

JUDGMENT OF THE COURT (Second Chamber)

29 January 2004 *

In Case C-209/02,

Commission of the European Communities, represented by J.C. Schieferer, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by C. Pesendorfer, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by authorising the proposed extension of the golf course in the district of Wörschach in the Province of Styria despite a negative assessment of the implications for the habitat of the corncrake (*crex crex*) in the special protection area, within the meaning of Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979

* Language of the case: German.

L 103, p. 1), situated in that district, the Republic of Austria has failed to fulfil its obligations under Article 6(3) and (4), in conjunction with Article 7, 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 COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), J.N. Cunha Rodrigues, J.-P. Puissochet and N. Colneric, 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 6 November 2003,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 4 June 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by authorising the proposed extension of the golf course in the district of Wörschach in the Province of Styria despite a negative assessment of the implications for the habitat of the corncrake (*crex crex*) in the special protection area, within the meaning of Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, ‘the Birds Directive’), situated in that district, the Republic of Austria has failed to fulfil its obligations under Article 6(3) and (4), in conjunction with Article 7, 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 Habitats Directive’).

The legal background

The Birds Directive

- 2 Article 4(1) and (2) of the Birds Directive requires Member States to classify as special protection areas (‘SPAs’) those areas fulfilling the ornithological criteria laid down by those provisions.

3 Article 4(4) of the Birds Directive provides:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

The Habitats Directive

4 Article 6(2), (3) and (4) of the Habitats Directive provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

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 Article 7 of the Habitats Directive provides:

‘Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of [the Birds Directive] in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under [the Birds Directive], where the latter date is later.’

6 The corncrake is a species mentioned in Annex I to the Birds Directive, as amended by Commission Directive 85/411/EEC of 25 July 1985 (OJ 1985 L 233, p. 33).

The background to the dispute

- 7 By decision dated 14 May 1999 ('the decision of 14 May 1999'), the Government of the Province of Styria authorised an extension of the golf course at Weißenbach in the district of Wörschach by the creation of two new holes on a site classified as a SPA, called the 'Wörschacher Moos' SPA. Following a complaint, the Commission sent a letter of formal notice to the Republic of Austria on 4 November 1999. In that letter, the Commission stated that information supplied as part of the complaint and the expert's reports on which the decision of 14 May 1999 was based showed that there was a strong probability that the extension in question would have adverse effects upon the existing corncrake population, for the purposes of Article 6(3) of the Habitats Directive. The planned extension could therefore have been authorised only under the conditions laid down in Article 6(4) of the Habitats Directive. However, none of these conditions had been met by the competent authorities. The Republic of Austria had therefore failed to fulfil its obligations under the Birds Directive in conjunction with Article 6(3) and (4) and Article 7 of the Habitats Directive.
- 8 In the reply of the Republic of Austria to the Commission by letter dated 12 January 2000, the Government of the Province of Styria stated that, as it was possible to prevent any lasting effects of the proposal on nature and the site from the outset by means of the conditions laid down in the decision of 14 May 1999, it had not been thought necessary to investigate whether there were any particular economic interests which took priority over the interests of the protection of nature. The conditions attached to the decision of 14 May 1999 prevented the foreseeable harmful consequences for the corncrake.
- 9 By letter of 27 July 2000, the Commission issued a reasoned opinion, in which it stated that the expert's report which Mr Gepp, of the Graz Institute for the Protection of Nature and Ecology, had written on the instructions of the Styrian authorities showed that the planned extension of the golf course gave rise to a

significant potential risk for the corncrake population. The Commission indicated, in this connection, that it was not convinced of the effectiveness of the conditions laid down by the decision of 14 May 1999, which were intended to remove the risk pointed out. Furthermore, the expert had advised against the imposition of complicated conditions reducing only part of the sources of the risks, and he had recommended specific alternative sites for the extension of the golf course, considering the creation of two new holes to be incompatible with the conservation of the corncrake population.

