

JUDGMENT OF THE COURT (Fifth Chamber)

6 April 2000 \*

In Case C-256/98,

**Commission of the European Communities**, represented by P. Stancanelli, of its Legal Service, and O. Couvert-Castéra, a national civil servant on secondment to that Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**French Republic**, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Nadal, Assistant Foreign Affairs Secretary in that Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

\* Language of the case: French.

APPLICATION for a declaration that, by not adopting all the laws, regulations and administrative measures necessary to comply with 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), in that it has omitted to take the measures necessary to comply with Article 6 thereof, the French Republic has failed to fulfil its obligations under that Directive and under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann (Rapporteur), J.-P. Puissochet and P. Jann, Judges,

Advocate General: N. Fennelly,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1999,

gives the following

## Judgment

- 1 By application lodged at the Court Registry on 15 July 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by not adopting the laws, regulations and administrative measures necessary to comply with 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; hereinafter 'the Directive'), in that it has omitted to take the measures necessary to comply with Article 6 thereof, the French Republic has failed to fulfil its obligations under that Directive and under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

### The applicable legislation

- 2 Article 2(1) of the Directive states that the aim of that measure is to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.
- 3 Article 2(2) states that measures taken pursuant to the Directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

- 4 According to the sixth recital in the preamble to the Directive, it is necessary, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, to designate special areas of conservation in order to create a coherent European ecological network in accordance with a specified timetable.
- 5 Pursuant to Article 3(1) of the Directive, that network — termed ‘Natura 2000’ — is to comprise, not only those special areas of conservation, but also areas which the Member States have designated as ‘special protection areas’ pursuant to Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1; hereinafter ‘the Wild Birds Directive’).
- 6 Article 1(l) of the Directive defines a special area of conservation as ‘a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated’.
- 7 Article 4 of the Directive lays down a three-stage procedure for the designation of special areas of conservation. Pursuant to Article 4(1), each Member State is to propose a list of sites and to indicate both the natural habitat types and the native species (of those listed, respectively, in Annexes I and II to the Directive) which those sites host. That list, together with information on each site, is to be transmitted to the Commission within three years of notification of the Directive.
- 8 Pursuant to Article 4(2) of the Directive, the Commission is to establish — on the basis of the criteria set out in Annex III to the Directive, and in agreement with each Member State — a draft list of sites of Community importance. The list of sites selected as sites of Community importance is to be adopted by the Commission in accordance with the procedure laid down in Article 21 of the

Directive. Pursuant to Article 4(3), the list is to be established within six years of notification of the Directive.

- 9 Article 4(4) provides that once a site has been adopted as a site of Community importance in accordance with the procedure laid down in Article 4(2), the Member State concerned is to designate it as a special area of conservation as soon as possible (within six years at most), establishing priorities in the light of the importance of the site for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which such a site is exposed.
- 10 Article 4(5) provides that as soon as a site is placed on the list of sites of Community importance drawn up by the Commission, it is subject to the provisions of Article 6(2), (3) and (4).
- 11 Article 6 of the Directive provides:

‘1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so

far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

12 Article 7 provides:

‘Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.’

13 Article 23(1) provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of its notification and immediately to inform the Commission thereof. Since the Directive was notified to the French Republic on 5 June 1992, the period prescribed for its implementation in France expired on 5 June 1994.

### The pre-litigation procedure

14 Since the French Government failed to communicate by 5 June 1994 the measures adopted to comply with the Directive, the Commission took the view that, in the absence of any other evidence to suggest that the necessary measures had indeed been adopted, the French Republic had failed to fulfil its obligations under the Directive. Accordingly, by letter of 9 August 1994, it sent the French Government formal notice to submit its comments in that regard within two months, in accordance with the procedure laid down in Article 169 of the Treaty.

- 15 By letter of 16 February 1995, the French Government informed the Commission that the Directive had been transposed into national law by Circular No 38 of 21 January 1993, supplemented by Circular No 24 of 28 January 1994. It also stated that the legal implications of the assessment of projects in accordance with Article 6(3) and (4) were under consideration, as was a draft decree concerning the list of habitats.
- 16 Under cover of a letter dated 18 April 1995, the French Government sent the Commission a copy of Law No 95-101 of 2 February 1995 concerning more stringent measures for the protection of the environment (*Journal Officiel de la République Française* of 3 February 1995, p. 1840). Appended was a table illustrating the provisions, both of the Directive and of the Wild Birds Directive, which were thereby transposed into national law. In addition, the French Government stated that a decree specifically concerning the Directive was under consideration at departmental level in the ministries responsible.
- 17 In the light both of the table relating to Law No 95-101 and the other information provided in the various letters from the French authorities, the Commission concluded that the Directive had only partly been transposed into national law and that additional measures were needed to ensure its full implementation, particularly with respect to Article 6.
- 18 When communication of those transposition measures was not forthcoming, the Commission sent the French Government by letter of 21 September 1995 a reasoned opinion calling upon it to adopt the measures necessary to comply with the Directive within two months of such notification.
- 19 Under cover of a letter dated 30 October 1995, the French Government sent the Commission a copy of Decree No 95-631 of 5 May 1995 on the conservation of natural habitats and habitats of wild species of Community interest (JORF of 7 May 1995, p. 7612). However, the Commission was unable on that basis to conclude that the Directive had been wholly transposed into French national law. Nevertheless, since the reasoned opinion of 21 September 1995 had neglected to



mention the letter of 18 April 1995 from the French authorities to the Commission, a complementary reasoned opinion was delivered by letter of 31 October 1997.

