

JUDGMENT OF THE COURT (Fourth Chamber)

10 May 2007^{*}

In Case C-508/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 December 2004,

Commission of the European Communities, represented by M. van Beek and B. Schima, acting as Agents, and by M. Lang, Rechtsanwalt, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by E. Riedl and H. Dossi, acting as Agents, with an address for service in Luxembourg,

defendant,

^{*} Language of the case: German.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), G. Arestis, 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 11 January 2007,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities requested the Court to declare that the Republic of Austria has failed to fulfil its obligations under Articles 1, 6(1) to (4), 7, 11, 12, 13, 15, 16(1) and 22(b) 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; ‘the Directive’).

Legal context

Community legislation

2 Article 1 of the Directive contains a number of definitions, including the following:

‘(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as “favourable” when:

- its natural range and areas it covers within that range are stable or increasing, and

- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

— the conservation status of its typical species is favourable as defined in (i);

...

(g) *species of Community interest* means species which, within the territory referred to in Article 2, are:

(i) endangered, except those species whose natural range is marginal in that territory and which are not endangered or vulnerable in the western palearctic region; or

(ii) vulnerable, i.e. believed likely to move into the endangered category in the near future if the causal factors continue operating; or

- (iii) rare, i.e. with small populations that are not at present endangered or vulnerable, but are at risk. The species are located within restricted geographical areas or are thinly scattered over a more extensive range; or

- (iv) endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.

Such species are listed or may be listed in Annex II and/or Annex IV or V;

- (h) *priority species* means species referred to in (g)(i) for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority species are indicated by an asterisk (*) in Annex II;

- (i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as “favourable” when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

...

- (l) *special area of conservation* means 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’.

- 3 Article 6(1) of the Directive states that, ‘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’.
- 4 Article 6(2) of the Directive provides that ‘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 [the] Directive’.
- 5 Article 16(1) of the Directive states:

‘Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

- (a) in the interest of protecting wild fauna and flora and conserving natural habitats;

- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and re-introducing these species and for the [breeding] operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

⁶ Article 22(b) of the Directive states in particular that the Member States are to 'ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction'.

The provisions of Laws and regulations of the various Austrian provinces the compatibility of which with the Directive's provisions is contested

Province of Lower Austria

- 7 The following provisions are at issue: Paragraph 95 of the Law of Lower Austria on Hunting (Niederösterreichisches Jagdgesetz 1974, LGBl. (Niederösterreich) No 76/74; 'the Nö JagdG'); Paragraphs 9(5), 17(5), 20(4), 21 and 22 of the Law of Lower Austria on Nature Protection (Niederösterreichisches Naturschutzgesetz 2000, LGBl. (Niederösterreich) No 87/2000; 'the Nö NSchG').

- 8 Paragraph 95 of the Nö JagdG provides:

'1. All non-selective hunting methods are prohibited; in particular it is prohibited:

...

(3) to hunt at night, that is to say during the period from 90 minutes after sundown until 90 minutes before sunrise; the hunting of wild boar, predatory game, capercaillie, black grouse, wild goose, wild duck and snipe is excluded from this prohibition;

(4) to use, when capturing or killing game, devices for illuminating targets (with the exception of mobile lamps ...), artificial night-time sighting aids, such as infra-red apparatus, electronic sight units, sighting devices for night shooting comprising an electronic image magnifier or image converter, such as residual light amplifiers;

...

(8) to use blind or mutilated animals as live decoys, or anaesthetic bait; to use tape recorders, or electric or electronic devices capable of killing or stunning; to use mirrors or other dazzling devices, explosives, or nets that operate non-selectively; to gas or smoke animals out;

(9) to hunt game birds with snares, limes, hooks, nets or traps;

(10) to hunt from aircraft, moving motor vehicles, or boats that can be operated at a speed of more than five kilometres per hour.

...

9 Paragraph 9 of the Nö NSchG provides:

‘ ...

2. ... the following definitions shall apply:

...

