

JUDGMENT OF THE COURT (Fourth Chamber)

20 September 2007 *

In Case C-304/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 July 2005,

Commission of the European Communities, represented by M. van Beek and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia and G. Fiengo, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, R. Silva de Lapuerta (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 19 April 2007,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities asks the Court to declare that, in relation to the project for the extension and improvement of the Santa Caterina Valfurva skiing area (the 'Bucaneve' and 'Edelweiss' runs) and for the provision of associated facilities with a view to the holding of the 2005 World Alpine Ski Championships in Special Protection Area ('SPA') IT 2040044 Parco Nazionale dello Stelvio ('the park'), by:

- authorising measures likely to have a significant impact on that area without making them subject to an appropriate assessment of their implications for the

site in the light of the site's conservation objectives and, in any event, without complying with the provisions which allow a project to be carried out in spite of a negative assessment of the implications and in the absence of alternative solutions only for imperative reasons of overriding public interest and only after adopting and communicating to the Commission all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected;

- failing to adopt measures to avoid the deterioration of natural habitats and habitats of species and the disturbance of species for which that area was designated;
- failing to endow that area with a protective legal status capable of ensuring, in particular, the survival and reproduction of the species of birds mentioned in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), and the breeding, moulting and migration of the regularly-occurring migratory species not covered by Annex I,

the Italian Republic has failed to fulfil its obligations under Articles 6(2) to (4) and 7 of 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) and Article 4(1) and (2) of Directive 79/409.

Community legal context

- 2 The aim of Directive 92/43 is to contribute to 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 EC Treaty applies.

3 The 10th recital in the preamble to that directive states:

‘... an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future’.

4 Article 3(1) of that directive provides:

‘A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types mentioned in Annex I and habitats of the species mentioned in Annex II, shall enable the natural habitat types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.’

5 Article 4 of Directive 92/43 governs the procedure permitting the establishment of the Natura 2000 network and the designation of special areas of conservation by the Member States.

- 6 Article 6 of that directive, which establishes the conservation measures for those areas, provides:

‘ ...

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.’

7 Article 7 of that directive 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.’

8 Directive 79/409 aims to guarantee the protection, management and control of all species of naturally occurring birds in the wild in the European territory of the Member States to which the Treaty applies.

9 Article 4 of that directive requires, for the bird species mentioned in Annex I thereto, special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. Article 4 provides:

‘1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

- (a) species in danger of extinction;
- (b) species vulnerable to specific changes in their habitat;
- (c) species considered rare because of small populations or restricted local distribution;
- (d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as 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.

2. Member States shall take similar measures for regularly occurring migratory species not mentioned in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration

routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

...

4. 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. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

The park

The status of the park in national law

- ¹⁰ The park was created by Law No 740 of 24 April 1935, initially on the territory only of the provinces of Trento and Bolzano, with the aim of protecting and promoting flora, of increasing fauna and of preserving the special geological formations and the beauty of the landscapes.
- ¹¹ By decree of the President of the Republic of 23 April 1977, the territory of the park was extended to the areas of Cancano and Livigno and to Mounts Sobretta, Gavia and Serottini, situated in the provinces of Sondrio and Brescia in the Region of Lombardy.

- 12 The park is a protected area within the meaning of Framework Law No 394 of 6 December 1991 on national protected areas. That law sets out the fundamental principles governing those areas in order to guarantee and promote, in a coordinated manner, the conservation and utilisation of the natural heritage of the country.
- 13 By decree of the President of the Council of Ministers of 23 November 1993 the Consorzio del Parco Nazionale dello Stelvio ('the Consorzio') was constituted. Its powers and tasks are defined by its statutes.
- 14 In accordance with Article 4 of the statutes, the Consorzio is required to ensure, in its management of the park, the protection of nature and conservation of the countryside.

