Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

26 April 2018 *

(Failure of a Member State to fulfil obligations — Protection of nature — Directive 2009/147/EC — Conservation of wild birds — Special Protection Area (SPA) — Classification as SPAs of the most suitable territories in number and size for the conservation of the bird species listed in Annex I to Directive 2009/147 — Important Bird Area (IBA) — IBA Rila — Partial classification of IBA Rila as an SPA)

In Case C-97/17,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 24 February 2017,

European Commission, represented by P. Mihaylova and C. Hermes, acting as Agents,

applicant,

v

Republic of Bulgaria, represented by E. Petranova and L. Zaharieva, acting as Agents,

defendant,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Rosas, C. Toader (Rapporteur), A. Prechal and E. Jarašiūnas, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare that, by failing to include the entire Important Bird Area ('IBA') covering the Rila Mountains (Bulgaria) ('IBA Rila') as a Special Protection Area ('SPA'), the Republic of Bulgaria did not classify as SPAs the most suitable territories

* Language of the case: Bulgarian.

in number and size for the conservation of the species listed in Annex I to Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive'), and consequently failed to fulfil its obligations under Article 4(1) of that directive.

Legal context

2 According to Article 1(1) of the Birds Directive, that directive concerns the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the FEU Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.

3 Article 4(1) and (2) of that directive provides:

'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 [SPAs] for the conservation of these species 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.'

4 Under Article 12(1) and (2) of that directive:

'1. Member States shall forward to the Commission every three years, starting from 7 April 1981, a report on the implementation of national provisions taken under this Directive.

2. The Commission shall prepare every three years a composite report based on the information referred to in paragraph 1. That part of the draft report covering the information supplied by a Member State shall be forwarded to the authorities of the Member State in question for verification. The final version of the report shall be forwarded to the Member States.'

Pre-litigation procedure

5 Following a complaint by the Bulgarsko druzhestvo za zashtita na ptitsite (Bulgarian Society for the Protection of Birds; 'the BDZP'), which is a member of the non-governmental organisation BirdLife International, the Commission sent to the Republic of Bulgaria, on 6 June 2008, a letter of

formal notice in which it complained that that Member State did not classify as SPAs the most suitable territories in number and size as regards six IBAs (Rila, Kaliakra, Tsentralen Balkan, Lomovete, Pirin and Zapadni Rodopi), and therefore has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive.

6 In its replies to the letter of formal notice, the Republic of Bulgaria has disputed any failure to comply with the Birds Directive, claiming in particular that part of IBA Rila, the Rilski manastir (Rila monastery, Bulgaria), had, in the meantime, been the subject of an additional classification as an SPA.

7 Since it was not satisfied by all those replies, on 17 October 2014 the Commission sent the Republic of Bulgaria a reasoned opinion in which it alleged that it had failed to fulfil its obligations under Article 4(1) of that directive. However, the reasoned opinion concerned only IBA Rila, since, in the meantime, the Kaliakra IBA had been the subject of a specific infringement procedure, on which the Court ruled in its judgment of 14 January 2016, *Commission* v *Bulgaria* (C-141/14, EU:C:2016:8), and the Tsentralen Balkan, Lomovete, Pirin and Zapadni Rodopi IBAs, meanwhile, had to a great extent been classified as SPAs.

8 In relation to IBA Rila, the Commission stated in its reasoned opinion that only 72% of its total area was classified as an SPA, which had the effect of restricting the protection of 17 species listed in Annex I to the Birds Directive.

9 On 15 December 2014, the Republic of Bulgaria responded to the reasoned opinion, then, on 7 September 2015 and 3 February 2016 respectively, sent additional information and an update. That Member State also argued, in essence, that the classification of 72% of IBA Rila as an SPA ensured 'maximum protection of the species and their habitats, described in the IBA', but that, in a spirit of effective cooperation, the efforts made to examine the question of extending the area of the Rila SPA would be increased.

10 Considering that, notwithstanding the measures taken, the Republic of Bulgaria had still failed to fulfil its obligations under Article 4(1) of the Birds Directive, the Commission decided to bring the present action.

Admissibility

Arguments of the parties

11 The Republic of Bulgaria submits that the action is inadmissible and puts forward, in essence, two arguments in support of its position.

