

OPINION OF ADVOCATE GENERAL  
FENNELLY

delivered on 26 October 1995<sup>\*</sup>

I — Introduction

1. Can a Member State rely upon Article 9 of the wild birds directive<sup>1</sup> to justify the delegation, by means of a national law, to regional or provincial authorities of the power to permit the hunting of bird species which are not included in the annex to the Directive, which permits hunting, even though that law purports to oblige those authorities to respect both the Directive and the national legislative provisions? Such is the rather complex legal background to the present case, which comes to the Court by means of a question from an Italian court on the extent of the obligations which arise for the Member States to ensure that the conditions under which exceptional derogations may be granted under Article 9 of the Directive are respected.

adopted Decision No 4209 approving the hunting calendar for the 1992-93 season. The Associazione Italiana per il World Wildlife Fund (hereinafter 'WWF Italiana') and a number of other organizations sought the annulment of this decision, *inter alia*, on the ground that the calendar permitted the hunting of certain species of wild birds not listed in the relevant annex to the Directive, and that the conditions for relying on the derogation allowed under Article 9 of the Directive had not been fulfilled.

3. The Tribunale Amministrativo Regionale per il Veneto, Sezione II (Regional Administrative Court for the Veneto Region, Second Chamber) has referred the following question to the Court:

II — Facts and procedure

2. On 21 July 1992, the Giunta Regionale (Regional Executive) of the Veneto Region

'Does Article 9 of the Directive require the Italian Republic to demonstrate, by means of an appropriate provision or measure (depending on whether legislative or administrative means are employed), the existence

<sup>\*</sup> Original language: English.

<sup>1</sup> — Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, hereinafter 'the Directive'; OJ 1979 L 103, p. 1.

of the individual grounds justifying the derogation, as specified in the Directive?’

5. Article 1(4) reads, so far as relevant, as follows:

### III — The relevant provisions of Italian law

4. Article 1(1) of Law No 157 of 11 February 1992 on the protection of warm-blooded wild fauna and on hunting<sup>2</sup> (hereinafter ‘Law 157’) declares that wild fauna are the inalienable heritage of the State, which are protected in the interests of the national and international community. Hunting activities are permitted in so far as they do not conflict with the requirements of the conservation of wild fauna or cause damage to agricultural production (Article 1(2)). By virtue of Article 1(3), ordinary regions (regioni a statuto ordinario) ‘shall adopt regulations governing the management and protection of all species of wild fauna in accordance with the present law, international conventions and Community directives’, while special regions (regioni a statuto speciale) and autonomous provinces shall do so ‘within the limits of their exclusive powers as laid down by their respective constitutions’.

‘Council Directive 79/409/EEC of 2 April 1979, Commission Directive 85/41/EEC of 25 July 1985 and Commission Directive 91/244/EEC of 6 March 1991 on the conservation of wild birds, together with the related annexes, are wholly transposed into domestic law and implemented in the manner and within the time-limits prescribed by the present law.’

This provision also purports to implement the Paris Convention of 18 October 1950 (applied by Law No 812 of 24 November 1978) and the Bern Convention of 19 September 1979 (applied by Law No 503 of 5 August 1981).

6. Article 18(1) lists the species which may be hunted and lays down the dates of the hunting seasons for different groups of species; under Article 18(2), however, the regions may, after having consulted the National Institute for Wild Fauna (‘INFS’), authorize modifications to the dates of the hunting season for particular species, taking account of the environmental situation in the different localities, though they must respect the maximum duration of the season set by the preceding paragraph. New lists of species which may be hunted must be adopted within 60 days of the adoption of the Community norm or the entry into force of international conventions, by a Presidential

<sup>2</sup> — *Supplemento Ordinario alla Gazzetta Ufficiale della Repubblica Italiana* No 46 of 25 February 1992, p. 3.

Decree on a proposal of the Minister for Agriculture and Forestry in conjunction with the Minister for the Environment; the list of species which may be hunted may be amended in conformity with the Community directives in force (Article 18(3)). Under Article 18(4), the regions must, after consulting the INFS, publish the regional hunting calendar and the regulations on the entire hunting year by 15 June, having regard to the provisions of Article 18(1) to (3), and specifying the maximum number of specimens which may be killed per day during the hunting season.

#### IV — Council Directive 79/409/EEC

7. Article 18(1) lists a number of species of wild birds which are not included in the list of bird species which may be hunted in accordance with the Directive. The list of such species is set out in Ministry of Agriculture Circular No 3 of 29 January 1993,<sup>3</sup> which provides that these species may be hunted only if the conditions and criteria established by the Directive are strictly respected, and that the regions and autonomous provinces may only grant derogations under these conditions.

