

(d) that, from December 2004

- by permitting opencast mining (in the case of the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines) likely to have a significant impact on the natural assets which determined the designation of the 'Alto Sil' area as a site of Community interest but failing to make an appropriate assessment of the possible impact of those mines, and in any event failing to comply with the conditions under which the execution of those projects would be permitted, in spite of the risk which they represented to the natural assets which justified the designation of the 'Alto Sil' and in the absence of alternative solutions, namely solely for imperative reasons of overriding public interest and only after having notified the Commission of the necessary compensatory measures to ensure that the coherence of the Natura 2000 network is protected;
- and by having omitted in relation to the above opencast mining to adopt the necessary measures to prevent the deterioration of natural habitats and the habitats of species, and the disturbances of species caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Nueva Julia' and 'Ampliación de Feixolín' mines;

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' site of community interest under Article 6(2) (3) and (4) of Directive 92/43/EEC;

- order the Kingdom of Spain to pay the costs.

Pleas in law and main arguments

The Commission became aware of the existence of various opencast coal mines, developed by the Empresa Minero Siderúrgica de Ponferrada (MSP), likely to affect the natural assets of the area proposed as the 'Alto Sil' site of Community interest (ES0000210), situated in the province of León in the northeast of the Autonomous Community of Castilla y León. Reports confirmed not only the existence at the same time of several open cast mines for the extraction of coal, but also that the opencast mining was to continue by means of further mines to which consent had been given or was about to be given.

As regards Directive 85/337/EEC, the Commission considers that, as regards the three mines at issue, no account was taken of the possible indirect, cumulative or synergistic effects on the most vulnerable species.

The Commission considers that, having regard to the nature of the projects at issue, their proximity and their lasting effects over time, the description of the significant effects of those projects on the environment, pursuant to what is laid down in Annex IV to Directive 85/337/EEC ought necessarily to cover *'the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary. effects of the project'*.

As regards Directive 92/43, in relation to habitats, the species referred to by the application are mainly the capercaillie and the brown bear. The Commission considers that the consequences of the mines on those species cannot be assessed solely in terms of direct destruction of the critical areas for those species, but that account must be taken of the greater fragmentation, degradation and destruction of habitats which are potentially suitable for reconquest by those species and of the increased disturbance caused to those species, those being matters which have not been taken into account. Further there is the additional risk of a definite barrier effect as a result of the movement and fragmentation of populations.

In brief, the Commission considers that the mines at issue worsen the factors considered to be causing the decline of those species and that therefore the authorities are not entitled to conclude that the mining activities at issue have no significant effects on those species.

Consequently, the Commission considers that there has been no assessment of the possible impact on the capercaillie and brown bear species which can be considered appropriate, within the meaning of Article 6(3). The Commission considers that if such an assessment had taken place, the conclusion would have to have been, at the least, that there was not the certainty which the case-law requires that there were no significant effects for those species stemming from the projects to which consent had been given. That means that the authorities were entitled to give consent to those opencast mining projects solely after they were satisfied that the conditions of Article 6(4) were met; in other words, in the absence of alternatives, including the 'zero alternative', after they had identified the existence of imperative reasons of overriding public interest to justify the application of the exception to the rule contained in that article and after, as appropriate, they had determined the necessary compensatory measures.

(¹) OJ 1985 L 175, p. 40

(²) 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)

Action brought on 22 October 2009 — Commission of the European Communities v Hellenic Republic

(Case C-407/09)

(2010/C 11/27)

Language of the case: Greek

Parties

Applicant: Commission of the European Communities (represented by: M. Kontou-Durande and A.-M. Rouchaud-Joët)

Defendant: Hellenic Republic

Form of order sought

- declare that, by having failed to take the necessary measures to comply with the judgment delivered by the Court of Justice on 18 July 2007 in Case C-26/07, the Hellenic Republic has failed to fulfil its obligations under Article 228(1) of the EC Treaty;

- order the Hellenic Republic to pay to the Commission, into the account 'European Community own resources', a proposed penalty payment in the sum of EUR 72 532,80 for each day of delay in taking the measures necessary to comply with the judgment delivered in Case C-26/07, from the day on which judgment is delivered in the present case until the day on which the judgment in Case C-26/07 has been complied with;

- order the Hellenic Republic to pay to the Commission, into the account 'European Community own resources', the daily lump sum of EUR 10 512 for each day of delay from the day on which judgment was delivered in Case C-26/07 until the day on which judgment is delivered in the present case, or the date on which the measures necessary to comply with the judgment in Case C-26/07 are taken if that occurs earlier;

- order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

In the present case, the Hellenic Republic has not yet adopted the legislative measures necessary for transposing Directive 2004/80/EC into Greek law.

It is therefore clear that the Hellenic Republic has not yet taken the measures required in order to comply with the judgment of the Court of Justice of 18 July 2007 in Case C-26/07 *Commission v Greece*.

Under the second sentence of the second subparagraph of Article 228(2) of the EC Treaty, the Commission is to specify in its application the amount of the lump sum and/or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. In the instance in point, the Commission has decided to propose to the Court a penalty payment and a lump sum.

The Commission, acting on the basis of the principles and the methods of calculation set out in the Communication of 13 December 2005, has regard to three fundamental criteria when determining the proposed amount: (a) the seriousness of the infringement; (b) the duration of the infringement; and (c) the need to ensure that the penalty will be a deterrent.

Analysis of the application of those criteria in the present case leads to the conclusion that the duration of the infringement and its effects on private and public interests are significant and justify imposition of the financial penalties proposed.

As is apparent from the Commission's report relating to implementation of the directive, all the Member States apart from Greece have transposed the directive into national law and provide the protection required by the directive.

The failure to transpose the directive into Greek law obstructs achievement of the fundamental objective of freedom of movement for persons in a uniform area of freedom, security and justice. The effects on interests of a general and individual nature are therefore very significant.

Reference for a preliminary ruling from the Supremo Tribunal de Justiça (Portugal) lodged on 27 October 2009
— José Maria Ambrósio Lavrador, Maria Cândida Olival Ferreira Bonifácio v Companhia de Seguros Fidelidade — Mundial SA

(Case C-409/09)

(2010/C 11/28)

Language of the case: Portuguese

Referring court

Supremo Tribunal de Justiça

Parties to the main proceedings

Appellants: José Maria Ambrósio Lavrador, Maria Cândida Olival Ferreira Bonifácio

Respondent: Companhia de Seguros Fidelidade — Mundial SA