12 Firstly, the Republic of Bulgaria asserts that the Commission has altered the subject matter of the proceedings. While the Commission had complained in the letter of formal notice that the Republic of Bulgaria had not classified as SPAs the most suitable territories in number and size for the conservation of the species mentioned in Annex I to the Birds Directive, that institution has, in the reasoned opinion and in the form of order sought in the application, based its claim on the fact that the entirety of IBA Rila had not been classified as an SPA. Thus, the Republic of Bulgaria was not in a position either to comply with the obligations arising from EU law or to defend itself against the complaints formulated.

13 The Republic of Bulgaria notes that it was certain, on reading the letter of formal notice, that it was sufficient that it ensure sufficient protection of the species mentioned in Annex I to the Birds Directive, such that it has taken the measures necessary to comply with that letter of formal notice. It was only after receiving the reasoned opinion that it found that the Commission was in fact complaining that it had not classified the entire territory of IBA Rila as an SPA.

14 Secondly, the Republic of Bulgaria is of the view that, both in the reasoned opinion and in the application, the Commission did not properly set out the subject matter of the dispute or give coherent and precise reasons for its view that that Member State has failed to fulfil its obligations under Article 4(1) of the Birds Directive.

15 In particular, it notes that the Commission merely stated in general terms that the classification of only a part of IBA Rila as an SPA had the effect of limiting the protection of 17 species listed in Annex I to the Birds Directive, without, however, providing sufficient elements enabling those species to be identified.

16 In response, the Commission is of the opinion, with regard, firstly, to the alleged alteration of the subject matter of the dispute, that the conclusions of the letter of formal notice and the reasoned opinion are identical and that there is not the slightest mismatch or difference between the two documents. It submits that, in the course of the pre-litigation procedure, taking into account the additional territories which have been classified by the Republic of Bulgaria following the letter of formal notice, the subject matter of the dispute has simply been limited to the residual, unclassified part of IBA Rila.

17 As regards, secondly, the allegedly insufficient statement of the subject matter of the dispute, the Commission notes that it relied on a specific provision of the Birds Directive and that it provided a list of 17 bird species whose conservation was insufficiently guaranteed due to the classification of only a part of IBA Rila as an SPA and a list of 9 species of birds seriously affected by that incomplete classification.

Findings of the Court

18 As regards the complaint alleging an alteration to the subject matter of the dispute, it should be recalled that, according to the Court's settled case-law, the purpose of the letter of formal notice is, firstly, to delimit the subject matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence and, secondly, to enable the Member State to comply before proceedings are brought before the Court (judgments of 28 March 1985, *Commission* v *Italy*, 274/83, EU:C:1985:148, paragraph 19, and of 7 April 2011, *Commission* v *Portugal*, C-20/09, EU:C:2011:214, paragraph 19 and the case-law cited). The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the FEU Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations (judgment of 14 April 2011, *Commission* v *Romania*, C-522/09, EU:C:2011:251, paragraph 16).

19 Nonetheless, although the reasoned opinion must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the Member State in question has failed to fulfil one of its obligations under the Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the

letter of formal notice (see, to that effect, judgments of 8 April 2008, *Commission* v *Italy*, C-337/05, EU:C:2008:203, paragraph 23, and of 13 February 2014, *Commission* v *United Kingdom*, C-530/11, EU:C:2014:67, paragraph 40).

20 In the present case, it must be noted that, in both the letter of formal notice and the reasoned opinion, the Commission expressly stated that, by not classifying as SPAs the most suitable territories in number and size for the conservation of the species listed in Annex I to the Birds Directive, the Republic of Bulgaria has failed to fulfil its obligations under Article 4(1) of that directive.

21 The only difference between those documents lies in the fact that, in the letter of formal notice, the Commission stated that the Republic of Bulgaria was failing in its obligation to classify as SPAs the most suitable territories for the conservation of the species listed in Annex I to the Birds Directive, whereas in the reasoned opinion and in the application, not being satisfied with the territories classified as such by that Member State following the letter of formal notice, the Commission specified the subject matter of the dispute, by restricting it to the residual, unclassified part of IBA Rila, while referring to the whole of that IBA.

22 Consequently, having regard to the fact that the entire Rila IBA was included in the list of the most suitable territories in number and size, within the meaning of Article 4(1) of the Birds Directive, the Republic of Bulgaria is not justified in claiming that the Commission has altered the subject matter of the dispute.