8. The Directive takes as its starting point the decline in the numbers of certain species of wild birds naturally occurring in the European territory of the Member States<sup>4</sup> to which the Treaty applies, which 'represents a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby' (preamble, second recital). Effective bird protection is seen as 'typically a trans-frontier environment problem entailing common responsibilities', particularly as regards migratory species which 'constitute a common heritage' (preamble, third recital). The objective of such conservation is identified as being 'the long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe' and 'the maintenance and adjustment of the natural balances between species as far as is reasonably possible' (preamble, eighth recital).

9. The Directive imposes a number of general obligations regarding the maintenance of population levels of protected species, and the preservation, maintenance and re-establishment of their habitats (Articles 2 and 3). Later provisions contain more specific obligations on the protection of

3 — *Gazzetta Ufficiale della Repubblica Italiana* No 38 of 16 February 1993, p. 37.

4 — In the interests of brevity, I will sacrifice accuracy by referring throughout to 'Europe' rather than the 'European territory of the Member States'.

endangered and migratory species (Article 4), and the protection of wild birds and their eggs in general, including a prohibition on the marketing of wild birds and restrictions on hunting birds of protected species (Articles 5 to 8). Articles 5 and 7 allow the Member States to authorize the hunting of certain species of wild birds listed in Annex II to the Directive the conservation of which, '[o]wing to their population level, geographical distribution and reproductive rate throughout the Community', would not be endangered thereby (Article 7(1)); hunting may not take place during the rearing season or during the various stages of reproduction, or, in the case of migratory birds, during their period of reproduction or return to their rearing grounds.

10. In accordance with Article 9(1), Member States may only derogate from the restrictions on hunting laid down by Article 7:

'... where there is no other satisfactory solution [and] for the following reasons:

(a) — in the interests of public health and safety,

— in the interests of air safety,

— to prevent serious damage to crops, livestock, forests, fisheries and water,

— for the protection of flora and fauna;

(b) for the purposes of research and teaching, of re-population, of re-introduction and for breeding necessary for these purposes;

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers'.

11. Article 9(2) provides that:

'The derogations must specify:

— the species which are subject to the derogations,

- the means, arrangements or methods authorized for capture or killing,
- the conditions of risk and the circumstances of time and place under which such derogations may be granted,
- the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom,
- the controls which will be carried out.’

In accordance with Article 9(3), the Member States must send a report on the implementation of this article to the Commission, which ‘shall at all times ensure that the consequences of these derogations are not incompatible with this Directive’ and take ‘appropriate steps to this end’ (Article 9(4)).

#### V — Observations submitted to the Court

12. In accordance with Article 20 of the Statute of the Court, observations have been

submitted by WWF Italiana, the Federazione Italiana della Caccia (Italian Hunting Federation), an intervening party in the national proceedings, and the Commission. Thus the Court does not have the benefit of observations from the Italian Government or any other Italian public authority, including the defendant in the annulment proceedings before the Italian court. The observations may be summarized as follows.

13. WWF Italiana submits that the Court should declare Article 18 of Law 157 incompatible with the Directive, either because it permits the hunting of species not listed in the annexes to the Directive or, as suggested by the referring court, because of the absence of any procedure for ensuring respect for the conditions laid down in Article 9. In its view, in purporting to transpose the Directive in accordance with the provisions laid down by Law 157, the Italian State has failed to guarantee that the prohibitions and obligations prescribed by the Directive will be respected. As Article 18 of this law is presumed to have been adopted in conformity with Article 9 of the Directive, all the species mentioned in Article 18(1) may in fact be hunted, in direct violation of the Directive.

14. According to WWF Italiana, the order for reference raises two distinct questions, concerning, respectively, the absence from the Italian provisions of a specific procedure for the authorization of derogations, and the vesting in regional authorities of the power to grant such derogations. In accordance with a tacit derogation, Article 18 does not ensure

the full application of the Directive in a sufficiently clear and precise manner, as required by the case-law of the Court;<sup>5</sup> the system of derogations it establishes does not apply to specific situations and does not fulfil the conditions set out in Article 9 of the Directive. Nor is it true, in its view, that Article 18 of Law 157 contains a list of wild birds which may 'theoretically' be hunted, and that the regional authorities must ensure that the conditions for recourse to derogations are fulfilled; the attribution of normative powers to regional authorities does not correct national legislation which does not respect the obligations laid down in a directive.<sup>6</sup> Equally, simple administrative practices do not constitute a valid fulfilment of the obligations incumbent on Member States by virtue of a directive;<sup>7</sup> in each case, the Member State has contravened the principle of legal certainty. WWF Italiana concludes that the relevant Italian legislative provisions breach the Directive by permitting the hunting of bird species excluded from Annex II, and by not incorporating into the national legal order the methods, procedures, controls or limits according to which the authorities responsible for regulating hunting may, in conformity with Article 9 of the Directive, authorize the killing of protected species.

