Directive in respect in particular of the species listed in Annex I (see Case C-44/95 *R* v *Secretary of State for the Environment*, ex parte *Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraph 23), *a fortiori* since even Article 3 provides, for all the species of birds covered by the Directive, that the preservation, maintenance and re-establishment of biotopes and habitats is to include primarily measures such as the creation of protected areas.

Besides, as the Advocate General points out in point 33 of his Opinion, if Member States could escape the obligation to classify SPAs if they considered that other special conservation measures were sufficient to ensure survival and reproduction of the species mentioned in Annex I, the objective of creating a coherent network of SPAs, referred to in Article 4(3) of the Directive, might not be achieved.'

27. The Court has therefore already ruled that Article 4 requires Member States to classify SPAs, an obligation that cannot be met by the adoption of other conservation measures or by the introduction of classifications other than classification as protection areas.

28. Nor do the words 'in particular' thereby lose their legal meaning. They are to be construed, firstly, in the sense that the Member States have to take this specific measure in order to protect the habitats of the species listed in Annex I. This is shown by a comparison with Article 3(2) of the directive under which, in addition to the

creation of protected areas, other conservation measures such as the creation of biotopes are possible, for all species of birds and not just those named in Annex I.

29. The words are also to be construed as meaning that a Member State can classify other territories as SPAs on a voluntary basis, in addition to the most suitable territories.

30. The parties also disagree as to the question of the criteria by which the quality and quantity of the protection areas to be classified are to be governed. Article 4 of the wild birds directive requires classification of 'the most suitable territories in number and size as special protection areas for the conservation of these species'. This means that this obligation does, on the one hand, provide a certain margin of discretion as it is for the Member States to classify the territories as protection areas. On the other hand, the territories must be the *most suitable* areas in number and size for the conservation of the species (that is to say, the species listed in Annex I). This is an imprecise legal term which needs clarification, as the directive does not define it elsewhere or acknowledge the importance of a particular scientific source.

31. In doing so, account must be taken of the objectives of the directive and of the criteria stated elsewhere in the directive that are binding on the Member State in the exercise of its discretion. The Court has already stated in this connection, in paragraph 26 of its judgment in *Commission* v *Spain*: [6]

'Although Member States do have a certain margin of discretion with regard to the choice of special protection areas, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the directive, such as the presence of birds listed in Annex I, on the one hand, and the designation of a habitat as a wetland area, on the other.'

32. The Court expounded upon this case-law in paragraphs 60 to 62 of its judgment in *Commission* v *Netherlands*, cited above, as follows:

'Moreover, while the Member States have a certain margin of discretion in the choice of SPAs, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the Directive (see Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 26).

6 — Case C-355/90 [1993] ECR I-4221.

It follows that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Directive.

Consequently, Member States are obliged to classify as SPAs all the sites which, applying ornithological criteria, appear to be the most suitable for conservation of the species in question.'

33. The governments of the Member States — when choosing the most suitable territories, as they are required to do — as well as the Commission — when monitoring the measures taken by the Member States (Article 12 of the wild birds directive) and coordinating the formation of a coherent whole (Article 4(3)) — need for performing those tasks a scientifically based analysis of the natural conditions appertaining in the particular Member State concerned in order to be able to apply the said ornithological criteria.

34. This function can be fulfilled by the 1994 ZICO and 2000 IBA studies relied on by the Commission. The 1994 ZICO study, which applies only to French territory, was indisputably commissioned by the French Ministry of the Environment for the purposes of transposing the wild birds directive and was published by it in association with ornithological experts. The 2000 IBA inventory stems from instructions given by the Commission in connection with transposition of the wild birds directive, whereby scientists throughout Europe identified areas of importance for the conservation of birds on the basis of internationally recognised criteria, and is now in its fourth edition. Its reliability as regards detailed scientific analysis can also be seen, for example, from the fact that there is now no listing for seven sites in France that have ceased to be of importance for the conservation of birds since 1994.

