

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 26 April 2007¹

I — Introduction

Special Protection Areas ('SPAs') within the meaning of Article 4 of the Birds Directive, but have not yet been so classified.⁴ In addition to a series of factual questions, it is above all necessary to clarify whether and to what extent, in the context of the protection regime, interference can be justified by compensatory measures.

1. The present case concerns the application of Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds² ('the Birds Directive') to plans to irrigate an area which hitherto has been characterised by its steppe-land habitat and the rare birds inhabiting that habitat. Since, at the material time, that area had not yet been declared a special protection area for steppe-land birds, the protection scheme for so-called *de facto* bird protection areas applies for the first time since the adoption of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora³ ('the Habitats Directive'). *De facto* bird protection areas are areas which should have been classified as

II — Legal framework

2. The Birds Directive applies, as Article 1 states, to the protection of all species of birds occurring in the wild state in Europe. Article 2 lays down in that regard the fundamental obligation of the Member States:

'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level

1 — Original language: German.

2 — OJ 1979 L 103, p. 1.

3 — OJ 1992 L 206, p. 7.

4 — See Case C-374/98 *Commission v France* ('Basses Corbières') [2000] ECR I-10799, paragraphs 47 and 57.

which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.’

(b) species vulnerable to specific changes in their habitat;

3. Article 3 sets out the methods which the Member States are to use for that purpose, in particular the creation of protected areas and the upkeep of habitats.

(c) species considered rare because of small populations or restricted local distribution;

4. Article 4 contains provisions regarding which areas Member States are to classify as SPAs for certain birds particularly worthy of protection. The first sentence of Article 4(4) deals first with the protection of those areas:

(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.

‘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.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

In this connection, account shall be taken of:

(a) species in danger of extinction;

2.-3. ...

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

III — Facts, pre-litigation proceedings and forms of order sought

6. In the Catalanian province of Lleida there are extensive steppe-land habitats which offer good conditions for the bird species which rely on them. In the present case, these are, inter alia, Bonelli's Eagle (*Hiera-aetus fasciatus*), the Little Bustard (*Tetrax tetrax*), the Calandra Lark (*Melanocorypha calandra*), Dupont's Lark (*Chersophilus duponti*), the European Roller (*Coracias garrulus*) and the Short-Toed Lark (*Calandrella brachydactyla*).

5. Under Article 7 of the Habitats Directive, the obligations arising under Article 6(2), (3) and (4) of the Habitats Directive replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive as from the date of implementation of the Habitats Directive — that is to say, as from June 1994⁵ — or the date, if later, of classification or recognition of the area in question as an SPA by a Member State pursuant to the Birds Directive.

7. Thus the list of ornithologically important areas in Spain, published in 1998⁶ by the Spanish ornithological society (Sociedad Española de Ornitología), names two areas particularly suitable for the protection of those bird species: IBA No 142 'Secanos de Lérida' covering an area of 62 500 hectares and IBA No 144 'Cogul-Alfes' covering an area of 18 000 hectares (IBA stands for Important Bird Area).

5 — The judgment in Case C-166/97 *Commission v France* ('Bouches de la Seine') [1999] ECR I-1719, paragraph 5, also mentions only June 1994. It is in fact difficult to determine the precise time-limit prescribed for implementation of the Habitats Directive. It is based, in accordance with Article 191(2) of the EEC Treaty in force at the time (now, after amendment, Article 254 EC) on the date on which it was notified to the Member States. Eur-Lex gives 10 June 1994 as the expiry date, whilst the Court, in Case C-329/96 *Commission v Greece* ('failure to transpose') [1997] ECR I-3749, paragraph 2, and Case C-83/97 *Commission v Germany* ('failure to transpose') [1997] ECR I-7191, paragraph 2, took 5 June 1994 as the date.

6 — Carlota Viada (Ed.), *Áreas importantes para las aves en España*, Madrid 1998. Included in the annexes to the application in Case C-235/04 *Commission v Spain*, pending before the Court.