The status of the park in Community law

- 15 In 1998, the park was classified as an SPA within the meaning of Article 4 of Directive 79/409. It is designated, in the 'Region of Lombardy' chapter, under number IT 2040044.
- 16 According to a data form completed by the Italian Republic in 1998 in accordance with Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1996 L 107, p. 1), the park hosts a large number of species of birds protected pursuant to Annex I to Directive 79/409 — the golden eagle (*Aquila chrysaetos*), the peregrine (*Falco peregrinus*), the honey buzzard (*Pernis apivorus*), the hazel hen (*Bonasa bonasia*), the ptarmigan (*Lagopus mutus helveticus*), the black grouse (*Tetrao tetrix*), the capercaillie (*Tetrao*

urogallus) and the black woodpecker (*Dryocopus martius*) — and three species of migratory birds — the sparrowhawk (*Accipiter nisus*), the common buzzard (*Buteo buteo*) and the wallcreeper (*Tichodroma muraria*).

- 17 Another data form, of 14 May 2004, indicates the presence in that area of other species mentioned in Annex I to Directive 79/409, that is to say the bearded vulture (*Gypaetus barbatus*), the kite (*Milvus milvus*), the dotterel (*Charadrius morinellus*), the boreal owl (*Aegolius funereus*), the Eurasian pygmy owl (*Glaucidium passerinum*), the eagle owl (*Bubo bubo*), the grey-headed woodpecker (*Picus canus*) and the rock partridge (*Alectoris graeca saxatilis*).

Facts

- 18 On 4 October 1999, a proposal for the improvement of the Santa Caterina Valfurva skiing area and its facilities was lodged with the regional authorities with a view to the holding of the 2005 World Alpine Ski Championships.
- 19 That project provided for the creation of a corridor in a forest area for the ski runs. It also involved the construction of a cable car which, from the entrance of Santa Caterina, was to run to Plaghera and, over a second section, to Valle dell'Alpe. In addition, it provided for a link between Valle dell'Alpe and Costa Sobretta by way of a single-cable four-seat chairlift. The project involved further work closely linked to the proposed improvements, namely the provision of a departure station, a ski stadium and a car park near to the departure station, modification to the 'Edelweiss' run, and construction of a bridge over the Frodolfo stream, of a refuge at Valle dell'Alpe and service routes, of a programmable artificial snow machine and of a depot for vehicles.

- 20 By Decree No 13879 of 30 May 2000, the Region of Lombardy, on the basis of a study carried out by an architect for the undertakings Montagne di Valfurva and Santa Caterina Impianti, gave a favourable opinion with regard to the environmental compatibility of the project, subject to compliance with a series of general conditions and specific conditions linked to the carrying out of the various elements of the project. That decree stated that, in the context of later authorisation procedures, compliance with those conditions would be monitored, as would compliance with certain prohibitions and the environmental compensation required.
- 21 In the preamble to the study referred to in Decree No 13879, it was stated that the condition of the ski installations and of the facilities of the area concerned had deteriorated and that their modernisation was necessary, this having the additional objective of obtaining a subsidy for the proposed project.
- 22 According to that study, account had not been taken of the effect of the increase of anthropogenic pressure on species whose reproductive activity is sensitive to human presence, in particular the ptarmigan and the marmot, nor of the possible consequences for invertebrates and amphibians, nor of the effect on the migration routes of wading birds.
- 23 According to the study, the environmental impact and questions relating to mitigation, compensatory and monitoring measures in respect of the effects of the proposed works on the various environmental components had been examined in a summary manner and the 'flora, vegetation and habitat' component had been analysed merely in an ad hoc way. The study thus concluded that a morphological and environmental recovery project, dealing with the replanting of the area once the works were completed, was necessary.

24 The study contained the following conclusions:

‘ ...

If the works are not carried out, the consequence could be a slow but unavoidable economic decline, not only of the region of Santa Caterina, but of the entire skiing area. Consequently, it is essential to support the carrying out of the proposed development of the lifts and the creation of the new ski runs, with associated facilities, because of the proposal's socio-economic value, particularly from the point of view of tourism.

...

The works proposed may be regarded as respecting the environment on the following conditions:

- the entire project to improve the installations and put the new installations and services into operation must be subject to the creation of the car park down the valley from the urban centre of Santa Caterina, as a logical support for the construction of the new installations. Having regard to the type and economic scale of the parking project and given the limits on authorised contributions at Community level, it must be stressed that it is possible that the installations will be financed mainly by the applicants themselves.