23 With regard to the complaint alleging an insufficient statement of the subject-matter of the proceedings in the application, it must be noted that, by virtue of Article 120(c) of the Rules of Procedure of the Court of Justice and the case-law relating thereto, an application initiating proceedings must state the subject matter of the dispute and include a brief statement of the pleas in law. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a claim (see, to that effect, judgments of 14 January 2010, *Commission* v *Czech Republic*, C-343/08, EU:C:2010:14, paragraph 26; of 15 June 2010, *Commission* v *Spain*, C-211/08 EU:C:2010:340, paragraph 32; and of 15 November 2012, *Commission* v *Portugal*, C-34/11, EU:C:2012:712, paragraph 44).

24 It is, moreover, settled case-law that the Court must examine whether the reasoned opinion and the action set out the complaints coherently and precisely in order that the Court may appreciate exactly the extent of the alleged infringement of EU law, a condition which is necessary in order to enable the Court to determine whether there has been a breach of obligations as alleged (judgment of 15 November 2012, *Commission* v *Portugal*, C-34/11, EU:C:2012:712, paragraph 43 and the case-law cited).

25 In the present case, it is appropriate to note that, in the conclusions of the reasoned opinion and the application, the Commission expressly stated that the action for failure to fulfil obligations was based on a failure by the Republic of Bulgaria to have regard to its obligations under Article 4(1) of the Birds Directive.

26 Furthermore, in the grounds of the reasoned opinion and the application, the Commission argued that the effect of the merely partial classification of IBA Rila as an SPA was a ‘considerable restriction’ of the protection of 17 species of birds listed in Annex I to that directive, namely the boreal owl (*Aegolius funereus*), the hazel grouse (*Bonasa bonasia*), the short-toed eagle (*Circaetus gallicus*), the white-backed woodpecker (*Dendrocopos leucotus*), the black woodpecker (*Dryocopus martius*), the peregrine falcon (*Falco peregrinus*), the Eurasian pygmy owl (*Glaucidium passerinum*), the three-toed woodpecker (*Picoides tridactylus*), the capercaillie (*Tetrao urogallus*), the golden eagle (*Aquila*

chrysaetos), the European nightjar (*Caprimulgus europaeus*), the corncrake (*Crex crex*), the middle spotted woodpecker (*Dendrocopos medius*), the Eurasian eagle-owl (*Bubo bubo*), the red-backed shrike (*Lanius collurio*), the woodlark (*Lullula arborea*), the European honey buzzard (*Pernis apivorus*), even stating that the first nine of those species were 'seriously affected'.

27 Thus, the Commission must be regarded as having set out its complaints coherently and precisely, within the meaning of the case-law set out in paragraphs 23 and 24 of this judgment.

28 The present action is accordingly admissible.

Substance

Arguments of the parties

29 The Commission claims that, by failing to classify the whole of IBA Rila as an SPA, the Republic of Bulgaria has failed to fulfil its obligations under Article 4(1) of the Birds Directive.

30 In that regard, the Commission underlines the importance for the conservation of the birds in the part of IBA Rila not classified as an SPA, criticises the fact that certain species of birds are deprived of the protection which full classification of IBA Rila as an SPA would guarantee them and confirms the relevance of the evidence adduced to show the need for such full classification.

31 Firstly, as regards the section of IBA Rila not classified as an SPA, which covers the area at the foot of the Rila Mountains around the boundaries of the Rila SPA and Rilski manastir, the Commission highlights the fact that a large proportion of this section, i.e. 75%, consists of ancient forests, mainly coniferous, conducive for the conservation of the Eurasian pygmy-owl, boreal owl and three-toed woodpecker, of which the biggest breeding populations in the country can be found in these forests, on the one hand, and the golden eagle, the capercaillie, the peregrine falcon, the black woodpecker, the white-backed woodpecker, the Eurasian nightjar and the hazel grouse, on the other. The whole of IBA Rila forms part of priority sites, in Bulgaria and at European Union level, for those species.

32 In addition, there are, in the whole of IBA Rila, 130 different species, including 20 listed in Annex I to the Birds Directive and 41 of European significance in terms of conservation, including one in category SPEC 1, as a globally threatened species, 14 in category SPEC 2, as species with a European unfavourable conservation status, the majority of the world's population of which is in Europe, and 26 in category SPEC 3, as species with a European unfavourable conservation status, the majority of the world's population of which is outside Europe.