8. In 1988, Spain had classified in the area of IBA No 144 an SPA within the meaning of Article 4(1) of the Birds Directive, the 'Mas de Melons' SPA covering an area of 1 462 hectares (after extension now 6 418 hectares). Otherwise there was no SPA yet in the areas of the two IBAs.

9. In 2001 the Commission was informed, by way of a complaint, of a project to irrigate approximately 110 000 hectares of agricultural land in that area. It was to make possible additional irrigation of 1 500, 3 500 or 6 500 cubic metres of water per hectare. Various detailed construction measures are necessary for its implementation. By Law No 42/1994 of 30 September 1994,⁷ Spain declared the project one of general (nation-wide) interest.

10. On 26 September 2002 the competent bodies of the region adopted a statement of the environmental impact of that project. The initial works began in the same year. The completion of all works necessary was expected to take approximately 10 years. The actual irrigation has not yet begun.

11. Since the Commission took the view, after further information from Spain and the

complainant, that the project infringed the Birds Directive, on 1 April 2004 it called on Spain to submit its observations in accordance with Article 226 EC. Despite Spain's response, the Commission adhered to its earlier view and on 14 December 2004 issued a reasoned opinion which was received by Spain's Permanent Representation in Brussels on 22 December 2004. The Commission laid down therein a final period of two months, that is to say until 22 February 2005, within which Spain was to comply with the requirements of the Birds Directive.

12. According to Spain's reply, received by the Commission on 7 March 2005, further SPAs with an additional size of 20 475 hectares had been classified in the area in question as early as 2003. These were probably the areas 'Anglesola-Vilagrassa' (857 hectares), 'Bellmunt-Almenara' (3 466 hectares), 'Plans de Sió' (after extension now 5 298 hectares), 'Granyena' (6 646 hectares), 'Valls del Sió-Llobregós' (27 791 hectares, probably only partly inside the project area) and 'Secans de la Noguera' (probably outside the project area) in IBA No 142 and 'Secans del Segrià i Utxesa', which possibly in part corresponds to areas in IBA No 144.

⁷ — BOE of 31 December 1994.

13. Despite Spain's reply, the Commission brought the present action on 11 April 2006, seeking

- a declaration that, in relation to the plan to irrigate the irrigable area of the Segarra-Garrigues Canal, the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3 and 4(1) and (4) of Council Directive 79/409/EEC on the conservation of wild birds;

- an order that the Kingdom of Spain should pay the costs.

14. The Kingdom of Spain contends that the Court should

- dismiss the claim and
- order the applicant institution to pay the costs.

15. During the judicial proceedings, on 5 September 2006, Catalonia classified further areas within both IBA No 142 and

No 144 as SPAs. In addition to the extension of existing SPAs, the 'Secans de Belianes-Preixana' SPA (1 925 hectares) within IBA No 142 should be mentioned. In total 38 150 hectares within the project area are now said to be classified as SPAs.

IV — Legal assessment

A — *Admissibility of the claim*

16. Spain submits first that, in the reasoned opinion and the application, the Commission has extended the subject-matter of the proceedings, since in the letter of formal notice Spain was required to take a position only with regard to a breach of Article 4(1) and (4) of the Birds Directive, and not with regard to a breach of Articles 2 and 3. The Commission does not expressly comment on this assertion.

17. Spain's objection must be upheld. The subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision.⁸ This

⁸ — Case C-350/02 *Commission v Netherlands* [2004] ECR I-6213, paragraph 20.

function is performed particularly by the invitation to submit observations, which in addition indicates to the Member State the factors enabling it to prepare its defence,⁹ but should also enable it to comply before proceedings are brought before the Court.¹⁰ Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure.¹¹ Accordingly the Commission's complaints must already have been made generally in the letter of formal notice.¹²

were not raised even generally in the letter. To that extent the reasoned opinion and the application contain an inadmissible extension of the subject-matter of the proceedings.

19. The application is therefore inadmissible to the extent that the Commission complains of infringement of Articles 2 and 3 of the Birds Directive.