...

- in order to limit to the maximum extent possible the felling of trees, soil movements and the width of the bridge over the Frodolfo, the linking run, proposed initially to have a minimum width of 40 metres, must be reduced to a width of 20 metres. ...

...

- the valley facilities (stands, commentators' and timekeepers' cabins) must be the subject of a specific proposal. ...

- the width of the corridor to be deforested for the creation of the lifts must be strictly limited to that required by the safety standards of those installations. ...

- the dimensions of the linking run between the existing ski runs and the new arrival/departure station of Plaghera must be altered to reduce soil movements.

...

- in order to reduce soil movements and consequent impairment of the sites, neither the linking road between the arrival station and the Valle dell'Alpe refuge nor the depot for the cabins must be built. ...

- the proposed new road for traffic to the worksite for the Valle dell'Alpe-Costa Sobretta chairlift must not be built, in light of the excessive impairment of the sites which it would cause. ...

- given the great natural quality of the sites (ground cover in the natural meadows, perennial plants, rupestral and moraine plants, typical landscape having the massive vertical lines of rock faces and the broken lines of ridges) and the various risks for the environmental framework which are set out above, the final project ... must comply with all directions in the various domains (flora, fauna, ecosystems, geology, hydrogeology, stability of slopes ...), in order to permit an assessment of the works proposed consistent with high levels of protection for the Alpine nature of the sites.

If the works can be carried out, the final project must also include ... the following:

- compensation must be made for the loss of forest resulting from the tree felling by planting twice the number of trees felled. ...

- all the [places where] soil [will be moved] must be landscaped and replanted. ...

- the service routes (aqueducts, drainage, electricity, artificial snow machines) must be underground. The siting of overhead electricity cables near to lifts must be prohibited.

- it is necessary and vital to provide for a morphological and environmental recovery project, dealing definitively with the replanting of the area once the works have been completed. ...

The following conditions must be met before the definitive project is carried out:

- with regard to hydrogeology, the problems relating to the consequences of the creation of the ski runs and to the impact of the construction sites on the hydrogeological system at Valle dell'Alpe and on the south slope of Costa Sobretta must be dealt with;
- specific studies must be made with regard to the hydrogeological system and geomechanics, with studies of groundwater circulation. ...
- an appropriate check of the alterations to the geomorphological state of the outcrop formations on the rock faces affected must be made. ...

With regard to the environmental component of fauna, it is vital again to measure the effect of the works in their global context ...'

- 25 Subsequently, in September 2000, the Region of Lombardy instructed the Istituto di Ricerca per l'Ecologia e l'Economia Applicate alle Aree Alpine (Research Institute for Applied Ecology and Economics in Alpine Regions; 'the IREALP') to draw up a report relating to assessment of the environmental impact of the project in question.
- 26 That report was conceived as a feasibility study which was to cover the environmental-improvement matters, corrective action, environmental engineering works and environmental restoration considered necessary, with a view to drawing up a preliminary proposal followed by a definitive project.
- 27 The project was subsequently amended, in particular to include the widening of the 'Edelweiss' ski run, the width of which was increased from 20 to almost 50 metres.
- 28 In September 2002, the IREALP published its report on the assessment of the impact of the proposed measures. That report described, in a summary manner, that part of the area affected by the project in question as a 'spruce forest containing few rare species but with the characteristically wide diversity of subalpine forests, very fragile and slow to regenerate'.
- 29 The report referred to the 'presence of particularly interesting nesting fauna in the forest: goshawk, black woodpecker, great spotted woodpecker, green woodpecker'. Amongst the main effects of the project during the work phase, the report mentioned the 'reduction of the forest habitat used for nesting by species of conservation interest'.

30 It follows from the conclusions of the IREALP report that the guidelines which the study was able to take into consideration had not yet been fully defined, but were in the course of progressive development, in particular on the basis of the knowledge and details coming to light during the process of implementing the project. It was also pointed out that the report constituted an opportunity to introduce other proposals for improvement of the environmental impact of the management of the whole of the skiing area.