33 The entire Rila IBA is of worldwide importance as a representative area for the Alpine biome, given that three species of birds restricted to this biome and characteristic thereof, of the four registered in the Republic of Bulgaria, are present there, namely the wallcreeper, the Alpine chough and the Alpine accentor. The territory of IBA Rila is also one of the largest in Europe for the conservation of populations of rock thrush, European robin, common chaffinch, Eurasian wryneck, ring ouzel, song thrush, goldcrest, Eurasian blackcap and common linnet.

34 In that context, the Commission states that the habitats and the population of the species most affected ranges across the section of IBA Rila which is classified as an SPA and that which is not. Given that the Republic of Bulgaria has not adduced any other scientific data to justify only part of IBA Rila being classified as an SPA, the Commission recalls that, according to the settled case-law of the Court, the list of areas of importance for the conservation of birds in Europe ('the IBA list'), constitutes the most up-to-date and accurate reference for the identification of the sites most suitable in number and size for the conservation of the species listed in Annex I to the Birds Directive.

35 Secondly, the Commission submits that that section of IBA Rila which is classified as an SPA is far from sufficient in the light of the range of the national population of very important species listed in that annex.

36 In support of that argument, the Commission recalls that it is based on an evaluation of the bird database for the 114 SPAs initially proposed by BDZP, drawn up by the Bulgarska Akademia na Naukite (Bulgarian Academy of Sciences, Bulgaria) ('the BAN') and revised following a report drawn up in 2008 by a national working group created by the Ministry of the Environment and Water ('Ministry of the Environment').

37 The Commission adds that its analyses are also based on information from the database supplied by the Republic of Bulgaria and on the standard data forms ('the SDFs') concerning the Rila SPA, also provided by the Bulgarian authorities.

38 In order to determine the significance of a site to the population of a given species, the Commission explains that it relied on the 1% threshold concerning the regional or national breeding population used by BirdLife International. In order to exclude cases of adventitious presence and sites hosting smaller populations, the sites in question must also contain large numbers of the species and subspecies concerned at EU level.

39 Thirdly, the Commission points out that the size of the section of IBA Rila not classified as an SPA is also apparent from other documents showing the need to classify further areas of that IBA.

40 In that regard, that institution notes that the proposed classification as an SPA of all of IBA Rila was included in the agenda of a meeting of 11 March 2011 of the Natsionalen savet po biologichno raznoobrazie (National Council for Biodiversity, Bulgaria) ('the NSBR'), an institutions newly created at the BAN, and that the meeting was convened following the drafting, on 28 December 2010, by the latter, of a report which contained a line of argument in favour of the designation of three new SPAs in the Rila Mountains, covering almost entirely the territory of IBA Rila not yet classified as an SPA, namely the SPA Rilski manastir, the Rila Yug SPA (Rila South) and the Rila Sever SPA (Rila North). The latter two areas were then combined by the Environment Ministry into a single area, called the Rila buffer SPA.

41 While the NSBR approved the designation of the Rilski manastir SPA, examination of the proposal to include the future Rila buffer SPA in the "Natura 2000" network has been postponed, despite the fact that the Bulgarian authorities do not question the need to classify additional territories in IBA Rila as SPAs. To this end, they undertook, in their reply to the reasoned opinion, to discuss that classification in the NSBR in March 2015.

42 On the basis of an agreement concluded with the Ministry of the Environment, the BDZP submitted a new proposal for designation of the Rila buffer as an SPA, which was to be considered at the meeting of the NSBR scheduled for 22 March 2016. In the meantime, at technical meetings between the Commission's services and the competent Bulgarian authorities, and on the presentation of written information in the context of the present proceedings, the Republic of Bulgaria left the Commission waiting as regards the question of a new SPA classification, claiming the delay was due to administrative and procedural obstacles.

43 In addition, the Commission received from the BDZP a draft standard data form prepared by the BAN in respect of the future Rila buffer SPA, which was to match almost entirely the section of IBA Rila not yet classified. In the latter, even greater importance was given to the area unclassified for the conservation of the species in question.

44 The importance of the section of IBA Rila not yet classified as an SPA for the typical forest species listed in Annex I to the Birds Directive, such as the capercaillie, the white-backed woodpecker and the three-toed woodpecker, is also apparent from the new action plans for those species financed by the Ministry of the Environment through the 'Environment' Operational Programme 2007-2013.