B — *Substance of the application*

1. Legal bases of the application

18. As Spain submits, the invitation to submit observations mentions only Article 4(1) and (4) of the Birds Directive as the provisions infringed. The Commission does not refer to Article 2. It does in fact briefly quote Article 3,¹³ but there is no indication of how that provision has been infringed. Thus the complaints relating to infringement of Articles 2 and 3 of the Birds Directive

20. In so far as the application is admissible, the Commission claims that, in relation to the plan to irrigate the irrigable area of the Segarra-Garrigues Canal, Spain has infringed Article 4(1) and (4) of the Birds Directive.

9 — Case C-289/94 *Commission v Italy* [1996] ECR I-4405, paragraph 15, and Case C-230/99 *Commission v France* [2001] ECR I-1169, paragraph 31.

10 — Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraphs 23 and 24.

11 — Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 55, and *Commission v Italy*, cited in footnote 10, paragraph 23.

12 — *Commission v Germany*, cited in footnote 11, paragraph 54, and *Commission v Italy*, cited in footnote 10, paragraph 26.

13 — The provisional translation of the draft of the letter of formal notice there mentions also Article 2, but that reference is absent from the final Spanish version.

21. Pursuant to the first sentence of Article 4(1) of the Birds Directive, the species mentioned in Annex I are to be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. In particular Member States are, pursuant to the fourth sentence of Article

4(1), to classify as protection areas the most suitable areas, in terms of number and size, for the conservation of those species. To date that aspect has been the most important area of application of Article 4(1) in the case-law.

the first sentence of Article 4(1) is put into concrete terms by the first sentence of Article 4(4) of the Birds Directive does not, however, preclude infringement of both provisions at the same time.¹⁵ It is rather to be inferred from an infringement of the first sentence of Article 4(4) of the Birds Directive that at the same time there is an infringement of the first sentence of Article 4(1) of the Birds Directive.

22. The parties do agree, however, that the subject-matter of the present proceedings is not the classification of particular SPAs¹⁴ but the deterioration of areas which ought to have been classified as SPAs. Thus the question is whether Spain, regardless of classification, has adopted sufficient special conservation measures within the meaning of the first sentence of Article 4(1) of the Birds Directive.

23. So far as SPAs are concerned, this is the typical area of application of the first sentence of Article 4(4) of the Birds Directive, which puts the first sentence of Article 4(1) into concrete terms. In accordance therewith, Member States are to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds in the protection areas classified under Article 4(1) and (2), in so far as these would be significant having regard to the objectives of that article. The fact that

24. The first sentence of Article 4(4) of the Birds Directive originally applied to classified SPAs. *Santoña Marshes* extended its application to de facto bird protection areas.¹⁶ Under Article 7 of the Habitats Directive, the obligations arising under Article 6(2), (3) and (4) of the Habitats Directive replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive. That is so from the date of implementation of the Directive — that is to say, from June 1994 — or the later date of classification or recognition of the area in question as an SPA by a Member State under the Birds Directive. The

14 — In that respect proceedings are pending against Spain regarding the entirely insufficient overall classification of SPAs. See in that regard my Opinion of 14 September 2006 in Case C-235/04 *Commission v Spain*.

15 — See my Opinion of 19 April 2007 in Case C-304/05 *Commission v Italy* ('*Santa Catarina*'), pending before the Court, point 74 et seq.

16 — Case C-355/90 *Commission v Spain* ('*Santoña Marshes*') [1993] ECR I-4221, paragraph 22.

Court held in *Basses Corbières* that de facto bird protection areas remain subject to the provision in the first sentence of Article 4(4) of the Birds Directive.¹⁷

25. Since Article 6(2) to (4) of the Habitats Directive now applies to classified SPAs, the infringement alleged by the Commission relates exclusively to de facto bird protection areas. The Commission must prove that the irrigation plans impair such areas' function as a habitat for protected birds.

2. The conduct complained of

26. The Commission is not objecting to harm which has already been done; the complaint is based on the fact that Spain has planned and carried out the formalities leading to approval of the project. In that respect it refers to two legal acts, that is to say the declaration of general interest in Law No 42/1994 and the environmental impact statement from 2002. Accordingly, it must first be clarified whether such acts are liable at all to infringe the first sentence of Article 4(4) and the first sentence of Article 4(1) of the Birds Directive.