15. The Italian Hunting Federation (hereinafter 'the Federation') takes the view that the

request for a preliminary ruling is inadmissible, on the grounds that the question posed by the national judge concerns the conformity of the relevant Italian provisions with Article 9 of the Directive, rather than requesting an interpretation of the scope of this article.

16. The Federation considers that, while only those species mentioned in Annex II may be hunted, the Directive is not rigid to the point of not admitting possible derogations; thus Article 9(1)(c), for example, allows the capture of certain birds in small numbers 'under strictly supervised conditions and on a selective basis', thereby attributing a particular importance to local customs and requirements. It recognizes that neither Article 1 nor Article 18 of Law 157 mention the conditions under which derogations may be granted in accordance with the Directive which it describes as a lacuna which may give rise to difficulties in applying these provisions. However, under Article 189 of the Treaty the Member States are free to choose the means by which they achieve the objectives of the Directive; Law 157 is 'not insensitive' to the requirements of conservation which led the Council to adopt the Directive, and has set up a dynamic system of supervision of the respect of its own provisions, as witness the Decree of 22 November 1993<sup>8</sup> which deleted two species from the list of birds which may be hunted.

5 — Case 247/85 *Commission v Belgium* [1987] ECR 3029.

6 — Case C-157/89 *Commission v Italy* [1991] ECR I-57.

7 — Case C-339/87 *Commission v Netherlands* [1990] ECR I-851.

8 — *Gazzetta Ufficiale della Repubblica Italiana* No 76 of 1 April 1994, p. 39.

17. The Federation further notes that Law 157 applies the Paris and Bern Conventions as well as the Directive, and that the latter Convention contains rules which are parallel with, and sometimes identical to, the Community measure. The Bern Convention authorizes — or does not prohibit, which is in effect the same thing — the hunting of nine of the twelve species excluded from Annex II to the Directive the hunting of which is allowed under Law 157; the Community has acceded to the Convention by 'Decision No 82 of 3 December 1981',<sup>9</sup> thereby implicitly, but significantly, endorsing lists of species of wild birds which may be hunted which are different from those set out in Annexes II/1 and II/2 of the Directive. In transposing and implementing the two supranational instruments, the Italian State has thus complied almost entirely with its obligations under Community and international law.

18. It follows, according to the Federation, that the question put by the national judge in the present case, as to whether it is indispensable to demonstrate in an express provision the existence of the elements set out in Article 9(2) of the Directive justifying the derogation, concerns the conformity of the law transposing the Directive, rather than the interpretation of the Directive itself. Such a question, in its view, can only be raised in proceedings under Article 169 of the Treaty and not by means of a request for a preliminary ruling under Article 177. In any case,

the provisions of Article 9 are so clear that the national court considers they have direct effect, and hence no question of interpretation can arise; the court itself affirms that the legality of the calendar depends solely and exclusively on Article 18 of Law 157.

19. The Commission, which has initiated the procedure under Article 169 of the Treaty against the Italian State in respect of Law 157, takes issue with a number of the assumptions made by the national judge in the order for reference, concerning the legal effects of a directive which has been transposed into national law,<sup>10</sup> the power of a national judge to decide to disapply a provision of national law inconsistent with a provision of Community law,<sup>11</sup> and the duty of Member States to transpose into national law even those provisions of a directive which are clear, precise and unconditional.<sup>12</sup> In the Commission's view, however, the Court can answer the question referred to it without taking account of the erroneous affirmations of the national judge.

20. On the question referred, the Commission quotes the established case-law of the Court regarding the transposition requirements imposed by a directive.<sup>13</sup> In its view,

9 — Presumably, Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the Conservation of European Wildlife and Natural Habitats; OJ 1982 L 38, p. 1.