45 Finally, as regards the arguments of the Republic of Bulgaria put forward during the pre-litigation procedure to justify the only partial classification of IBA Rila as an SPA, based, inter alia, on the Member States' right to establish a hierarchy between the various priorities, such as the socio-economic development and the geographical conditions of the country, the unreliability of the available data, and the wish to follow a single calendar for the selection of the SPAs and sites of Community importance and to make sure that those areas overlap to the greatest possible extent, the Commission considers that those arguments are not based on any ornithological criterion and therefore are not relevant as regards Article 4(1) of the Birds Directive.

46 In its defence, the Republic of Bulgaria puts forward, in essence, five arguments.

47 Firstly, the Republic of Bulgaria states that the Member States have discretion in choosing the most suitable territories for classification as SPAs.

48 It reiterates that the mere fact that a site is appropriate for the conservation of certain species is not sufficient to found an obligation to classify that site as an SPA. In that regard, the national authorities have a better knowledge of the local situation. In addition, the updating of scientific data is necessary to determine the situation of the most endangered species and that of the species constituting the common heritage of the European Union in order to classify the most suitable areas as SPAs. In that regard, a very small presence in number of populations of species in certain territories would not be sufficient to consider those areas as the most suitable for the conservation of the species in question.

49 It also recalls that, in accordance with the case-law, Member States may demonstrate by scientific evidence that the obligations flowing from Article 4(1) of the Birds Directive could be satisfied by classifying as SPAs sites other than those appearing in the IBA inventory and covering a smaller total area, (judgment of 20 March 2003, *Commission* v *Italy*, C-378/01, EU:C:2003:176, paragraph 18). It adds that, on the basis of the discretion enjoyed by the Member States in the application of the ornithological criteria for identifying the most suitable sites for conservation of the species listed in Annex I to the Birds Directive, it drew a distinction between, on the one hand, the most important territories for the conservation of targeted bird species, referred to in Article 4(1) of that directive, and, on the other, those sites which are smaller and are subject to severe anthropogenic pressure.

50 The Republic of Bulgaria disputes the Commission's reasoning that the IBAs necessarily constitute the most suitable territories in number and size, within the meaning of Article 4(1) of the Birds Directive. According to that Member State, although the IBA inventory constitutes, in the absence of scientific proof to the contrary, a basis of reference for assessing whether that Member State has classified as SPAs sufficient territories in number and size to provide protection for all the bird species listed in Annex I to the Birds Directive, such an inventory is not legally binding (judgment of 7 December 2000, *Commission* v *France*, C-374/98, EU:C:2000:670, paragraph 25). Accordingly, Member States may be able to fulfil the obligations arising under Article 4(1) of the Birds Directive by classifying as SPAs sites other than those listed in the IBA inventory.

51 Secondly, the Republic of Bulgaria argues that the Commission has misrepresented the facts, evidence and arguments which it presented.

52 Thus, it submits, first of all, that it is for the Commission to prove that a particular site must be designated as an SPA. In the application, the Commission states that the Republic of Bulgaria does not deny the importance of IBA Rila for the conservation of birds. In so doing, the Commission distorts the arguments presented by the Republic of Bulgaria during the pre-litigation period. In fact,

the present action does not concern the importance of IBA Rila for the conservation of birds. The Republic of Bulgaria maintains in that regard that the classification of 72% of IBA Rila is such as to ensure a maximum level of protection of species and their habitats. Next, the Commission refers, in its application, to data contained in a table provided by the Republic of Bulgaria in the additional information of July 2009 and draws certain conclusions from those data. However, it is not possible to determine on what precise data the Commission relies in that regard. Finally, according to the Commission, it is clear from the available data and analyses that there is restricted coverage for 17 bird species listed in Annex I to the Birds Directive. However, it would appear that the Commission's findings are based mainly on information, the relevance and reliability of which are doubtful, from non-governmental bodies.

53 Thirdly, the Republic of Bulgaria submits that the Commission does not provide any evidence in support of its claim. It submits that there are no definitive scientific data demonstrating the need to classify the whole of IBA Rila as an SPA and that the data on which the Commission's action is founded are not reliable or up to date. In March 2014, the Republic of Bulgaria provided the Commission with data from the report referred to in Article 12 of the Birds Directive relating to the bird species in question, which data were not taken into account in either the reasoned opinion or the application. In that regard, that Member State sends a series of data which, it alleges, cast doubt on the accuracy of the BDZP data used by the Commission, such that it is necessary to collect additional scientific data. The data from the BDZP themselves give rise to doubts as to the need to classify the entirety of IBA Rila as an SPA. In that context, even though it is for the BDZP to make the selection and the initial assessment of regions which are IBAs in Bulgaria, it has not submitted either to the competent Bulgarian authorities or to scientific experts the information which it holds concerning the ornithological data for the areas outside the designated SPAs.