31 The report also stated as follows:

‘Although the process may be regarded as positive, it does, however, show less positive aspects, since it reflects the necessity for other determinations on certain equally important technical aspects which will probably require technical clarification during the next phases. Clearly, the present study also expresses that limitation and must, consequently, be considered a guidance document for decisions, which highlights risks and provides suggestions in order to resolve problems, rather than a precise measurement of the impact which the works proposed will have on the environment. More exact assessments of that impact ... can be supplied in the future in environmental impact studies which will accompany the development of the current guidelines ...’

32 The report’s conclusions set out a series of assessments regarding the feasibility from an environmental point of view of the guidelines for the project studied. They state as follows:

‘In any event, further design activities must provide for a significant reduction in environmental interference in relation to the initial hypotheses, an aim [for the achievement of which] proposals on the subject contained in the present report can also be used. [That objective must be pursued] with determination as regards the

works in Valle dell'Alpe, for which it will be necessary to carry out another specific study of the environmental impact once all the works proposed have been decided.'

- 33 On 3 October 2002, the Consorzio stated that it approved the general guidelines and the steps recommended by the IREALP report and the proposals contained therein.
- 34 On 14 February 2003, the Consorzio granted authorisation relating to the project for extension and modification of the 'Bucaneve' and 'Edelweiss' Alpine ski runs and associated facilities in the area of Santa Caterina Valfurva ('the authorisation of 14 February 2003'). The Consorzio took the view that the works proposed complied with the content of the IREALP report. However, it stated that the authorisation was granted provided that there was such compliance. The authorisation was, in addition, subject to compliance with a series of conditions and requirements.
- 35 As early as February 2003, almost 2 500 trees were felled in an area 50 metres wide and 500 metres long, at an altitude of between 1 700 and 1 900 metres. Furthermore, the effect of the improvement of the ski runs and facilities at Santa Caterina Valfurva, within SPA IT 2040044, was to split completely the habitat of the birds present on the site.
- 36 On 19 June 2003, after the guidance contained in the IREALP report, a new proposal was published, accompanied by a supplementary study by the municipality of Valfurva on the environmental impact. In July 2003, an environmental impact assessment procedure was opened, to obtain an opinion relating to the part of the project sited between Plaghera, Costa Sobretta and Valle dell'Alpe.

- 37 On 20 August 2003, the Consorzio gave an unfavourable opinion with regard to the environmental compatibility of the project, on the ground of non-compliance with the guidance given in the IREALP report.
- 38 On 16 October 2003, a memorandum of understanding was signed between the Region of Lombardy, the Consorzio, the organising committee of the World Ski Championships and the party responsible for the framework programme for the project in order to settle the controversial elements of the project. That understanding provided for:
- establishment of the method of gathering opinions with a view to completing the regional assessment procedures;
 - adoption of an overall view of the works subject to examination, coordinating so far as possible the procedures in question;
 - a guarantee that the conditions laid down by the board of the Consorzio would be observed;
 - confirmation of the siting of the intermediate station at Plaghera and of the refuge at Valle dell'Alpe;
 - re-examination and adaptation of the projects regarding the works on the Santa Caterina-Plaghera site in accordance with the monitoring requirements laid down by the Consorzio.

39 By Decree No 20789 of 28 November 2003, the Region of Lombardy determined that the project to improve the lifts and associated services on the territory of the municipality of Valfurva was compatible with the environment of SPA IT 2040044.

40 That decree, which sets out the conclusions of an impact assessment carried out by the Direzione Generale Agricoltura (Directorate-General for Agriculture) of the Region of Lombardy, gave responsibility to the municipality of Valfurva for monitoring compliance with the conditions laid down during both the approval phase of the projects and their implementation phase. Furthermore, it provided that the definitive projects were to be supplemented by a series of requirements, including submission of a study of the impact of the works.