27. It was clear to Advocate General Van Gerven that plans not yet carried out cannot infringe the first sentence of Article 4(4) of the Birds Directive, but plans carried out may do so.¹⁸ It might be inferred therefrom that only actual harm can form the basis of the complaint. That is supported by the fact that before a project is carried out no deterioration of an area has taken place. The Advocate General noted in that connection that some plans complained of had in the meantime been abandoned.

28. In fact, the cases relating to the first sentence of Article 4(4) of the Birds Directive always concerned plans of which at least the greater part, if not all, had been implemented and therefore were already affecting the area in question.¹⁹

29. However, the first sentence of Article 4(4) of the Birds Directive would in practice be incapable of effectively protecting areas if infringement occurred only when actual harm was caused and not at the time of

18 — Opinion of 9 June 1993, Case C-355/90 *Commission v Spain* ('*Santoña Marshes*') [1993] ECR I-4221, point 50.

19 — Cf. *Santoña Marshes* (cited in footnote 16, paragraph 33 et seq.), *Bouches de la Seine* (cited in footnote 5, paragraph 27 et seq.) and the order of the President of the Court in Case C-57/89 R *Commission v Germany* ('*Leybucht*') [1989] ECR 2849, paragraph 16.

17 — Cited in footnote 4, paragraphs 47 and 57.

State action forming the legal conditions for that harm or even promoting it.

30. Accordingly, the occurrence of harm was never a prerequisite for consideration by the Court.²⁰ Rather the President of the Court declined to grant interim relief against the dyke construction project in the Leybucht in Germany because the Commission did not bring the action until two years after approval was granted and the project had already been carried out to a great extent.²¹ It follows therefrom, a contrario, that in the interests of effective legal protection administrative decisions can already infringe the first sentence of Article 4(4) of the Birds Directive and form the subject-matter of infringement proceedings, including interim legal protection.

31. In the present case both Law No 42/1994 and the environmental impact statement are in principle capable of furthering deterioration of the affected areas, since they contribute to the implementation of the contested project.

20 — Cf. in particular *Santoña Marshes* (cited in footnote 16, paragraph 42 et seq.) regarding the substance of the case, in respect of which Advocate General Van Gerven made his comments mentioned in point 27 above.

21 — Order in *Leybucht* (cited in footnote 19, paragraph 16 et seq.).

32. However, all that is known of Law No 42/1994 is that it documented the general interest of the irrigation. Whether at the same time it stated that that interest takes priority over the requirements of protection of birds is not, however, clear from the file. Thus the existence of that law does not yet permit the conclusion that the protective measures for the affected areas do not satisfy the requirements of the first sentence of Article 4(4) of the Birds Directive.

33. However, the environmental impact statement rests on a consideration of the relevant environmental concerns and in particular the interests of the bird species to be protected. According to that statement, protection of birds does not prevent the implementation of the project, as it is structured according to the environmental impact statement.

34. That statement must therefore be examined to see whether it complied with the first sentence of Article 4(4) of the Birds Directive. There is an infringement if, without sufficient justification, it leads to the deterioration of de facto bird protection areas.

3. The existence of de facto bird protection areas

35. The parties agree that at the time of the environmental impact statement too few areas had been classified as SPAs in the project area. The environmental impact statement expresses that clearly, since the competent bodies were instructed to identify and classify additional areas.²²

36. It is not in dispute that this applies to at least 36 688 hectares, the difference between the 38 150 hectares within the project area classified in the meantime and the originally classified 1 462 hectares.

37. The Commission's complaint could however be understood as meaning that it considers that additional areas should be subject to classification. It refers to the stated areas of both affected IBAs, which together cover over 80 000 hectares.

38. The reference to the inventory of IBAs is not, however, sufficient to establish that additional areas within the project area should be classified. The Court has pre-

viously held, in connection with a similar French inventory, that the mere fact that the site in question was included in the inventory of significant areas for conservation of birds does not prove that it ought to have been classified as an SPA.²³ The details in the IBA list are merely a rebuttable indication that the areas are to be classified.