(6) “conservation status of a natural habitat” means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species;

(7) “priority species” means wild fauna and flora for the conservation of which the Community has particular responsibility and which are indicated by an asterisk (*) in Annex II to the Habitats Directive;

(8) “conservation status of a species” means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations;

(9) “conservation objectives” means the maintenance or restoration at a favourable conservation status of the natural habitats listed in Annex I to the Habitats Directive

and the species of fauna and flora listed in Annex II to that directive which a site of Community importance hosts, and of the species of birds listed in Annex I to the Birds Directive or referred to in Article 4(2) of that directive and their habitats which a European bird protection area hosts.

3. Sites referred to in subparagraph 1 shall, by regulation of the Provincial Government, be declared special areas of conservation called "European areas of conservation". In particular, existing nature conservation areas and landscape conservation areas may also be declared European areas of conservation.

4. The regulation adopted in accordance with subparagraph 3 shall lay down the boundaries of the area of conservation, the subject-matter of protection in each case, in particular priority natural habitat types and priority species, the conservation objectives and, if need be, the obligations and prohibitions necessary in order to achieve a favourable conservation status. In particular, measures which may lead to destruction of, or substantial detriment to, the area of conservation or its components are to be prohibited. More stringent protective provisions under this Law shall not be affected.

5. European areas of conservation shall, if need be, be the subject of appropriate maintenance, development and conservation measures of a governmental or contractual nature which reflect the ecological requirements of the natural habitat types under Annex I and the species under Annex II to the Habitats Directive, and of the species of birds in Annex I to the Birds Directive, which those areas host (management plan). In so far as those measures have implications for land-use planning, they shall be submitted to the Land-Use Planning Advisory Board, with the exception of measures for the administration of European areas of conservation.

6. The Provincial Government shall monitor and document the conservation status of the natural habitats and wild fauna and flora. In so doing, particular regard shall be had to priority natural habitat types and priority species.'

10 Paragraph 17 of the Nö NSchG provides:

'...

(5) The planting and promotion of non-native plants and plants inappropriate to the location and the release and promotion in the wild of non-native fauna require authorisation from the Provincial Government. Authorisation shall be refused if native populations appropriate to the location, the natural (genetic) characteristics of native species of fauna and flora or the beauty and characteristics of a landscape area will suffer lasting harm.'

11 Paragraph 20 of the Nö NSchG states:

'...

(4) The Provincial Government may by decision grant derogations ..., in particular for scientific or pedagogical purposes, when there is no reason to fear a material risk to protected flora growing in the wild and protected fauna living in the wild ... The authorisation shall lay down at least:

1. the species which are subject to the derogation,

2. the means, arrangements or methods authorised for capture or killing and

3. the controls which will be carried out.’

¹² Paragraph 21 of the Nö NSchG provides:

‘1. Without prejudice to specific rules laid down by the provisions of this Law or to regulations or decisions adopted on the basis of this Law, measures connected with commercial use of land shall remain in principle unaffected ... This exemption clause does not apply where protected flora and fauna or protected habitats are deliberately harmed or fauna and flora threatened with extinction ... are affected by measures.

2. Without prejudice to specific rules laid down by the provisions of this Law or to regulations or decisions adopted on the basis of this Law, measures connected with an up-to-date and sustainable agricultural or silvicultural use of land within the framework of an agricultural or silvicultural operation shall remain in principle unaffected ... This exemption clause does not apply where protected flora and fauna or protected habitats are deliberately harmed or fauna and flora threatened with extinction ... are affected by measures.

3. Agricultural or silvicultural use shall be considered to be up-to-date and sustainable where the activities in an agricultural or silvicultural operation serve to produce or obtain plant or animal products and are organised in accordance with processes which are customary in a particular area and at a particular time or on the

basis of traditional experience, and the use, adapted to the natural conditions, durably ensures performance in a functioning system, without the productive base being exhausted and nature and landscape being unduly burdened.'

13 Paragraph 22 of the Nö NSchG states:

'1. Instead of, or in addition to, the governmental safeguarding of nature protection interests, agreements under private law may also be concluded by the Province of Lower Austria in order to achieve nature protection objectives, in particular in order to conserve, maintain, safeguard and develop sites which are valuable from the point of view of nature protection or are important to the landscape. Such agreements must above all be concerned with the conservation and maintenance, subject to appropriate conditions, of fairly small natural or semi-natural expanses of stagnant surface water, of wet meadowland and of dry and nutrient-poor sites, and also of coppices located in open farmland, and hedges, that are valuable from the point of view of nature protection. Other support measures include:

- payment for measures to create, conserve or improve other areas and objects valuable for nature protection;

- the promotion of a method of use or management that is appropriate particularly to the interests of nature protection, in areas that are ecologically important or important in landscape terms;

- the promotion of measures to improve important rural ecology functions (for example, biotope network, extensification, switch to natural methods for pursuing agricultural and silvicultural activity).