- 10 In its reasoned opinion, the Commission also stated that it had obtained a new study entitled ‘The distribution, biology and ecology of the corncrake in the Enns Valley, Styria’, produced by Mr Schäffer on behalf of the Graz Institute for the Protection of Nature and Ecology. According to this study, on the basis of current knowledge of the behaviour of the corncrake, the view was to be taken that the areas proposed for the extension of the golf course were situated entirely within the section of grasslands which might be used by the corncrake. The Commission concluded from this that elements of the corncrake’s habitat would be destroyed by the extension. Accordingly, authorisation for the planned extension to the golf course in the district of Wörschach was given in breach of the requirements laid down in Article 6(3) of the Habitats Directive, despite the negative assessment of the implications of the extension for the habitat in question.

- 11 The Republic of Austria was requested to take the necessary measures to comply with that opinion within two months of the notification thereof.

- 12 By letter of 6 December 2000, the Austrian Government replied that the competent provincial government continued to take the view that there had been no breach of Community law, since carrying out the project in question was not, in the present case, likely to have a significant effect on the site within the meaning of Article 6(3) of the Habitats Directive.

- 13 On 31 May 2002 the Commission decided to bring the present action.

Admissibility

Arguments of the parties

- 14 The Austrian Government's principal claim is that on 27 June 2002 the Verwaltungsgerichtshof (Administrative Court) (Austria) quashed the decision of 14 May 1999 because of procedural errors. Since the judgment delivered has retroactive effect, the decision of 14 May 1999 never existed. The present action for failure to fulfil obligations is therefore devoid of purpose, since it specifically relates to that decision. Moreover, pursuant to the judgment of the Verwaltungsgerichtshof, playing the two new holes is forbidden. The new decision required to determine the application of the operator of the golf course will be adopted in accordance with Community law and the present proceedings cannot relate preventively to a decision which has not yet been taken.
- 15 The Commission maintains that the objection that the proceedings have become devoid of purpose must be rejected for two reasons. Firstly, notwithstanding the fact that the quashing of the decision of 14 May 1999 entails the return of the matter to the stage reached before the adoption of that decision, the authority responsible is required to give a fresh decision on the application of the person concerned, namely the operator of the golf course. As the authority responsible has not yet given its decision, it is impossible to determine with certainty whether, at the very least, the formal part of the breach has ceased. Secondly, the failure to fulfil obligations was continuing, both formally and on the facts, upon the expiry of the time-limit set by the Commission in its reasoned opinion.

Findings of the Court

- 16 The Court has consistently held that the question whether a Member State has failed to fulfil obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-166/97 *Commission v France* [1999] ECR I-1719, paragraph 18, and Case C-103/00 *Commission v Greece* [2002] ECR I-1147, paragraph 23).
- 17 It is common ground in the present case that, on expiry of the time-limit fixed by the Commission for the Republic of Austria to comply with the reasoned opinion, the decision of 14 May 1999, considered by the Commission as being the source of the Member State's failure to fulfil its obligations, was still in force. Moreover, on the admission of the Austrian Government itself, the two new holes provided for by that decision had in the meantime been created.
- 18 Accordingly, the present action for failure to fulfil obligations cannot in any case be regarded as being devoid of purpose (see, to this effect, Case 240/86 *Commission v Greece* [1988] ECR 1835, paragraphs 12 to 15).
- 19 The plea raised by the Republic of Austria must therefore be rejected.

Substance

Arguments of the parties

- 20 The Commission maintains that, by virtue of Article 6(3) of the Habitats Directive, the planned extension of the golf course in question on a site classified as a SPA should never have been authorised. The extension was likely significantly to affect the site and the corncrake population, and therefore to reduce considerably the function of the SPA with regard to the conservation objectives fixed by Community legislation. Furthermore, the conditions for authorisation of the project under Article 6(4) of the Habitats Directive were not met.
- 21 The Austrian Government states that, in view of the impact assessment which was duly carried out and of the subsequent measures imposed by the decision of 14 May 1999, any significant threat to the corncrake population in the 'Wörschach Moos' SPA was removed. Therefore it was not necessary for the conditions laid down in Article 6(4) of the Habitats Directive to be fulfilled in order for the extension of the golf course to be authorised.