10 — Citing Case 41/74 *Van Duyn* [1974] ECR 1337; Case 36/75 *Rutili* [1975] ECR 1219 and Case 103/88 *Fratelli Constanzo v Comune di Milano* [1989] ECR 1839.

11 — Citing Case 106/77 *Simmenthal* [1978] ECR 629 and the decision of the Italian Constitutional Court in its judgment No 170 of 1984 (*Grantal*).

12 — Citing Case 102/79 *Commission v Belgium* [1980] ECR 1473.

13 — Case 247/85, cited in footnote 5 above, paragraph 9 of the judgment; see paragraph 27 below.

national measures which exercise the right of derogation must demonstrate that all the conditions laid down in Article 9(1) and (2) are fulfilled; simple administrative practices are not sufficient for correctly transposing these provisions. It adds one further, implicit, condition which is the natural corollary of those which arise explicitly from the case-law of the Court, that any derogation be limited in time. The Commission concludes by submitting that Article 9 requires that Member States only delegate the power to grant derogations to domestic authorities where the powers of such authorities are properly defined and where all the substantive and formal conditions imposed by the Directive are expressly indicated.

## VI — Examination of the question submitted to the Court

### (i) *Jurisdiction of the Court of Justice*

21. The Federation has challenged what it terms the admissibility of the reference by the national judge of the question submitted to the Court in the present proceedings, on the grounds that the question put by the Italian court does not concern the scope of Article 9 of the Directive, but the conformity (or otherwise) with the Directive of the implementing provisions, and that the national judge did not need an interpretation

of Article 9 in order to resolve the matters pending before him in the principal proceedings. At the oral hearing, the Federation also sought to rely on the Court's judgment of 15 June 1995 in *Zabala Erasun and Others*.<sup>14</sup>

22. The matters raised by the Federation go to the question of the jurisdiction of the Court, rather than to the admissibility of the request for a preliminary ruling. The first question which arises, however, is whether the Federation is even entitled to challenge the jurisdiction of the Court or the admissibility of the question referred by the national court. It is settled case-law that, '[since] the right to determine the questions to be brought before the Court of Justice ... devolves upon the court or tribunal of the Member State alone, the parties may not change their tenor or have them declared to be without purpose ... Article 177 ... establish [es] a non-contentious procedure excluding any initiative of the parties, who are merely invited to be heard in the course of that procedure'.<sup>15</sup> Parties to the main proceedings may not therefore challenge either the Court's jurisdiction to provide a preliminary ruling or the admissibility of such a ruling.<sup>16</sup>

23. The assertion that the national court has requested the Court to rule on the compatibility with the Directive of the relevant

<sup>14</sup> — Joined Cases C-422/93 to C-424/93 [1995] ECR I-1567.

<sup>15</sup> — Case 44/65 *Hessische Knappschaft v Singer* [1965] ECR 965, pp. 970 and 971.

<sup>16</sup> — Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-43, paragraphs 8 to 14 of the judgment.

national provisions is in any case misconceived. The question of the national court, both in its terms and in its intent, requests the Court to provide an interpretation of Article 9 of the Directive, in circumstances where it is 'plainly apparent' that the interpretation of the relevant Community provisions has a 'bearing on the real situation [and] the subject-matter of the case in the main proceedings'.<sup>17</sup> In the present proceedings, the national court might consider the interpretation of the Directive necessary either in order to interpret those provisions of Law 157 which specifically refer to it, or to evaluate the compatibility of this law with the Directive; the national court is in any case required to interpret Law 157 in the light of the Directive which it purports to implement.<sup>18</sup> While in the context of the present proceedings the Court cannot rule on the question of the compatibility with Community law of national provisions, it 'may provide the criteria for the interpretation of Community law which will enable the national court to solve the legal problem with which it is faced'.<sup>19</sup>

determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court'.<sup>21</sup>

25. The Federation's reliance on *Zabala Erasmus* is also misplaced. While it is true that the Court may examine the conditions in which a question has been referred to it in order to confirm its own jurisdiction, nothing in the file of the present proceedings leads to the conclusion that the case is no longer pending before the national court, or that its ruling is not needed in the effective resolution of the dispute before it.<sup>22</sup> It follows that, in my opinion, the present request for a preliminary ruling is admissible, and that the Court has jurisdiction to provide the ruling requested.