39. In the present case the distribution maps for the most important bird species submitted by the Commission itself argue against the idea that the IBA areas are to be classified in full. They do not show that all areas of both IBAs are used by those species. The Commission has not submitted argument regarding the extent to which, in accordance with those distribution maps, further areas inside the project area should be classified.

40. Furthermore, the presentation of both IBAs permits the inference that they do not lie fully within the project area but also include areas outside it. The Commission does not say which areas these are.

²² — Page 54 of the annexes to the defence.

²³ — *Bouches de la Seine* (cited in footnote 5, paragraph 42).

41. Accordingly, it must be assumed in the present proceedings, in agreement with Spain's submissions, that at the time the environmental impact statement was produced, there were de facto bird protection areas of a size of 36 688 hectares within the project area.

44. Spain indeed contends that that assumption is purely hypothetical and, furthermore, points out that, by way of measures to reduce the harm and compensatory measures, it is offsetting any deterioration. However, that submission contradicts the environmental impact statement. As the Spanish Government expressly acknowledges,²⁴ the competent bodies reach the conclusion that, *despite* the preventive, corrective and compensatory measures envisaged, the effects are severe in nature ('*carácter severo*').²⁵

4. The deterioration

42. The next step is to examine whether at the time of preparation of the environmental impact statement Spain ensured, in respect of those de facto bird protection areas, the level of protection required under the first sentence of Article 4(4) of the Birds Directive. Under that provision, appropriate steps are to be taken to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of that article.

45. Furthermore, admittedly, measures to reduce harm can limit deterioration or even exclude it, but by definition this is not the case of compensatory measures. They presuppose harm which is to be made good by other measures.

43. The irrigation of steppe-land habitats and concomitant intensifying of agriculture alter the characteristics of those habitats. It can be assumed that the irrigated areas are less suitable for species adapted to steppe-land habitats. Consequently irrigation would harm the de facto bird protection areas.

46. In the present case, the only measure to be considered for the reduction of the harm in principle is the exclusion of the areas to be classified from the additional irrigation. According to the environmental impact statement, however, this is envisaged only for some 18 000 hectares.²⁶ It appears that

²⁴ — Paragraphs 40 and 42 of the defence.

²⁵ — Page 52 of the annexes to the defence. The letters of the environmental authorities produced by the Commission in annex 5 to the application also appear to indicate a significant environmental impact.

²⁶ — Page 55 of the annexes to the defence.

the Mas de Melons SPA then classified is fully contained in that area. Thus at least 20 000 hectares of de facto bird protection areas, more than half, are to be additionally irrigated.

47. In view of the extent of that area, it must be assumed that that deterioration is significant having regard to the objectives of that article. Nor is that conclusion precluded by the fact that, according to the environmental impact statement — taking the compensatory measures into account — none of the relevant species disappears. A reduction in the population is in fact already significant.

48. Thus it must be found that competent authorities, by issuing the environmental impact statement, agreed that there was deterioration of de facto bird protection areas. The steps necessary to avoid pollution or deterioration of habitats or any disturbances affecting the birds were thus not taken.

5. Justification

49. The Spanish Government, nevertheless, relies on various aspects in order to justify the deterioration.

50. An exception to the first sentence of Article 4(4) of the Birds Directive may, as the Court has held, be justified only on exceptional grounds which amount to a general interest superior to the general interest which is represented by the ecological objective of the Directive.²⁷ This presupposes that there is no alternative to the deterioration, that is to say that it does not go beyond what is necessary to attain the objective pursued.²⁸

51. The irrigation project in the present case is to be carried out on economic grounds. In accordance with established case-law, however, economic requirements cannot justify harm to de facto bird protection areas.²⁹ Nevertheless the question arises whether it may be justified by the compensatory measures and ecological advantages put forward by Spain.

52. In *Leybucht* the Court accepted that ecological benefits can justify harm caused to

27 — Case C-57/89 *Commission v Germany* ('*Leybucht*') [1991] ECR I-883, paragraph 21 et seq., and *Santoña Marshes* (cited in footnote 16, paragraph 19).