Pre-litigation procedure

41 In accordance with Article 226 EC, by letter of 19 December 2003 the Commission gave the Italian Republic formal notice to submit its observations on the situation in SPA IT 2040044.

42 As it received no response to that letter, on 9 July 2004 the Commission sent a reasoned opinion to the Italian Republic.

43 The Italian Republic responded to the complaints raised by the Commission in the reasoned opinion by sending a number of ministerial communications.

- 44 Taking the view that the response thus supplied was not satisfactory, the Commission brought the present action.

The action

- 45 The Commission raises four complaints against the Italian Republic, the first three of which relate to Directive 92/43 and the fourth to Directive 79/409.

The first complaint, alleging breach of Article 6(3) of Directive 92/43 in conjunction with Article 7

Arguments of the parties

- 46 The Commission takes the view that the authorisation of 14 February 2003 was not based on an appropriate assessment of the environmental impact of the decision to widen the 'Bucaneve' and 'Edelweiss' ski runs and to construct a number of associated facilities.
- 47 The Commission states that the IREALP report does not contain an appropriate assessment of the effect on SPA IT 2040044 of the works proposed.

- 48 It notes that that area forms the habitat of numerous species of protected birds, as is apparent from the details appearing in the *Atlas of European Breeding Birds*, a work which combines studies carried out by more than 10 000 ornithologists from all over Europe and which is considered to be an extremely reliable document with regard to birds nesting in Europe.
- 49 Furthermore, the Commission notes that, although the IREALP report contains useful recommendations, these have not been duly taken into account in the context of the authorisation of 14 February 2003.
- 50 The Commission concludes therefrom that the authorisation was granted without the national authorities being certain that the works envisaged would not adversely affect the integrity of the SPA concerned.
- 51 The Italian Republic submits that two types of works must be distinguished, that is to say, on the one hand, works for which the procedure of environmental impact assessment took place and for which the measures to be adopted to limit that impact were laid down and, on the other, works for which, on the basis of the IREALP report, adjustments were envisaged.
- 52 The Italian Republic states that, with regard to the first category of works, which includes the works carried out between Plaghera and Valle dell'Alpe, it must be determined whether the competent authorities undertook an assessment of the environmental interests present in SPA IT 2040044. For the other works, that is to say the works carried out between Santa Caterina and Plaghera, it should be ascertained whether the same procedure took place and whether the postponement of determination of the measures to reduce the environmental repercussions to a later phase of refinement of the project is compatible with the provisions of Directive 92/43.

- 53 The Italian Republic submits that Regional Decree No 13879 of 30 May 2000 was adopted after analysis of the criteria laid down in that directive, even though it does not expressly refer to the environmental impact assessment.
- 54 In the view of the Italian Republic, it follows that the assessment which constitutes the basis of that decree is vital to any later decision giving authorisation.

Findings of the Court

- 55 It must be stated, as a preliminary point, that the parties are in agreement on the fact that the works to modify the ski runs and construct associated facilities were such as to create the obligation to carry out a prior assessment of their environmental impact, in accordance with Article 6(3) of Directive 92/43.
- 56 Article 6(3) provides for an assessment procedure intended to ensure, by means of a prior examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (see Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405 ('*Waddenzee*'), paragraph 34, and Case C-239/04 *Commission v Portugal* [2006] ECR I-10183 ('*Castro Verde*'), paragraph 19).
- 57 With regard to the concept of 'appropriate assessment' within the meaning of Article 6(3) of Directive 92/43, it should be noted that the latter does not define any particular method for the carrying out of such an assessment.