(ii) *The obligations of the Member States under the Directive*

24. Furthermore, it does not fall to this Court 'to pass judgment on the relevance of the questions submitted' to the resolution of the dispute pending before the national judge;<sup>20</sup> the Court has consistently held that 'it is for the national courts alone ... to

26. The national court in the present proceedings has raised the question of the obligations arising for the Member States to state the reasons justifying their recourse to the derogation facility offered by Article 9 of the Directive. While the nub of the matter before it is whether the hunting calendar of the

17 — Joined Cases C-332/92, C-333/92 and C-335/92 *Enrico Italia Srl and Others* [1994] ECR I-711, paragraph 17 of the judgment.

18 — Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26 of the judgment.

19 — See, for example, Case C-150/88 *Parfumerie-Fabrik 4711 v Provide* [1989] ECR 3891, paragraph 12 of the judgment.

20 — Case 117/77 *Algemeen Ziekenfonds Drenthe-Platteland v Penk* [1978] ECR 825, paragraphs 6 and 7 of the judgment.

21 — Judgment of 6 July 1995 in Case C-62/93 *BP Supergas*, not yet reported in the European Court Reports, paragraph 10.

22 — Joined Cases C-422/93 to C-424/93, cited in footnote 14 above, paragraphs 17, 28 and 29 of the judgment.

Giunta Regionale of the Veneto Region complies with the Directive, the national court considers that the validity of the calendar can only be evaluated as against the implementing measure, Law 157; in these circumstances, the court is seeking to ascertain whether Law 157 correctly transposes the Directive. In order to provide the referring court with a useful answer, it is appropriate to examine more fully the extent of the obligations of the Member States under the Directive in relation to the hunting of wild birds, rather than restricting consideration to the sole issue of the duty to give reasons. In the light of these elements of interpretation, the national court will be in a position to determine whether, and to what extent, Article 9 of the Directive is relevant to the question of the validity of the contested hunting calendar.

27. In view of the range of arguments raised in the order for reference and by the parties, it may be useful to recall the case-law of the Court on the general question of the transposition of the Directive. This has come before the Court on a number of previous occasions, in the context of infringement actions by the Commission. The Court's finding on this matter in the first brace of such cases merits to be quoted in full:

precisely the same words in a specific, express provision of national law; a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see the judgment of 23 May 1985 in Case 29/84 *Commission v Federal Republic of Germany* [1985] ECR 1661). However, a faithful transposition becomes particularly important in a case such as this in which the management of the common heritage is entrusted to the Member States in their respective territories.’<sup>23</sup>

28. The Court has held that ‘the national legislation must guarantee that the species of bird not listed in Annex II may not be hunted’, and that national legislation which does not exclude the possibility that species other than those listed in Annex II to the Directive may be hunted ‘creates a legally ambiguous situation’ which is incompatible with the Member States’ duties under the Directive.<sup>24</sup> Furthermore, ‘[it] is clear from the general scheme of protection provided for in the Directive that national legislation may not extend the list contained in Annex II indicating the bird species which may be hunted’.<sup>25</sup>

29. The foregoing case-law and the terms of Article 9 underline the very exceptional nature of the possibility this provision offers

‘As regards the transposition of the directive into national law, it must be observed that this does not necessarily require the provisions of the directive to be enacted in

23 — Case 262/85 *Commission v Italy* [1987] ECR 3073, paragraph 9 of the judgment; see also Case 247/85, cited in footnote 5 above, paragraph 9 of the judgment.

24 — Case 247/85, cited in footnote 5 above, paragraphs 14 and 16 of the judgment.

25 — Case 262/85, cited in footnote 23 above, paragraph 12 of the judgment.

of derogating from the prohibition on killing protected birds laid down by Article 5 and from the restrictions on hunting established by Article 7. Article 7 consists of a permanent derogation allowing the hunting of the listed species, subject to conditions regarding essentially the maintenance of their population levels and their protection during particularly sensitive periods of the year. The hunting of other species of wild birds can only be justified, in accordance with Article 9 as has been definitively stated by the Court, if the following three conditions are fulfilled:

- first, the Member State must restrict the derogation to cases in which there is no other satisfactory solution;
- secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c);
- thirdly, the derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them ... [the derogation facility] must be applied appropriately in order to deal with precise requirements and specific situations'.<sup>26</sup>

26 — Case 262/85, cited in footnote 23 above, paragraph 7 of the judgment.