28 — Expressly laid down in Article 6(4) and Article 16 of the Habitats Directive and in Article 9 of the Birds Directive. Cf., with regard to justification of restrictions on fundamental freedoms on the basis of equally unwritten objectives in the general interest, Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 86; Case C-366/04 *Schwarz* [2005] ECR I-10139, paragraph 33; Joined Cases C-151/04 and C-152/04 *Nadin and Nadin-Lux* [2005] ECR I-11203, paragraph 39; and Case C-441/04 *A-Punkt Schmuckhandel* [2006] ECR I-2093, paragraph 26 et seq.

29 — *Leybucht* (cited in footnote 27, paragraph 22) and *Santoña Marshes* (cited in footnote 16, paragraphs 19 and 45).

a protected area on economic grounds.³⁰ The judgment could be understood as meaning that compensatory measures can in principle justify intervention in protected areas.

servation of various species of birds. In principle that harm was, however, justified on overriding grounds in the general interest, that is to say by the danger of flooding and protection of the coast.³²

53. Justification of intervention by way of compensatory measures should be treated with caution, however, since their success can hardly be ensured in advance. It is dependent on natural processes which are seldom fully understood and predictable. The risk with compensatory measures is thus that Europe's existing natural heritage is in fact reduced, whilst the creation of new assets at first remains a mere hope. Compensation should therefore be only the last resort if the need for the intervention is compelling.³¹

55. The Court took offsetting ecological benefits into account only since the project took account of economic interests, which cannot of themselves provide justification.³³ Without that taking into account, the effects of the plan on the interests of protection of birds would admittedly have been reduced, but it would have caused significant economic burdens. Thus the deterioration of a bird protection area was not intended to open new economic possibilities but to avoid intervention in existing situations.

54. A closer examination of *Leybucht* shows that the situation in that case was a particular one which does not permit its unrestricted application to the facts of other cases. The case concerned the construction and re-siting of dykes on the North Sea coast. As a result salt flats and mud flats were lost, habitats which are important for the con-

56. In that situation, Advocate General Van Gerven put forward the view that economic requirements could be taken into account in drawing up a project required by an interest superior to the environmental interest on condition that the additional harm to the environment caused by economic interests is not disproportionate in comparison with the

30 — *Leybucht* (cited in footnote 27, paragraph 26).

31 — Cf. my Opinion of 27 April 2006 in Case C-239/04 *Commission v Portugal* ('Castro Verde') [2006] ECR I-10183, point 35.

32 — *Leybucht* (cited in footnote 27, paragraph 23).

33 — *Leybucht* (cited in footnote 27, paragraph 24).

considerable harm to those other interests should no account be taken of them.³⁴ In other words: in the context of an overall project justified on extraordinary grounds, elements of the plan may be justified on economic grounds if those outweigh the harm to the environment and there is compensation for the harm. It appears to me that that consideration also underlies *Leybucht*.

57. That is confirmed also by subsequent decisions of the Court in which it pointed out that the system of protection under the first sentence of Article 4(4) of the Birds Directive is stricter than that under Article 6(3) and (4) of the Habitats Directive,³⁵ since the Birds Directive offers fewer possibilities for the justification of intervention.³⁶

58. That assessment would be incorrect if interventions in de facto bird protection areas could always be justified without additional conditions where there are compensatory measures. Article 6(4) of the Habitats Directive requires not only mere

compensation, but *in addition* compelling grounds in the general interest and the absence of alternatives.

59. Advocate General Van Gerven's theory, supported here to that extent, thus fully corresponds to the line taken by the Court. In that sense, offsetting is also insufficient as justification in the context of the first sentence of Article 4(4) of the Birds Directive. Rather, there must *in addition* be fundamental justification of the overall project on extraordinary grounds. Only then may it be possible for offsetting to allow interferences with the requirement of protection of birds which become necessary in order to limit harm to existing economic situations from the overall project. On that interpretation it is easier to justify a project under Article 6(4) of the Habitats Directive than under the first sentence of Article 4(4) of the Birds Directive.