- 58 The Court has, however, held that that assessment must be organised in such a manner that the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse authorisation (see, to that effect, *Waddenzee*, paragraphs 56 and 57, and *Castro Verde*, paragraph 20).
- 59 With regard to the factors on the basis of which the competent authorities may gain the necessary level of certainty, the Court has stated that no reasonable scientific doubt may remain, those authorities having to rely on the best scientific knowledge in the field (see *Waddenzee*, paragraphs 59 and 61, and *Castro Verde*, paragraph 24).
- 60 Accordingly, it is necessary to ascertain whether, in the present case, the impact of the disputed works on the integrity of the site concerned was examined in a manner compatible with the parameters set out above before authorisation was granted on 14 February 2003.
- 61 It is apparent from the documents submitted to the Court that prior consideration was given to the matter on a number of occasions before authorisation was granted. The assessments which might be considered appropriate within the meaning of Article 6(3) of Directive 92/43 are, firstly, an environmental impact study prepared in 2000 and, secondly, a report submitted in 2002 (see paragraphs 21 to 24 and paragraphs 25 to 32 of this judgment).
- 62 With regard, firstly, to the abovementioned study, which was carried out by an architect on behalf of two public works undertakings, it should be noted that, although the study addresses the question of the impact of the proposed works on the fauna and flora of the area, it highlights itself the summary and selective nature of the examination of the environmental repercussions of the widening of the ski runs and of the construction of associated facilities.

- 63 It should also be noted that that study itself mentions a large number of matters which were not taken into account. It thus recommends, in particular, additional morphological and environmental analyses and a new examination of the impact of the works, in their global context, on the wild fauna in general and on the situation of certain protected species, in particular in the area of forest to be felled.
- 64 Furthermore, the study takes the view that the carrying out of the proposed works, desirable from an economic point of view, must comply with a large number of conditions and protection requirements.
- 65 The inescapable conclusion is that the study does not constitute an appropriate assessment on which the national authorities could rely for granting authorisation for the disputed works pursuant to Article 6(3) of Directive 92/43.
- 66 With regard, secondly, to the IREALP report submitted in 2002, it must be noted that it also describes the proposed works, examining their impact on the hydrological regime, geomorphology and the area's vegetation. As regards the birds for which the SPA has been designated, the report does not contain an exhaustive list of the wild birds present in the area.
- 67 Although it is true that the IREALP report states that the main disturbance threatening fauna comes from the destruction of nests during the deforestation phase and from habitat fragmentation, it nonetheless contains numerous findings that are preliminary in nature and it lacks definitive conclusions. The report refers to the importance of assessments to be carried out progressively, in particular on the basis of knowledge and details likely to come to light during the process of implementation of the project. Furthermore, the report was designed as an opportunity to introduce other proposals for improvement of the environmental impact of the operations proposed.

68 These factors mean that the IREALP report cannot be considered an appropriate assessment of the impact of the disputed works on SPA IT 2040044 either.

69 It follows from all the foregoing that both the study of 2000 and the report of 2002 have gaps and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned.

70 Such findings and conclusions were essential in order that the competent authorities might gain the necessary level of certainty to take the decision to authorise the works.

71 In the circumstances, the authorisation of 14 February 2003 did not comply with Article 6(3) of Directive 92/43.

72 With regard to the other studies, it is sufficient to note that they cannot be considered relevant, given that they were prepared either during the works or after their completion, that is to say after grant of the authorisation of 14 February 2003.

73 The failure to fulfil obligations under Article 6(3) of Directive 92/43 must, accordingly, be considered established.

The second complaint, alleging breach of Article 6(4) of Directive 92/43 in conjunction with Article 7

Arguments of the parties

- ⁷⁴ The Commission takes the view that it was clear that the works which were proposed could well seriously harm the integrity of the area in question. However, no alternative was seriously suggested. Regional Decree No 13879 of 30 May 2000 raised the possibility that the 'Bucaneve' and 'Edelweiss' ski runs might not be modified but rather maintained, so far as possible, in their current route, departing from that route further on.
- ⁷⁵ The Commission deduces therefrom that the project was authorised although there were other solutions less harmful to the environment in that area, which, however, were not taken into consideration by the national authorities.
- ⁷⁶ The Commission also submits that the carrying out of the works was not justified by imperative reasons of overriding public interest. In addition, provision was not made for any compensatory measures.
- ⁷⁷ The Italian Republic points out that the disputed works were the subject of a double authorisation procedure. Thus, the initial part of the routes and installations between Santa Caterina and Plaghera were considered compatible with the environment by virtue of Regional Decree No 13879 of 30 May 2000, supplemented by a later, favourable opinion from the Regional Council of Lombardy. A revision phase, for that part of the project sited between Plaghera and Valle dell'Alpe, was

begun after the guidance contained in the IREALP report, in order to initiate an environmental impact assessment procedure.