30. The sets of conditions laid down by Article 9 are obviously cumulative, and, as the article itself is a derogation from the prohibitions laid down in Articles 5 to 8, they must be strictly interpreted. The existence of another satisfactory solution to the problem of air safety or crop protection, which might otherwise justify recourse to Article 9, precludes any derogation under this provision; hunting for recreational purposes is also precluded, as this is not amongst the reasons for which a Member State may derogate from these prohibitions. Furthermore, it is inherent in the Court's analysis of this provision cited in the preceding paragraph that Article 9(1) and (2) should be read together; the function of the formal conditions established by the latter is to enable strict supervision of the respect of the preconditions laid down by the former. It is clear from the same case-law that, while the Court will consider the possibility that a national legislative provision may be saved by Article 9, in any infringement proceedings it is incumbent on the Member State to submit evidence to demonstrate that the preconditions for benefiting from such a derogation are fulfilled.<sup>27</sup>

31. The requirements of the Directive in regard to the transposition of Article 9 have been refined in a number of subsequent

27 — See, for example, Case 247/85 *Commission v Belgium*, cited in footnote 5 above, paragraph 34 of the judgment; Case 262/85 *Commission v Italy*, cited in footnote 23 above, paragraph 14 of the judgment.

judgments, where Member States have generally attempted, largely without success, to rely on this provision as a justification for provisions of its national law which are *prima facie* in breach of the Directive. In *Commission v Germany*, the Court considered national provisions which disapplied the prohibition *inter alia* on killing and capturing protected birds and the destruction of their nests and eggs, where such acts took place in the course of 'the normal use of the land for agricultural, forestry or fishing purposes' or 'the exploitation of the products obtained from such activities'; these derogations were found not to 'meet the requirements laid down in Article 9 of the Directive since [such] activities ... cannot be attributed to any of the reasons set out in Article 9'.<sup>28</sup> Similarly, in *Commission v Netherlands*, the Court found that national provisions which allowed the owners or users of land to kill or capture protected birds which were liable to cause damage or a nuisance were incompatible with Article 9(1), as 'the wording of [the national provisions], unlike Article 9(1) of the Directive, [did] not make the grant of permits conditional upon the absence of any other solution'.<sup>29</sup> In *Commission v France*, the Court ruled incompatible with the Directive national rules which failed to protect the nests and eggs of certain species of wild birds; as the French rules in question did not specify the reasons justifying a derogation or the criteria and conditions set out in Article 9(2), they constituted a breach of Article 5 of the Directive.<sup>30</sup> The Court has ruled that for a correct transposition of the Directive, both the prohibitions it imposes and the criteria the Member States must meet

in order to derogate from these prohibitions must be embodied in specific national provisions.<sup>31</sup>

32. The transposition requirements do not, of course, stand in the way of a Member State's delegating implementing powers to regional or provincial authorities. It is settled case-law that 'each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement directives by means of measures adopted by regional or local authorities. That division of powers does not, however, release it from the obligation to ensure that the provisions of the directive are properly implemented in national law.'<sup>32</sup> The Court has recently had occasion to underline that 'it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear, and that individuals are made fully aware of

28 — Case 412/85 *Commission v Germany* [1987] ECR 3503, paragraph 19 of the judgment.

29 — Case 236/85 *Commission v Netherlands* [1987] ECR 3989, paragraph 13 of the judgment.

30 — Case 252/85 *Commission v France* [1988] ECR 2243, paragraph 11 of the judgment.

31 — Case 252/85, cited in footnote 30 above, paragraph 19 of the judgment, and Case C-339/87, cited in footnote 7 above, paragraph 28 of the judgment.

32 — Joined Cases 227/85 to 230/85 *Commission v Belgium* [1988] ECR I, paragraph 9 of the judgment.

their rights and, where appropriate, may rely upon them before the national courts'.<sup>33</sup>

33. In the case of Law 157, while the regions and autonomous provinces appear to be formally obliged to respect the Directive in accordance with Article 1(3) and (4), the terms of Article 18(1) of this law could have led these authorities to believe that the Italian State had already determined, in relation to those species and for the periods specified, that the conditions of Article 9 were already fulfilled. In fact, the simple addition, without any explicit justification, of a number of protected species to the list of those whose hunting is permitted under Article 7 and Annex II to the Directive tends to undermine the claim that Law 157 is even to be considered a derogation. As noted above, hunting is not, itself, a ground for derogation. It would be a serious understatement to say that this creates 'a legally ambiguous situation', incompatible with the transposition requirements of the Directive.