35. The Court has already stressed the practical significance of these inventories for its own activity too in paragraphs 68 to 70 of the judgment in *Commission* v *Netherlands*, cited above, in relation to the forerunner to IBA 2000:

'In this connection, it must be pointed out that IBA 89 draws up an inventory of areas which are of great importance for the conservation of wild birds in the Community. That inventory was prepared for the competent directorate-general of the Commission by the Eurogroup for the Conservation of Birds and Habitats in conjunction with the International Council of Bird

Preservation and in cooperation with Commission experts.

In the circumstances, IBA 89 has proved to be the only document containing scientific evidence making it possible to assess whether the defendant State has fulfilled its obligation to classify as SPAs the most suitable territories in number and area for conservation of the protected species.

...

It follows that that inventory... can, by reason of its acknowledged scientific value in the present case, be used by the Court as a basis of reference for assessing the extent to which the Kingdom of the Netherlands has complied with its obligation to classify SPAs.'

36. Nor does the French Government ultimately cast doubt on the scientific value of the studies — it merely disputes their evidential value in the Treaty infringement proceedings. The question, therefore, is whether the mere fact that a territory appears in a scientific inventory as a ZICO or an IBA necessarily makes it an SPA that has to be classified, as the Commission appears to demand. The effect of this would be that the Commission would only have to refer to the relevant inventories to satisfy the burden of proof imposed on it in Treaty infringement proceedings, without the Member State having an opportunity to defend its position.

37. The Court has already had occasion to comment on this issue, and has come to a somewhat qualified conclusion. It states in paragraphs 40 to 42 of its judgment in *Commission* v *France*:[7]

'It is settled case-law that, in proceedings under Article 169 of the Treaty for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information necessary to enable it to determine whether the obligation has been fulfilled (see, *inter alia*, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, at paragraph 6, and Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, at paragraph 59).

...

Clearly, the mere fact that the site in question was included in the inventory of ZICOs does not prove that it ought to have been classified as an SPA. The French Government has stated, without being contradicted by the Commission, that that

7 — Cited in point 19.

inventory is no more than an initial survey of the country's ornithological wealth and covers areas in which there is a wide variety of environments and, in some cases, a human presence and not all of which are of an ornithological interest such as to require that they be regarded as the most suitable territories in number and size for the conservation of birds.'

38. Paragraphs 69 and 70 of the judgment in Case C-3/96 *Commission* v *Netherlands* state as follows on this point:

'In the circumstances, IBA 89 has proved to be the only document containing scientific evidence making it possible to assess whether the defendant State has fulfilled its obligation to classify as SPAs the most suitable territories in number and area for conservation of the protected species. *The situation would be different* if the Kingdom of the Netherlands had produced scientific evidence in particular to show that the obligation in question could be fulfilled by classifying as SPAs territories whose number and total area were less than those resulting from IBA 89.

It follows that that inventory, although *not legally binding* on the Member States concerned...'. [8]

8 — Emphasis added.

39. The mere fact that a particular area is listed in a scientific inventory such as ZICO 1994 or IBA 2000 does not prove, therefore, that the French Republic is bound to classify it as an SPA. The evidential value of these reports is thus not irrefutable. Because of their scientific value, however, the inventories are *prima facie* correct. Unless other scientific evidence is adduced, they show the most suitable territories in number and size for the conservation of the species, within the meaning of Article 4 of the wild birds directive.

40. If a Member State should wish to deviate from those guidelines and utilise what it considers to be better scientific knowledge or take other aspects into account, it will be for it to produce other scientific evidence that can rebut the *prima facie* correctness of the inventories and prove that it was possible for the Member State to select different areas within its territory that also meet the requirements of Article 4(1) of the wild birds directive.

41. Nor can the Member State be relieved of its duty to provide express justification by reliance upon the principles of subsidiarity and proportionality. The wild birds directive has put the principle of subsidiarity into practice inasmuch as it is the Member States that classify as SPAs the sites in their territory most suitable for the conservation of the species, as they are in a better position than the Commission to

determine which of the species of birds listed in Annex I to the directive are present on their territory. It is therefore quite in accordance with that principle that the Commission relies on ZICO 1994, an ornithological inventory co-published by the French Ministry of the Environment.