78 The Italian Republic points out that the Region of Lombardy had imposed the condition, laid down in Regional Decree No 20789 of 28 November 2003 which contains an environmental impact assessment with regard to the area between Plaghera and Valle dell'Alpe, that an impact study be submitted for all the works, relating also to the area between Santa Caterina and Plaghera.

79 The Italian Republic adds that the competent authorities had become certain that it was necessary to subject all the works, including those authorised by the regional decree, to an environmental impact assessment.

Findings of the Court

80 Having regard to the fact that the complaint alleging breach of Article 6(3) of Directive 92/43 is well founded, it must be ascertained whether the authorisation of 14 February 2003 complied with the requirements set out in Article 6(4) of the directive.

81 That provision states that, if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

- 82 As the Court has pointed out in paragraphs 35 and 36 of the judgment in *Castro Verde*, Article 6(4) of the directive must, as a derogation from the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly.
- 83 Furthermore, Article 6(4) of Directive 92/43 can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified.
- 84 It follows from the foregoing that the national authorities did not have that information at the time of the decision to grant the authorisation of 14 February 2003. Accordingly, that authorisation cannot be based on Article 6(4) of Directive 92/43.
- 85 Consequently, the authorisation of 14 February 2003 did not comply with Article 6(4) of the directive.
- 86 The Commission's action is therefore also well founded in this regard.

The third complaint, alleging breach of Article 6(2) of Directive 92/43 in conjunction with Article 7

Arguments of the parties

- ⁸⁷ The Commission submits that the national authorities did not have power to grant the authorisation for the extension and improvement works to the Alpine skiing area since those works were likely seriously to harm the integrity of the park.
- ⁸⁸ The Commission states that the area in question suffered significant degradation following the works authorised by the Consorzio. It recalls that the modification of the ‘Bucaneve’ and ‘Edelweiss’ Alpine ski runs entailed the felling of almost 2 500 trees which constituted an important habitat for numerous species of protected birds.
- ⁸⁹ The Italian Republic notes that the fact that the carrying out of the disputed works entailed certain critical aspects and that these have not yet been remedied does not mean that the works proposed were not correctly assessed. When public works involving negative implications for the environment are necessary, the provisions of Directive 92/43 do not involve a prohibition on carrying out those works, but an obligation to adopt suitable compensatory measures.
- ⁹⁰ The Italian Republic takes the view that such measures must be implemented, in accordance with what is possible, before, during and after the carrying out of the works concerned.

Findings of the Court

- 91 In order to determine whether the complaint raised is well founded, it must be examined whether activities affecting an SPA can infringe both Article 6(3) and (4) of Directive 92/43, as has been found in the present case in paragraphs 73 and 85 of this judgment, and Article 6(2).
- 92 The latter provision establishes an obligation to take appropriate protective measures, consisting in avoiding deterioration and disturbance which could be significant in the light of the objectives of Directive 92/43.
- 93 That obligation corresponds to the objective set out in the seventh recital in the preamble to the directive, according to which each special area of conservation must form part of a coherent European ecological network.
- 94 Where, as is apparent in the present case from examination of the first complaint, authorisation for a plan or project has been granted without complying with Article 6(3) of Directive 92/43, a breach of Article 6(2) in relation to a special area of conservation may be found where deterioration of a habitat or disturbance of the species for which the area in question was designated has been established.
- 95 With regard to the present case, it should be recalled that almost 2 500 trees were felled in an afforested part of the area concerned, which constitutes the habitat of protected species of birds, inter alia the goshawk, the ptarmigan, the black woodpecker and the black grouse. Consequently, the disputed works destroyed the breeding sites of those species.

96 The inevitable conclusion is that the works and their repercussions on SPA IT 2040044 were incompatible with the protective legal status from which that area should have benefited pursuant to Article 6(2) of Directive 92/43.