34. In *Commission v Italy*,<sup>34</sup> the Court examined the compatibility with the

Directive of national provisions under which regional authorities were charged with implementing the Directive. Italian Law No 968 of 1977 conferred on the regions the power to authorize the capture and the sale of migratory birds with a view to their being kept for use as live decoys or for recreational purposes. The Court pointed out that the Commission's complaint was 'not objecting to the power to regulate hunting conferred on the regions or to the legislative and administrative provisions adopted by the regions'.<sup>35</sup> The Italian Government could not, however, rely on Article 9 to justify the prima facie breach of the prohibitions laid down by Article 5; as the relevant provision of the national law did not establish the criteria and conditions provided for in Article 9(2) of the Directive, or require the regions to take account of those criteria or conditions, 'it introduce[d] an element of uncertainty as regards the obligations which the regions must observe when adopting their regulations ... . There is therefore no guarantee that the capture of certain birds will be limited to the strict minimum ... or that the means, arrangements or methods for capture are not large-scale, non-selective or capable of causing the local disappearance of a species. It follows that the essential elements of Article 9 of the Directive have not been transposed completely, clearly and unequivocally into the Italian rules.'<sup>36</sup> In subsequent proceedings concerning the same national law, the Court held that 'it would be contrary to the principle of legal [certainty] if a Member State could rely on the regional authorities' power to issue regulations in order to justify national legislation which does not comply with the prohibitions laid

33 — Case C-365/93 *Commission v Greece* [1995] ECR I-499, paragraph 9 of the judgment.

34 — Case 262/85, cited in footnote 23 above.

35 — Loc. cit., paragraph 33 of the judgment.

36 — Loc. cit., paragraph 39 of the judgment.

down in a directive'.<sup>37</sup> The reasoning of that case, also concerning hunting derogations in Italy, in application to the present case is, in my view, compelling.

35. The effects in Italian law of the Ministerial Circular of 29 January 1993, requiring the regions and autonomous provinces only to grant derogations in accordance with the Directive, are not a matter for this Court in the present proceedings. It should be pointed out, however, that the proper transposition of the conditions and criteria of Article 9 requires any implementing provisions to specify that a derogation is only available 'where there is no other satisfactory solution', an essential precondition of which the circular makes no mention. Furthermore, it is clear that an administrative practice of a Member State which is itself in conformity with the Directive is not sufficient for proper compliance with the Directive;<sup>38</sup> on the other hand, the Court does accept that the national legislative provisions may be supplemented by other measures provided these are 'of a general nature and capable of creating rights and obligations for individuals', and that the national authority empowered to adopt such measures in fact complies with the Directive.<sup>39</sup>

36. In my view, it follows from the scheme of the Directive that a Member State which opts to derogate by means of a provision of national law and leave the adoption of implementing measures to regional or provincial authorities, may not seek to establish an exceptional derogation to permit hunting under Article 9 as if it were an integral part of the provisions allowing hunting under Article 7 of the Directive. As noted above, Article 7 does not require that any prior conditions be fulfilled, and allows the hunting of the species listed subject to certain minimum conditions which ensure the maintenance of the population of the particular species. The extent of the hunting which may be carried out under the aegis of an Article 9 derogation depends on the reasons for which the derogation is employed; it seems very likely to me, for example, that hunting justified for reasons of air safety would be more restricted geographically than, say, hunting justified by the need to avoid serious damage to crops and livestock. Any national derogation under Article 9 must be restricted to the clear necessity of the occasion of its creation.

37. It follows from the above, in my view, that Article 9 of the Directive may not be relied upon to justify national provisions authorizing the hunting of certain bird species which are not included in the relevant annexes to the Directive, where the provisions do not contain clear objective criteria

37 — Case C-157/89, cited in footnote 6 above, paragraph 17 of the judgment; the English version of the report uses the expression 'legal safety' for 'certezza del diritto' in the original Italian, which is usually translated as 'legal certainty'.

38 — Case 236/85, cited in footnote 29 above, paragraph 13 of the judgment.

39 — Case C-339/87, cited in footnote 7 above, paragraphs 7 and 8 of the judgment.

for establishing that the conditions for resorting to the derogation of Article 9 have been fulfilled and which do not, in any event, limit hunting to that which is strictly necessary 'in order to deal with precise requirements and specific situations', or identify with sufficient clarity the duties of the regional authorities to respect those conditions.

the Contracting Parties to adopt stricter measures than those provided; the Directive must be considered such a measure.