Findings of the Court

- 22 It can be seen from Article 6(3) of the Habitats Directive, read in conjunction with Article 7, that any plan or project not directly connected with or necessary to the management of a SPA classified under Article 4 of the Birds Directive 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 SPA in view of the SPA's conservation objectives. In the light of the conclusions of the assessment of the implications for the SPA, the competent national authorities are to agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the SPA concerned and, if appropriate, after having obtained the opinion of the general public.

23 It is common ground that, in 1998, in the course of the investigations preceding the adoption of the decision of 14 May 1999, an expert's report was produced, at the request of the authorities of the Province of Styria, by Mr Gepp of the Graz Institute for the Protection of Nature and Ecology. This report is reproduced as part of that decision.

24 The report stated that a corncrake population was present in the SPA where the disputed extension to the golf course was to be created. The extension would entail in particular the loss of part of the feeding and resting areas of the species in question, the destruction of the functional links by the splitting up of the different zones used by the corncrake and the elimination of, and disturbance to, elements of habitat. The measures which might counter the disturbance liable to be caused by the disputed project would be only partially effective, difficult to implement and of doubtful long-term effectiveness. In short, the creation of the two holes in question could well threaten the continued existence of the corncrake population in the 'Wörschacher Moos' SPA, the only population in the Central Alps likely to reproduce. It is for this reason that the report suggests some alternative sites for the extension to the golf course.

- 25 At the request of the authorities of the Province of Styria, Mr Lentner produced a report, on 26 June 1999, assessing the value of Mr Gepp's report, in the light of the conclusions drawn from it by the Styrian authorities. According to Mr Lentner, the proposition contained in the decision of 14 May 1999 that the measures laid down would enable negative effects on the corncrake population to be avoided and ensure its continuation was not in any way supported by Mr Gepp's report or by other ornithological reports or opinions available to the authorities. In reality, those measures, laid down as compensatory measures, had to be considered inappropriate for avoiding those negative effects with a margin of safety.
- 26 Having regard to the content of those expert's reports and in the absence of evidence to the contrary, the inevitable conclusion is that at the time of the adoption of the decision of 14 May 1999, the Austrian authorities were not justified in considering that the planned extension of the golf course in question in the present case, coupled with the measures prescribed by that decision, was not such as significantly to disturb the corncrake population in the 'Wörschacher Moos' SPA and would not adversely affect the integrity of that SPA.
- 27 The fact that the note dated 15 July 2002 produced by Mr Gepp at the request of the Government of the Province of Styria regarding the interpretation of the assessments and conclusions contained in his own report seems to soften somewhat their implications cannot affect the finding made in the previous

paragraph of this judgment. The same is true of the surveys of the corncrake population in the ‘Wörschacher Moos’ SPA carried out in 2000 and 2002 and recording the presence, respectively, of three and two parading males, to which the Austrian Government refers to show that the creation of the extension of the golf course has not caused a significant reduction in that population.

28 It is apparent from the above that the decision of 14 May 1999 was not adopted in compliance with the requirements of Article 6(3) of the Habitats Directive. It is also established that the conditions laid down in Article 6(4) thereof have not been fulfilled in the present case.

29 Accordingly, it must be held that, by authorising the proposed extension of the golf course in the district of Wörschach in the Province of Styria despite a negative assessment of its implications for the habitat of the corncrake (*crex crex*) in the ‘Wörschacher Moos’ SPA situated in that district and classified as provided for in Article 4 of the Birds Directive, the Republic of Austria has failed to fulfil its obligations under Article 6(3) and (4), in conjunction with Article 7, of the Habitats Directive.

Costs

30 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 Republic of Austria has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Declares that, by authorising the proposed extension of the golf course in the district of Wörschach in the Province of Styria despite a negative assessment of its implications for the habitat of the corncrake (*crex crex*) in the 'Wörschacher Moos' special protection area situated in that district and classified as provided for in Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Republic of Austria has failed to fulfil its obligations under Article 6(3) and (4), in conjunction with Article 7, of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;
2. Orders the Republic of Austria to pay the costs.

Timmermans

Gulmann

Cunha Rodrigues

Puissochet

Colneric

Delivered in open court in Luxembourg on 29 January 2004.

R. Grass

Registrar

C.W.A. Timmermans

President of the Second Chamber