

JUDGMENT OF THE COURT (Sixth Chamber)  
20 March 2003 \*

In Case C-378/01,

**Commission of the European Communities**, represented by G. Valero Jordana and R. Amorosi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Italian Republic**, represented by U. Leanza, acting as Agent, and M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to classify as special protection areas the most suitable territories, in number and size, for the protection of those species mentioned in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as subsequently

\* Language of the case: Italian.

amended, and of the other migratory species which regularly occur in Italy, and by failing to send to the Commission all necessary information relevant to most of the said areas classified by it, the Italian Republic has failed to fulfil its obligations under Article 4(1) to (3) of that directive,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen and C. Gulmann (Rapporteur), F. Macken and N. Colneric, Judges,

Advocate General: P. Léger,  
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 November 2002, at which the Commission was represented by R. Amorosi and the Italian Republic by A. Cingolo, avvocato dello Stato,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2002,

gives the following

## Judgment

- 1 By application lodged at the Court Registry on 2 October 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to classify as special protection areas (hereinafter ‘SPAs’) the most suitable territories, in number and size, for the protection of those species mentioned in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, hereinafter ‘the Directive’), as subsequently amended, and of the other migratory species which regularly occur in Italy, and by failing to send to the Commission all necessary information relevant to most of the said areas classified by it, the Italian Republic has failed to fulfil its obligations under Article 4(1) to (3) of the Directive.

### Legal framework

- 2 Article 2 of the Directive provides that Member States are to ‘take the requisite measures to maintain the population of [all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies] 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’.

3 Article 4(1) to (3) of the Directive provide:

'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 it may take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 above form a coherent whole which meets the protection requirements of these species in the geographical sea and land area where this Directive applies.'

### **Pre-litigation procedure**

- 4 Since it considered that the Italian Republic had failed to fulfil certain of its obligations flowing from Article 4 of the Directive, the Commission, by letter of 18 March 1994, gave that Member State formal notice to submit its observations in that regard.

5 In that letter, the Commission maintained, in particular, that the Italian Republic had not yet managed to designate the SPAs suitable in number and size both for the species mentioned in Annex I to the Directive and for the other migratory species which regularly occur in Italy. According to the Commission, the Italian authorities had designated only 74 SPAs corresponding to an area of about 310 400 hectares and, in addition, 22 of those 74 areas involved territories which are not important areas for bird life. Furthermore, the Commission accused those authorities of failing to send the appropriate quantitative data for most of the SPAs designated, with the result that it was not in a position to carry out all the necessary checks or to coordinate the network of those SPAs in Italy.

6 By several letters sent to the Commission between 21 November 1994 and 15 May 1997, the Italian authorities informed it of the designation of a total of 34 new SPAs and sent it the technical data relating to them.

7 Since it considered that the measures adopted by the Italian Republic to comply with its obligations under Article 4 of the Directive were still insufficient, the Commission, by letter of 18 August 1998, issued a reasoned opinion in which it stated that, first, the classification of SPAs was largely insufficient in regard to the requirements of the said Article 4 and that, second, it had still not been sent a whole series of data and information concerning a large number of SPAs designated by that Member State. The Commission requested the latter to adopt the measures necessary to comply with that reasoned opinion within a period of two months from the date of its notification.

8 Between 19 November 1998 and 9 August 2000, the Italian Government sent to the Commission several communications, by which it notified the Commission of the new designations of SPAs and forwarded technical documentation relating to them, as in the case of the SPAs previously designated.

- 9 Taking this view that those communications did not enable it to conclude that the Italian Republic had complied with its obligations under Article 4 of the Directive, the Commission decided to bring the present action.

## The action

### *The insufficient number and size of the territories classified as SPAs*

#### Arguments of the parties

- 10 The Commission bases itself on the *Inventory of Important Bird Areas in the European Community*, published in 1989, (hereinafter ‘the IBA Inventory 89’), in claiming that the Italian Republic has not classified as SPAs a sufficient number and area of the most suitable territories for the conservation of the species mentioned in Annex I to the Directive and of the other migratory species regularly occurring in Italy, thus failing to fulfil its obligations under Article 4(1) and (2) thereof. In the absence of scientific evidence to the contrary, the sites listed in the IBA Inventory 89 may be regarded as territories essential for the conservation of the species mentioned in the said annex and the other migratory species. Consequently, they must be classified as SPAs in accordance with the abovementioned provision. On the basis of that inventory, there are 164 areas in Italy which are important for bird life, covering a total area of 3 609 070 hectares. The Italian authorities have hitherto classified 336 sites as SPAs, that is a total area of 1 370 700 hectares. According to the Commission, 194 of those SPAs do not coincide, even partly, with any of the 164 areas important for bird life listed in the IBA Inventory 89. Thus, a large number of the sites listed in that inventory and a significant area thereof should still be classified as SPAs by the Italian authorities in order for the provisions of the Directive to be observed.