38. The Federation sought to rely on the Bern Convention of 3 December 1981 on the conservation of European wildlife and natural habitats, approved on behalf of the Community by Council Decision 82/72/EEC,<sup>40</sup> and particularly on the fact that the Convention does not protect certain bird species the hunting of which is prohibited under the Directive. In the first place, the fact that the Convention does not apply to certain bird species under threat does not dispense Member States from their obligations under the Directive; a failure to ban hunting of these species is not equivalent to a permission to authorize hunting. Furthermore, there is no indication in Council Decision 82/72/EEC that the Community's approval of the Convention in any way modified the obligations of the Member States under the Directive, which was cited in the preamble to the decision. Finally, as the Commission has noted, Article 12 of the Convention allows

39. At the oral hearing, the Federation relied on the fact that the Italian Government had notified the Commission on 12 August 1992 of the derogations which it wished to exercise on the basis of Article 9 of the Directive; the notification of a derogation does not, however, establish its conformity with the substantive provisions of Article 9(1) and (2). In any case, according to the Commission, Italy did not list Article 18 of Law 157 as being a derogation granted under Article 9 in its report of October 1993 on the application of the Directive.<sup>41</sup> The Federation also referred to the Ministerial Circular of 23 January 1993 and Law No 50 adopted by the Veneto Region on 9 December 1993 to support its contention that the relevant Italian texts have established the criteria on the basis of which the Member States may derogate from the prohibitions laid down by the Directive. Not only does this contradict its assertion that Law 157 alone constitutes the derogation, but it is difficult to see how either of these measures could be relevant to the validity of a decision adopted on 21 July 1992.

<sup>41</sup> — Notifications were however made in respect of nine of the twelve species listed in Article 18(1) (*Second report on the application of Directive No 79/409/EC on the conservation of wild birds*, COM(93) 572 final of 24 November 1993, p. 88).

<sup>40</sup> — Cited in footnote 9 above.

(iii) *The duties of the national court*

40. Where a national court is faced with an apparent contradiction between a measure of national law, or an administrative act adopted under a national provision implementing a Community directive, and the terms of the directive itself, it is not prevented by the existence of the national implementing provisions from having regard to the provisions of the directive, as the national judge in the present case appears to believe. Equally, if the national court is unable to determine whether such a national measure or administrative act is in substantive conformity with the directive, it is required to verify the conformity of that measure or act with the terms of the directive itself. Indeed, the court is obliged under Articles 5 and 189 of the Treaty 'to take all appropriate measures, whether general or particular, to ensure the fulfilment' of the Member State's obligation to achieve the result envisaged by a particular directive; '[it] follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [the directive], national courts are required to interpret their national law in the light of the wording and the purpose of the directive'.<sup>42</sup> This is so even where the directive allows the Member State the possibility of derogating from its provisions; in such circumstances, 'it is the duty of the national court before which the directive is invoked to determine whether the disputed national measure falls outside the margin of the dis-

cretion of the Member States and cannot therefore be considered as a legitimate ... derogation'.<sup>43</sup>

41. The existence of a rule of Italian law, to which the national judge has referred, which would prevent his examining the compatibility with the Directive of Law 157 in the present proceedings, has been doubted by the Commission. Be that as it may, the case-law of the Court has long established that 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent ... Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law'.<sup>44</sup> It follows in my view that, in accordance with the obligations of the Italian State under the Treaty, the national judge in the present proceedings is not only empowered but is obliged to verify the conformity with the restrictive conditions of Article 9 of the Directive of the hunting calendar established by Decision No 4209 of the Giunta Regionale of the Veneto region, whether by interpreting the relevant provision of Law 157 in conformity with the Directive, or by disapplying any provisions of this law which contradict the Directive.

42 — Case 14/83, loc. cit., footnote 18 above.

43 — Case 51/76 *Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraph 29 of the judgment.

44 — Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 20 of the judgment.

## VII — Conclusion

42. In view of the foregoing, the question submitted by the Tribunale Amministrativo Regionale per il Veneto, Sezione II, should in my view be answered as follows:

- (1) Article 9 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds may not be relied upon to justify provisions in a national law delegating to regional or provincial authorities the power to permit the hunting of bird species which are not included in the relevant annexes to the Directive, where the provisions do not contain clear objective criteria for establishing that the conditions for resorting to the derogation allowed under this article have been fulfilled, or do not limit hunting to that which is strictly necessary in order to deal with precise requirements and specific situations, or identify with sufficient clarity the duties of the regional authorities to respect those conditions.
  
- (2) Where the national court is unable to determine whether an administrative act establishing a calendar for the hunting of wild birds is in conformity with national legislative provisions purporting to implement the Directive, it is required to verify the substantive conformity of the administrative act with the terms of the Directive itself.