54 Furthermore, the Republic of Bulgaria is of the opinion that the Commission has not explained the methodology and the studies which have led it to the conclusion that the current classification of part of IBA Rila as an SPA is insufficient. In that regard, account has not been taken of more up-to-date data. The Republic of Bulgaria also points out that, at the NSBR meeting of 22 March 2016, experts expressed doubts about the appropriateness of classifying the entirety of IBA Rila as an SPA.

55 In addition, the Republic of Bulgaria maintains that the Commission's calculations cannot be regarded as being accurate.

56 As regards the criterion that sites hosting at least 1% of the national breeding population of a species must be used, the Republic of Bulgaria is of the view that that is not the only criterion that can and should be applied to identify an SPA. The low number of birds present in certain territories is a factor which must also be taken into account.

57 Moreover, it contests the use by the Commission of the out-of-date data from the *Corine Land Cover* biotope project, dating from 1990 or 2000, noting that there are more recent data from that project, dating from 2006 and 2012. The Republic of Bulgaria submits that more current data have been presented to the Ministry of the Environment as part of the draft Management Plan of Rila National Park for 2015 to 2024. In addition, it considers that the Commission failed to take into consideration or examine, in both its reasoned opinion and its application, the data on bird species from the point of view of the obligations arising under Article 12 of the Birds Directive in respect of the years 2008 to 2012.

58 Fourthly, the Republic of Bulgaria submits that it has not been possible to classify, even partially, as an SPA the part of IBA Rila not yet classified, as a result of the constraints imposed by the domestic procedure. The NSBR which is competent to consider proposals for SPAs, did not reach unanimity on the need for such a classification in view of the inconsistencies of the existing scientific data, their insufficient reliability and the differing positions held by members of the NSBR concerning the ornithological criteria applicable.

59 Fifthly, as regards the understanding of the arguments of the Republic of Bulgaria set out by the Commission in its application, that Member State claims, first, that, contrary to the Commission's conclusion, the possible future economic development in the unclassified area of IBA Rila was not determinant in its decision not to classify the entirety of IBA Rila as an SPA. The Republic of Bulgaria maintains that it has, in any event, the right to establish the hierarchy of its priorities. Second, the reason for the lack of classification of the Rila buffer SPA as initially intended is not, as the Commission maintains, the unreliability of the data available, but the lack of current and unambiguous data showing the need for its classification. Third, as regards the alleged intention of following one single timetable for the selection of the SPAs and sites of European importance, the Republic of Bulgaria states that it did not rely on that argument in order to justify the failure to classify the entirety of IBA Rila as an SPA.

Findings of the Court

60 It should be noted, firstly, that, according to the settled case-law of the Court, Article 4(1) of the Birds Directive requires the Member States to classify as SPAs the territories meeting the ornithological criteria specified by that provision (judgment of 14 January 2016, *Commission* v *Bulgaria*, C-141/14, EU:C:2016:8, paragraph 27 and the case-law cited).

61 Secondly, Member States are obliged to classify as SPAs all the sites which, in accordance with the ornithological criteria, appear to be the most suitable for conservation of the species in question (judgment of 14 January 2016, *Commission* v *Bulgaria*, C-141/14, EU:C:2016:8, paragraph 28 and the case-law cited).

62 Thirdly, as regards the partial classification of certain regions, the Court has previously held, on the one hand, that classification as an SPA cannot be the result of an isolated study of the ornithological value of each of the areas in question but must be carried out in the light of the natural boundaries of the ecosystem in question and, on the other, that the ornithological criteria which alone form the foundation of the classification must have a scientific basis (judgment of 14 January 2016, *Commission* v *Bulgaria*, C-141/14, EU:C:2016:8, paragraph 30 and the case-law cited).

63 In order to challenge the Commission's argument that the part of IBA Rila classified as an SPA is inadequate, the Republic of Bulgaria submits, first of all, that the Member States enjoy a margin of discretion in the application of the ornithological criteria to identify the most suitable territories for the conservation of the species listed in Annex I to the Birds Directive.

64 In that regard, the Court has held that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs concerns not the appropriateness of classifying as SPAs the territories which appear 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 Birds Directive (judgment of 14 January 2016, *Commission* v *Bulgaria*, C-141/14, EU:C:2016:8, paragraph 29 and the case-law cited).