- 11 According to the Italian Government, the measures which Member States adopt to ensure sufficient diversity and size of habitats for all bird species comply with the Directive as long as they are proportional to the populations of the species of protected birds. In that regard, it argues that such proportionality is to be determined in relation to the ecological, scientific and cultural requirements of each species, account also being taken of the economic and recreational requirements of the relevant geographical area.
- 12 That Government submits that a complaint based on failure to fulfil the obligation of protection should indicate the scientific criteria upon which it is based. Yet the Commission has confined itself to issuing purely formal criticisms, in a field where reversal of the burden of proof is not permitted, without any reference to the protected species, to the migration routes or to the staging posts, or to the local culture and the economic activities of the areas concerned. The criticisms thus formulated are therefore purely abstract and, as such, inappropriate to found an action for infringement.
- 13 In addition, the Italian Government points out that the measures which it has adopted to comply with the obligations under the Directive are themselves the result of the documentation produced by the Commission in support of its action. Those measures of selection and investigation are being pursued. Since the letter of formal notice was sent, the Italian authorities have designated 269 SPAs, which constitutes an increase in the area of SPAs of 1 518 000 hectares. None the less, the designation of new SPAs is still in train. Finally, the Italian Government states that, in order to bring the IBA Inventory 89 up to date, the Ministry of the Environment, in December 2000, confided to the Lega italiana protezione uccelli (Italian association for the protection of birds) the task of revising the list of IBAs in Italy.



## Findings of the Court

- 14 It is appropriate to note, in the first place, that Article 4(1) and (2) of the Directive require the Member States to classify as SPAs the territories meeting the ornithological criteria specified by those provisions (see to that effect, Case C-355/90 *Commission v Spain* [1993] ECR I-4221, paragraphs 26, 27 and 32).
- 15 Secondly, it is important to point out that neither the economic nor the recreational requirements mentioned in Article 2 of the Directive may be taken into account when selecting an SPA and defining its boundaries (see, to that effect, Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031, paragraph 59).
- 16 It is clear that the Italian authorities have continued to classify territories as SPAs after the expiry of the period laid down in the reasoned opinion, particularly to comply with the requirements thereof.
- 17 Furthermore, the Italian Government has let it be known that the selection of the SPAs depends both on economic and recreational requirements.
- 18 In addition, it is not disputed that a large number and area of the sites listed in the IBA Inventory 89 have not been classified as SPAs by the Italian authorities. In that regard, it is necessary to point out that the Italian Government, although it maintained, at the hearing, that that inventory required revision, admitted that it

had not been in a position to challenge it with a more persuasive document. In those circumstances, in view of the scientific nature of the IBA Inventory 89, and of the absence of any scientific evidence adduced by the Italian Republic, tending particularly to show that the obligations flowing from Article 4(1) and (2) of the Directive could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area, that inventory, although not legally binding on the Member State concerned, can be used by the Court as a basis of reference for assessing whether the Italian Republic has classified a sufficient number and area of territories as SPAs for the purposes of the abovementioned provisions of the Directive (see, to that effect, *Commission v Netherlands*, cited above, paragraphs 68 to 70).

- 19 In the light of the foregoing, it must be held that the complaint based on the insufficient number and size of the territories classified as SPAs is well founded.

*The failure to send the Commission all necessary information relating to the SPAs*

- 20 The Commission claims that by not sending it full and precise ornithological data and sufficiently detailed maps, the Italian authorities have infringed Article 4(3) of the Directive.

- 21 The Italian Government does not contest this complaint. Indeed, in the letter which it sent on 19 November 1998 to the Commission, it acknowledged that the

information and maps which it had previously sent to the Commission regarding the 108 areas already classified as SPAs were incomplete.

- 22 Therefore, the complaint based on the failure to send the Commission all necessary information relating to the SPAs must also be upheld.
- 23 It must therefore be held that, by failing to classify as SPAs the most suitable territories, in number and size, for the protection of those species mentioned in Annex I to the Directive, as subsequently amended, and of the other migratory species which regularly occur in Italy, and by failing to send to the Commission all necessary information relevant to most of the said areas classified by it, the Italian Republic has failed to fulfil its obligations under Article 4(1) to (3) of the Directive.

### Costs

- 24 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 Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by failing to classify as special protection areas the most suitable territories, in number and size, for the protection of those species mentioned in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as subsequently amended, and of the other migratory species which regularly occur in Italy, and by failing to send to the Commission all necessary information relevant to most of the said areas classified by it, the Italian Republic has failed to fulfil its obligations under Article 4(1) to (3) of that directive;
2. Orders the Italian Republic to pay the costs.

Puissochet

Schintgen

Gulmann

Macken

Colneric

Delivered in open court in Luxembourg on 20 March 2003.

R. Grass

J.-P. Puissochet

Registrar

President of the Sixth Chamber