97 Accordingly, the Commission's action must also be upheld on this point.

The fourth complaint, alleging breach of Article 4(1) and (2) of Directive 79/409

Arguments of the parties

98 The Commission takes the view that analysis of the measures taken by the national authorities shows that SPA IT 2040044 did not benefit from a protective legal status under national law capable of ensuring, in particular, the survival and reproduction of the bird species mentioned in Annex I to Directive 79/409 and the breeding, moulting and wintering of regularly-occurring migratory species not mentioned in that annex.

99 The Commission takes the view that the works carried out following the authorisation of 14 February 2003 are such as seriously to damage the species of birds present in that SPA, in particular during the breeding period.

- 100 The Commission states that, although that area is subject to a certain number of rules, the decision of 14 February 2003 shows that the national authorities did not take the necessary measures to put in place an appropriate legal regime to ensure not only protection of the area, but also effective protection of the bird species present there.
- 101 The Italian Republic asserts that the disputed area is heavily regulated.
- 102 It states that it follows from the legislation which led to creation of the park that the area in question enjoys a protective status which is appropriate for guaranteeing the objectives laid down by Community legislation. The creation of the park was intended to protect the fauna by putting into place a management system based around conservation of animal and plant species.

Findings of the Court

- 103 As a preliminary point, it must be noted that the area which is the subject of the present action was designated as an SPA in accordance with Article 4 of Directive 79/409.
- 104 It must also be noted that, although it is true that Article 7 of Directive 92/43 substitutes the obligations arising from Article 6(2) to (4) of that directive for those arising from Article 4(4) of Directive 79/409, the obligations which arise from Article 4(1) and (2) of Directive 79/409 remain fully applicable. The latter obligations are autonomous in nature and pursue objectives different from those envisaged in Article 6(2) to (4) of Directive 92/43.

105 In order to determine whether the complaint raised is well founded, it must be pointed out that, in accordance with established case-law, it is incumbent upon the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court all the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (see, inter alia, Case C-434/01 *Commission v United Kingdom* [2003] ECR I-13239, paragraph 21; Case C-117/02 *Commission v Portugal* [2004] ECR I-5517, paragraph 80; and Case C-135/05 *Commission v Italy* [2007] ECR I-3475, paragraph 20).

106 In that regard, it must be noted that, as the Commission has pointed out itself, the management of the SPA in question is subject to regulation under a number of instruments of Italian law.

107 In those circumstances, it is for the Commission to prove that the legal framework determined by those various instruments is not such as to confer an appropriate protective status on that area.

108 The Commission has not shown how that legal framework would be insufficient in the light of the provisions of Article 4(1) and (2) of Directive 79/409. It has merely pleaded the adoption by the administrative authority of a decision giving authorisation contrary to Article 6(2) to (4) of Directive 92/43, a fact which cannot, however, be sufficient to establish the incompatibility of that legal framework with Article 4 of Directive 79/409.

109 The inevitable conclusion is that the Commission's fourth complaint must be rejected.

Costs

¹¹⁰ 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. As the Commission has applied for costs to be awarded against the Italian Republic and the latter has been essentially unsuccessful, the Italian Republic must be ordered to pay the costs.

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

1. Declares that:

- **by authorising measures likely to have a significant impact on Special Protection Area IT 2040044, Parco Nazionale dello Stelvio, without making them subject to an appropriate assessment of their implications in the light of the area's conservation objectives;**
- **by authorising such measures, without complying with the provisions which allow a project to be carried out, in spite of a negative assessment of the implications and in the absence of alternative solutions, only for imperative reasons of overriding public interest and then only after adopting and communicating to the Commission of the European Communities all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected; and**
- **by failing to adopt measures to avoid the deterioration of natural habitats and habitats of species and the disturbance of species for which SPA IT 2040044, Parco Nazionale dello Stelvio, was designated,**

the Italian Republic has failed to fulfil its obligations under Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in conjunction with Article 7 of that directive, and under Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

2. Dismisses the remainder of the action;

3. Orders the Italian Republic to pay the costs.

[Signatures]