42. It is for the Commission, on the other hand, to monitor throughout the Community compliance with obligations under the wild birds directive and to coordinate the formation of a coherent network of protection areas, as this cannot be better accomplished at national level. In carrying out these duties, the Commission can only have recourse to the internationally acknowledged scientific data known to it which are to be found in the ornithological inventories. If it is to take account of more recent findings or of interests other than the conservation of birds, it is dependent upon the Member State concerned providing it with details of the data that it has used and showing how it has weighed up the other interests against the objectives of the wild birds directive.

43. In this connection, the Court found in *Commission* v *Italy*[9] that it is for the Member States, in a spirit of genuine cooperation and mindful of each Member State's duty under Article 5 of the EC Treaty (now Article 10 EC), to facilitate attainment of the general task of the Commission, which is to ensure that the provisions of the Treaty, as well as provisions adopted thereunder by the institutions, are applied.

44. If the Member State should succeed in adducing evidence in this way to counter the guidelines contained in the most recent ornithological inventory, everything will depend upon whether the Commission contradicts it. If the Commission does not do so, or if the further expert opinion that is then required does not lead to the conclusion sought by the Commission, failure to fulfil an obligation cannot be established since this is for the Commission to prove.

45. It is therefore necessary to examine whether a justification can be deduced from the reasons given by the French Republic.

46. As already stated, because of the manner in which the 1994 ZICO and 2000 IBA inventories arose and because of their purpose, they are not just an initial survey of ornithological wealth. Nor can that be inferred from the passage of the Court's judgment in *Commission* v *France* quoted in point 37, as in that case the Court was

9 — Case C-365/97 [1999] ECR I-7773, paragraph 85.

merely citing an argument put forward by the French Government that had not been contradicted by the Commission and was not making any pronouncement of its own on this point.

47. The fact that ZICO 1994 also lists as ZICOs areas cultivated by man which, according to the passage on page 51 of the inventory quoted by the parties, cannot make the main contribution to the conservation of birds does not invalidate those guidelines. This passage is to be interpreted as meaning that man's influence has resulted in a deterioration in the quality of sites with regard to the conservation of birds, as mentioned in the preamble to the wild birds directive. As there are now no sites of better quality available, it is necessary sometimes to include areas cultivated by man as protection areas in order to be able to achieve the conservation of birds in accordance with the directive.

48. The French Government's global assessment that sites which are only of heightened or particular significance to bird conservation do not have to be classified as protection areas cannot be followed. This nevertheless involves 223 of the 285 areas of importance for the conservation of birds listed in ZICO 1994. The fact that, after seven years without being classified as protection areas, seven of these territories are no longer of importance for the conservation of birds does not provide a scientific explanation for the French Government's viewpoint. Special importance is to be inferred from the words 'heightened' and 'particular' which, in view of the ever-decreasing number of suitable habitats, mean that the territories concerned merit conservation in the light of the aims of the directive.

49. Nor are the standards of justification met by the French Government's sweeping assertion that all of the sites listed in ZICO 1994 but not classified by it are sites of little to moderate ornithological interest. As already stated, the conservation aims of the directive extend to areas where interest is below the highest level. The French Government does, to a certain extent, contradict its own argument by repeatedly reporting the classification of new or extended SPAs — which would not be necessary if they were not of heightened ornithological interest.

50. The mention of problems relating to hunting cannot justify failure to classify sites, as the French Government has not explained how it properly concluded, after weighing up the interests involved, that preference should be given to hunting rather than to bird conservation.

51. The same applies to the difficulties mentioned with regard to transposing simultaneously the wild birds directive and the habitats directive. The Court has consistently held that a Member State may not plead internal administrative difficulties in order to justify a failure to comply with its obligations.

52. The French Government has not mentioned any other requirements that should be taken into consideration.

53. Unlike the situation in *Commission* v *France*, cited above, in which it adduced a study by the National Museum of Natural History, it has also not produced any concrete scientific reports refuting ZICO 1994.