60. The Court does not, however, in the present case, have to clarify in detail the conditions and scope of this very restricted exception to protection of areas under the first sentence of Article 4(1) of the Birds Directive. The present case is in fact entirely different from *Leybucht*. There are no extraordinary grounds for the irrigation

34 — Opinion of 5 December 1990 in Case C-57/89 *Commission v Germany* ('*Leybucht*') [1991] ECR I-883, point 39.

35 — *Basses Corbières* (cited in footnote 4, paragraph 50).

36 — Case C-44/95 *Royal Society for the Protection of Birds* ('*Lappel Bank*') [1996] ECR I-3805, paragraph 37.

project. Thus it is not possible to justify it by way of compensatory measures.

would then be, under Article 4 of the Birds Directive, obliged to ensure this.³⁷

61. Furthermore, it would be doubtful whether the projected compensatory measures could offset at all the threatened loss of steppe-land habitats. The use, mentioned in particular by Spain, of the irrigated fields by the Little Bustard does not in any event appear likely to offset the harm. Rather it should be recalled once more that the effects of the project, according to the environmental impact statement, are heavy despite all the projected measures.

64. However, it is not clear that the irrigation project alone ensures that further land management. Rather the project would even lead to a change in the land management which would, by additional irrigation and intensifying of agriculture, reduce the suitability of the affected areas for the protection of birds. Consequently, other measures would be required in order to ensure the continuation of the current land management, perhaps by way of appropriate subsidies.³⁸

65. Consequently, no justification of the deterioration can be seen.

62. Spain points out also that the further agricultural use of the areas will be ensured by the irrigation. It says that this is necessary since without land management the areas will lose their particular suitability for the protection of birds.

6. Remedy of the infringement

66. Finally, at the material time, that is to say 22 February 2005, the end of the period

63. In fact it is indeed possible, even highly probable, that the present land use must be continued in order to retain the favourable conditions for the protection of birds. Spain

37 — Cf. my Opinion in *Santa Catarina* (cited in footnote 15, point 75) and of 23 February 2006 in Case C-191/05 *Commission v Portugal* ('Moura, Mourão, Barrancos') [2006] ECR I-6853, point 14, and, for classified SPAs, Case C-6/04 *Commission v United Kingdom* ('Conformity') [2005] ECR I-9017, paragraph 33 et seq.

38 — Cf. Case C-344/03 *Commission v Finland* ('Spring hunting of water fowl') [2005] ECR I-11033, paragraphs 35, 38 and 40, and my Opinion of 11 January 2007 in Case C-507/04 *Commission v Austria* ('Conformity'), point 61.

which the Commission had set in the reasoned opinion, Spain had not ended its infringement of Article 4 of the Birds Directive.

Habitats Directive. Neither the former nor the latter took place in the present case. Thus at the material time Spain had failed to end the infringement.

67. It is true that Spain has to date classified further SPAs within the project area. Quite apart from the fact that after expiry of the period further areas were classified, classification of SPAs does not, however, suffice to end the infringement. As the parties repeatedly point out, the question does not concern the duty to classify areas but is whether *de facto* bird protection areas were affected by an environmental impact statement.

69. In summary it must therefore be found that, by the environmental impact statement for the plan to irrigate the irrigable area of the Segarra-Garrigues Canal, the Kingdom of Spain has failed to fulfil its obligations under Article 4(1) and (4) of the Birds Directive.

V — Costs

68. Ending of the infringement would thus have required abandonment of the project — at least for the *de facto* bird protection areas — or — in the alternative — the classification of these areas and the carrying out of the procedure laid down in Article 7, in conjunction with Article 6(3) and (4), of the

70. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Although the claim must be dismissed in part as inadmissible, the Commission has been successful in the present case in its submissions against the contested project. Thus Spain must be ordered to pay the costs.

VI — Conclusion

71. I therefore propose that the Court should:

- (1) Declare that, by the environmental impact statement for the project to irrigate the irrigable area of the Segarra-Garrigues Canal, the Kingdom of Spain has failed to fulfil its obligations under Article 4(1) and (4) of Council Directive 79/409/EEC on the conservation of wild birds;
- (2) Dismiss the remainder of the action;
- (3) Order the Kingdom of Spain to pay the costs.