- 20 In the complementary reasoned opinion, the Commission expressed the view that, in failing to transpose Article 6 of the Directive into national law, the French Republic was denying future sites of Community importance a suitable regulatory framework which was in conformity with Community law. Pursuant to Article 4(5) of the Directive, such protection must be accorded to a site of that nature as soon as it is placed on the list referred to in the third subparagraph of Article 4(2). Secondly, the Commission maintained that, in neglecting to transpose Article 6(2), (3) and (4) of the Directive, the French Republic was also depriving the special protection areas designated earlier under the Wild Birds Directive of a suitable regulatory framework which is in conformity with Community law, contrary to the requirements of Article 7 of the Directive.
- 21 The Commission also noted that the information provided by the French Government indicated that the French authorities were contemplating the use of management projects, in accordance with Article 6(1) of the Directive. However, the French Government was silent as to the procedures and measures by which the requirements laid down in that provision would be satisfied. Article 6(1) clearly states that by the deadline set for compliance with the Directive — 5 June 1994 — a regulatory framework must be in place for the establishment of the conservation measures needed to meet the ecological requirements referred to in Annexes I and II to the Directive and which involve management projects and the appropriate statutory, administrative or contractual measures.
- 22 The Commission adds that, although French law already makes provision for the protection of nature in the form of measures and bodies of rules which were brought to the Commission's knowledge when it was notified of the special protection areas under the Wild Birds Directive, the French authorities have not specified which provisions, in their view, meet the objectives of the Directive and, in particular, of Article 6(1) and (2) thereof.

- 23 On receiving no communication thereafter regarding the adoption of measures to transpose the Directive into national law, the Commission decided to bring the present proceedings.
- 24 The Commission bases its application on the same complaints as were raised in the complementary reasoned opinion.

**The complaints concerning the transposition into national law of Article 6(1) and (2) of the Directive**

- 25 As regards the transposition into French law of Article 6(1) and (2) of the Directive, the Commission states in its application that the French authorities failed to communicate to it the measures which, in their view, satisfy the objectives of those provisions.
- 26 In its defence, the French Government refers to a number of French legal provisions which, in its view, constitute an adequate range of legislative, regulatory and contractual measures for ensuring that the objectives of the Directive, particularly of the above provisions, are realised in full.
- 27 The Commission acknowledges in its reply that French law includes measures designed to enable the obligations created by those provisions to be met. It maintains, however, that nowhere in French law are the French authorities expressly obliged to apply conservation and protection measures to special areas of conservation, in accordance with Article 6(1) and (2) of the Directive. According to the Commission, the very least required under the Directive, if Article 6(1) and (2) thereof are to be correctly transposed into national law, is the incorporation into French law, not only of legal instruments to ensure the

protection of special areas of conservation, but also — especially since the latter instruments were not specifically designed for the implementation of the Directive — of an express provision of general application requiring the French authorities to use those instruments in the situations envisaged and in accordance with the criteria set out in the Directive. Not only would such provision facilitate the transposition of the Directive into French law, it would also offer individuals greater legal certainty by lending more substance to their right to rely before the courts on failure by the competent authorities to comply with the obligation to adopt appropriate measures of protection.

28 It is clear from the foregoing that, both in the reasoned opinion and in the application, the Commission essentially imputes to the French Republic a failure to establish a legal framework to accommodate the measures necessary to ensure the protection of special areas of conservation, such measures being understood in the sense of measures defined by the national legislation and designed to take effect at the same time as the adoption, in accordance with Article 23, of the general measures necessary to ensure compliance with the Directive.

29 In its reply, the Commission amended its grounds of complaint to focus on the question of the existence in Community law of an obligation incumbent on Member States to incorporate in their laws express provisions requiring the competent national authorities to apply the conservation and protection measures provided for in Article 6(1) and (2) of the Directive to special areas of conservation.

30 It should be noted, however, that the amendment goes beyond a mere restatement, albeit in greater detail, of the initial complaints, thereby raising submissions before the Court which were not put forward during the pre-litigation procedure or in the application initiating the proceedings.