54. A Member State is therefore not obliged *per se* always to classify as SPAs all those sites that are named in the ornithological inventories. In the present case, however, France has not submitted any substantiated arguments to relieve it of this obligation. The declaration sought by the Commission must therefore be granted.

V — The head of claim relating to the Plaine des Maures

1. *Arguments of the parties*

55. The Commission alleges that the French Republic has failed to classify a sufficiently large protection area in the Plaine des Maures. Even taking into account the final total of 4 537 hectares classified by July 2001, there are still 2 963 hectares outstanding for a full classification in accordance with the 1994 ZICO inventory. The Commission claims that it has adequately substantiated this head of claim.

56. The French Government considers this second head of claim to be inadmissible for lack of grounds relating to it. It also argues that the part of the Plaine des Maures that it has now classified as a protection area is large enough to satisfy its obligations under the wild birds directive. As already submitted in relation to the first head of claim, the Commission cannot demand strict transposition of the inventory. The territory not yet classified comprises areas cultivated by man that are obviously not suitable for the conservation of birds.

2. *Analysis*

57. The French Republic's plea of inadmissibility must be examined first of all. The Commission initiated a separate procedure with regard to the Plaine des Maures under reference A/92/4527. This was duly followed by the procedure for failure to fulfil an obligation under Article 226 EC, in which the Commission first sent France a letter of formal notice and, on 19 December 1997, a reasoned opinion in which it complained of inadequate classification of the Plaine des Maures. The Commission mentioned the wild birds directive as its statutory basis and the data proving the inadequate classification. During the pre-litigation procedure, the French Republic, faced with these specific objections, partially complied with its obligations (after the expiry of the time-limit set in the reasoned opinion), which would not have been possible if the complaint had been imprecise. The application also contains a brief statement of the grounds on which it is based, indicating the specific complaints on which the Court is called upon to rule and, in summary form, the legal and factual particulars on which those complaints are based, as required by the Court in its judgment in *Commission* v *Greece*.[10] The complaint is therefore not inadmissible for lack of a statement of grounds.

58. As the proceedings are admissible and as the Commission is pursuing them despite a request for their withdrawal by the French Government, the issue is whether the French Republic has classified the Plaine des Maures in insufficient measure. On the date on which the time-limit set in the reasoned opinion expired, 19 February 1998, the French Republic had not classified even the first 879 hectares; this was not done until 5 November 1998. Since measures to remedy a failure to fulfil an obligation taken after the expiry of the time-limit set in the reasoned opinion cannot have any effect on whether the action is well founded,[11] it is irrelevant for the purposes of a declaration of failure to fulfil an obligation whether the French Republic has in the mean time classified further land.

59. However, even the subsequent classifications totalling 4 537 hectares do not satisfy the obligation under the wild birds directive to classify the most suitable territories in number and size. ZICO 1994 identifies a conservation area of 7 500 hectares for the Plaine des Maures. A reference to the findings on the first head of claim is sufficient here since the French Republic has not produced any data to prove its general assertion that the area classified by it, which extends to only 60% of the area designated in ZICO 1994, comprises the most suitable territory for the conservation of the species whilst the rest is unsuitable land cultivated by man.

10 — Case C-347/88 [1990] ECR I-4747, paragraph 28.

11 — Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26.

60. Consequently, the French Republic has not fulfilled its obligations under Article 4 of the wild birds directive in this respect either and the whole of the declaration sought by the Commission must be granted.

VI — Costs

61. The Commission also claims that the Court should order the French Republic to pay the costs. 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.

VII — Conclusion

62. In view of the considerations set out above, I propose that the Court should:

(1) declare that by not classifying as special protection areas the territories most suitable for the conservation of the species of wild bird listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and for the conservation of migratory species of bird and, in particular, by not classifying as a special protection area a sufficiently large area of land on the Plaine des Maures, the French Republic has failed to fulfil its obligations under that directive and under the Treaty establishing the European Community;

(2) order the French Republic to pay the costs.