65 As is apparent from the case-law cited in the preceding paragraph, and as the Commission rightly pointed out, on the one hand, while it is true that Member States have some discretion with regard to the choice of SPAs, a decision on their classification and delimitation must be based solely on the ornithological criteria laid down in the Birds Directive. Consequently, by having drawn a distinction, in order to identify the most suitable territories for classification as SPAs, between the most important territories for the conservation of the species referred to in Article 4(1) of that directive, and the less significant territories subject to severe anthropogenic pressure, the Republic of Bulgaria did not stay within the limits of the discretion enjoyed by the Member States.

66 On the other hand, since, by virtue of Article 4(1) of the Birds Directive, the Member States are to classify in particular the most suitable territories in number and size as SPAs for the conservation of these species, a Member State cannot, on the ground that it has discretion as regards the choice of SPAs, classify 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 (see, to that effect, judgment of 19 May 1998, *Commission* v *Netherlands*, C-3/96, EU:C:1998:238, paragraph 63).

67 Accordingly, the Republic of Bulgaria cannot rely on the discretion enjoyed by the Member States to justify the merely partial classification as SPAs of territories which, taken as a whole, meet the ornithological criteria referred to in Article 4(1) of the Birds Directive.

68 Next, the Republic of Bulgaria maintains, in essence, that the evidence adduced by the Commission in support of the alleged infringement is not scientifically reliable and is based on data which have not been updated.

69 In that regard, it must be recalled that, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is incumbent upon the Commission to prove the alleged failure. It must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (judgment of 21 July 2016, *Commission* v *Romania*, C-104/15, EU:C:2016:581, paragraph 83 and the case-law cited).

70 However, the Commission, which does not have investigative powers of its own in the matter, is largely reliant on the information provided by any complainants, private or public bodies active in the territory of the Member State concerned and that Member State itself. Similarly, any official document issued by the authorities of the Member State concerned can be regarded as a valid source of information for the purposes of the initiation, by the Commission, of the procedure referred to in Article 258 TFEU (judgment of 16 July 2015, *Commission* v *Slovenia*, C-140/14, not published, EU:C:2015:501, paragraph 40 and the case-law cited).

71 With regard, firstly, to the alleged lack of reliability of the scientific and legal data put forward by the Commission, it should be noted that of those data, a part of which was provided by the Bulgarian authorities themselves, were subject, between 2007 and 2010, to a series of assessments carried out by the BAN, the BDZP and ad hoc working groups comprising experts representing the Bulgarian authorities, academia and non-governmental organisations, and were subsequently discussed and updated at meetings of experts within the NSBR.

72 It is apparent from those data that the part of IBA Rila not classified as an SPA, in this case the Rila buffer site, constitutes a habitat favourable to several species listed in Annex I to the Birds Directive. In addition, the entire Rila IBA is of the utmost importance for a large number of those species and the habitats of those most affected are in both the part of the IBA which is classified as an SPA and that which is not.

73 Contrary to the argument of the Republic of Bulgaria that the Commission did not provide details on either the methodology or the analyses used for each of the species in question, it must be observed that, in the application, the Commission has provided relevant information about that methodology and those analyses and, in particular, has provided tables showing the level of impact for each species concerned.

74 Similarly, with regard to the results of the NSBR meetings of 11 March 2011 and 22 March 2016, after which the Republic of Bulgaria decided to defer its decision on the possible classification of the Rila buffer site as an SPA, it should be noted that the NSBR could not reach consensus as to that classification because, on the one hand, of the opposition not of the scientific experts but of officials from the various ministries involved in the procedure and the mayors and, on the other, constraints connected with the internal procedure for classification as SPAs.

75 However, the inadequacy of the classification as an SPA of IBA Rila cannot be justified by such constraints. Moreover, as the Commission points out, apart from the fact that no scientific expert objected to the classification as an SPA of the Rila buffer site, the municipal officials have not produced any scientific analysis against such a classification and merely suggested that further studies should be conducted.

76 In this respect, it must be recalled that, although any classification presupposes that the competent authorities are convinced, based on the best scientific knowledge available, that the site in question is among the most suitable areas for the protection of birds, that does not, however, mean that the obligation to classify does not, as a rule, arise so long as those authorities have not completed their evaluation and check of the new scientific knowledge (judgment of 13 December 2007, *Commission* v *Ireland*, C-418/04, EU:C:2007:780, paragraph 63 and the case-law cited).