- 31 Those submissions are inadmissible because they are contrary to Article 38(1)(c) of the Rules of Procedure, under which the parties are required to state the subject-matter of the proceedings in the application initiating proceedings. Even though Article 42 of those Rules allows, subject to specific conditions, the introduction of new pleas in law, it is not permissible for a party to alter the very subject-matter of the proceedings. It follows that the merits of an application must be determined solely in the light of the submissions made in the application initiating the proceedings (see Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 3).
- 32 Since the Commission must be deemed to have withdrawn its complaints in relation to Article 6(1) and (2) of the Directive, as initially formulated, the application must to that extent be dismissed as inadmissible.
- 33 Consequently, there is no need to consider the question — which, moreover, was not addressed during the proceedings — whether Member States were under an obligation to transpose the provisions at issue, particularly Article 6(1) of the Directive, into national law before the Commission adopted the list of sites of Community interest pursuant to the third subparagraph of Article 4(2) of the Directive.

**The complaint concerning the transposition into national law of Article 6(3) and (4) of the Directive**

- 34 First, as regards Article 6(3) of the Directive, the French Government admits that under the existing rules of French law relating to the prior assessment of the environmental implications of a development plan or project, the competent authorities are not able in all cases to refuse authorisation on the grounds that the findings of such an assessment were negative. The French Government states that, with a view to complying with the Directive on that point, it is preparing supplementary legislation.

- 35 However, the French Government disputes the Commission's assertions that its legislation does not enable the competent national authorities to comply fully with the obligation laid down in Article 6(3) of the Directive to carry out a prior assessment of the implications for the environment of any plan or project not directly connected with or necessary to the management of the site but likely nevertheless to have a significant effect thereon, citing in that respect Law No 76-629 of 10 July 1976 on the protection of nature (JORF of 12 and 13 July 1976, p. 4203).
- 36 It is common ground that there has long been provision in French law, notably in the rules provided for by Law No 76-629, for compulsory environmental impact assessments along the lines indicated by the Directive. Nevertheless, it is for the national authorities responsible for the transposition of the Directive into French law to make sure that those rules do indeed guarantee, with sufficient clarity and precision, the full implementation of Article 6(3).
- 37 However, as regards two of the three facets of French law as it stands which, in the view of the Commission, precludes full compliance with the obligations imposed by the Directive, the transposition into French law is not sufficiently clear and precise.
- 38 That does not apply to the first point raised by the Commission. As regards its assertion that the rules in force in France do not guarantee an assessment in the case of 'plans' likely to have a significant effect on sites, the Advocate General has properly pointed out in paragraphs 32 to 34 of his Opinion both that the Directive fails to define the term 'plan' and that French law (Article 2 of Law No 76-629) requires an environmental impact assessment in the case of both 'projets d'aménagement' (development projects) and 'documents d'urbanisme' (town planning). It cannot be regarded as established, therefore, that the French legislation in force does not satisfactorily transpose into national law the term 'plan' referred to in Article 6(3) of the Directive.

- 39 On the other hand, as regards the Commission's uncontested statement that, contrary to the Directive, the position in France is that the environmental impact assessment may be waived in the case of certain projects because of their low cost or their purpose, it should be noted that such exemptions cannot be justified in terms of the discretion of Member States implied, according to the French Government, by the expression 'likely to have a significant effect [on the site]'. On this point, it is enough to note that, in any event, that provision cannot authorise a Member State to enact national legislation which allows the environmental impact assessment obligation for development plans to be waived because of the low costs entailed or the particular type of work planned.
- 40 Lastly, as regards the Commission's statement that, contrary to the requirements of Article 6(3) of the Directive, there is no provision in French law which couples the obligation to make an environmental impact assessment with consideration of the 'site's conservation objectives', it should be noted that none of the provisions to which the French Government refers in its pleadings requires the assessment to determine the environmental impact of development plans in the light of the site's particular conservation objectives. It must be concluded, therefore, that those implications of Article 6(3) have not been transposed into French law with sufficient clarity and precision.
- 41 It follows that, as regards two of the three facets examined in paragraphs 38 to 40 above, Article 6(3) of the Directive has not been transposed into French law in a sufficiently clear and precise manner. Consequently, the action brought by the Commission is well founded in this respect.

- 42 Secondly, as regards the transposition into French law of Article 6(4) of the Directive, the Commission claims that the French Republic has not implemented the substantive conditions laid down in that provision, concerning the carrying out of a plan or project notwithstanding a negative assessment of the impact on the site, in cases where there are no alternative solutions.
- 43 On that point, it is enough to note that the French Government acknowledges that it has not adopted the measures necessary to comply with Article 6(4) of the Directive.
- 44 In the light of the foregoing, it must be held that, by not adopting within the period prescribed all the laws, regulations and administrative provisions necessary to comply with Article 6(3) and (4) of the Directive, the French Republic has failed to fulfil its obligations under that Directive.

## Costs

- 45 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. However, under the first paragraph of Article 69(3), the Court may order that the parties each bear their own costs where each party has succeeded on some and failed on other heads. Since both the Commission and the French Republic have been partially unsuccessful in their pleadings, they must be ordered to bear their own costs.