77 The Republic of Bulgaria also disputes the choice made by the Commission, for the purpose of determining the significance of IBA Rila for the species of birds which are represented there, to take as its basis the 1% threshold for the regional or national breeding population used by BirdLife International.

78 Nonetheless, since it is common ground that the Republic of Bulgaria has not put forward any other ornithological criteria which are objectively verifiable, as compared with those used by BirdLife International, that threshold provides, in the absence of scientific evidence to the contrary, a point of reference which makes it possible to assess whether that Member State ought to have classified the entirety of IBA Rila as an SPA (see, to that effect, judgment of 13 December 2007, *Commission* v *Ireland*, C-418/04, EU:C:2007:780, paragraphs 53 and 54).

79 It follows that the argument of the Republic of Bulgaria regarding the lack of reliability of the data used by the Commission cannot be accepted.

80 Secondly, it is necessary also to reject the Republic of Bulgaria's argument that there are more up-to-date data which were disregarded by the Commission, concerning certain species referred to in paragraph 57 of this judgment, which classification of the Rila buffer site as an SPA is allegedly intended to protect.

81 Admittedly, it follows from the case-law of the Court that the updating of scientific data is necessary to determine the situation of the most endangered species and the species constituting the common heritage of the European Union in order to classify the most suitable areas as SPAs and that it is necessary to use the most up-to-date scientific data available at the end of the period laid down in the reasoned opinion (judgment of 13 December 2007, *Commission* v *Ireland*, C-418/04, EU:C:2007:780, paragraph 47).

82 Nonetheless, in the absence of other up-to-date scientific studies capable of justifying a solely partial classification of IBA Rila as an SPA, the Commission was correct to take the view, in its application, that the IBA inventory is the most up-to-date and accurate reference for assessing whether the Republic of Bulgaria has classified a sufficient number and area of territories as SPAs for the purpose of Article 4(1) of the Birds Directive (see, to that effect, judgment of 13 December 2007, *Commission* v *Ireland*, C-418/04, EU:C:2007:780, paragraph 67). That inventory, although not legally binding on the Member States concerned, contains scientific evidence making it possible to assess whether a Member State has complied with its obligation flowing from that provision (see, to that effect, judgment of 7 December 2000, *Commission* v *France*, C-374/98, EU:C:2000:670, paragraphs 25 and 26).

83 The Court has thus repeatedly held that, in view of the scientific nature of the IBA inventory and of the absence of any scientific evidence adduced by a Member State tending in particular to show that the obligations flowing from Article 4(1) and (2) of the Birds Directive could be satisfied by classifying as SPAs sites covering a smaller total area than that resulting from that inventory, the inventory could

be used as a basis of reference for assessing whether a Member State has classified a sufficient number and size of areas as SPAs for the purposes of Article 4(1) of that directive (see, to that effect, judgments of 20 March 2003, *Commission* v *Italy*, C-378/01, EU:C:2003:176, paragraph 18, and of 13 December 2007, *Commission* v *Ireland*, C-418/04, EU:C:2007:780, paragraph 52).

84 It must be noted that the Republic of Bulgaria, which merely highlighted the need to carry out additional studies as regards IBA Rila, has not shown, as is apparent from the file put before the Court, that it was able to fulfil the obligations under Article 4(1) of the Birds Directive, by classifying as SPAs sites other than those resulting from the IBA inventory drawn up by the BDZP for 2007 and covering a total area less than that of the inventory sites.

85 In addition, the data arising from the report referred to in Article 12 of that directive, which the Commission had also examined, do not reveal any element to contradict the form of order sought in the application.

86 It follows from all the foregoing considerations that, by failing to include the entire Rila IBA in an SPA, the Republic of Bulgaria did not classify the most suitable territories in number and size for the conservation of the species listed in Annex I to the Birds Directive, so that that Member State has failed to fulfil its obligations under Article 4(1) of that directive.

Costs

87 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and the Republic of Bulgaria has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by failing to include the entire Important Bird Area covering the Rila Mountains as a Special Protection Area, the Republic of Bulgaria did not classify as SPAs the most suitable territories in number and size for the conservation of the species listed in Annex I to Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on wild birds, so that that Member State failed to fulfil its obligations under Article 4(1) of that directive;**

2. **Orders the Republic of Bulgaria to pay the costs.**

[Signatures]