...'

Province of Upper Austria

- ¹⁴ The provision at issue is Paragraph 15(2) of the Law of Upper Austria on Nature and Countryside Protection (Oberösterreichisches Natur- und Landschaftsschutzgesetz 2001, LGBL. (Oberösterreich) No 129/2001; 'the Oö NSchG').

- ¹⁵ That provision states:

'For countryside conservation areas ..., protected countryside zones ..., European areas of conservation ... or nature reserves ..., the Provincial Government may prepare countryside maintenance plans defining those measures which in accordance with subparagraph 1 are necessary in the public interest and which do not significantly hamper the authorised economic use of the affected land. In the absence of an agreement under private law or statutory provisions to the contrary, the costs of implementing such countryside maintenance plans must be borne by the Province as the holder of private rights. The landowner (person with the power of disposal) must permit such measures.'

Province of Salzburg

16 The following provisions are at issue: Paragraphs 3a, 5(8) to (10), 22a, 22b, 29 and 34 of the Law of Salzburg on Nature Protection (Salzburger Naturschutzgesetz 1999, LGBL. (Salzburg) No 73/1999; 'the Sbg NSchG'); Paragraph 104(4) of the Law of Salzburg on Hunting (Salzburger Jagdgesetz 1993, LGBL. (Salzburg) No 100/1993; 'the Sbg JagdG').

17 Paragraph 3a of the Sbg NSchG provides:

'1. When applying this Law and regulations adopted on the basis of this Law, the guiding principle is that the public interest in nature protection may be accorded precedence over all other interests.

2. Measures which, demonstrably, directly serve particularly important public interests are to be approved or taken into account, subject to the interests of nature protection ... being largely safeguarded, if:

- (1) in the specific case, the other public interests have precedence over the interests of nature protection and
- (2) it is demonstrated that there is no appropriate alternative to the measure in question that would have a lesser adverse effect on the interests of nature protection.

3. Where it can be anticipated that measures under subparagraph 2 will have a significant adverse effect on priority natural habitat types ... or priority species ... in European areas of conservation within the meaning of Paragraph 5(10)(a) and (c), only considerations connected with the following matters of public interest can be included in the weighing of interests:

(1) human life and health,

(2) public safety,

(3) beneficial consequences of primary importance for the environment.

Other public interests can be included in the weighing of interests only if an opinion from the ... Commission has first been obtained. The decision must have regard to that opinion.

4. Where, following a weighing of interests under subparagraph 2 or 3, the interests of nature protection do not have precedence, the adverse effect anticipated to result from the interference is, except in a case covered by subparagraph 6, to be compensated for by appropriate substitute measures. The compensation shall be prescribed by decision. Where the interference concerns particular habitats and populations of fauna and flora, above all the creation of replacement habitats comes into question as a substitute measure. These replacement habitats shall, where possible, be created in the immediate vicinity of the place of the interference. If no

replacement habitats can be created, the applicant shall be required, by decision, to pay a sum of money of an amount corresponding approximately to the costs of an appropriate substitute measure. Where replacement habitats can be created only to an insufficient extent, an appropriately reduced sum of money shall be required to be paid.

5. Where subparagraph 4 applies, the Provincial Government shall, in the case of European areas of conservation, safeguard the coherence of the European ecological network “Natura 2000”. The measures adopted for that purpose shall be communicated to the ... Commission.

6. Substitute measures shall not be prescribed in respect of measures which:

(1) are necessary and unavoidable because of a risk to human life or health or in order to avert serious damage to the national economy, and

(2) have no effects on European areas of conservation.’

¹⁸ Paragraph 5 of the Sbg NSchG provides:

‘For the purposes of this Law:

...

(8) “Interference with a protected site or object” means temporary or permanent measures which, individually or together with other measures, can have not merely insignificant effects, on the protected site or object or with regard to the protective purpose, or can be expected to have such effects through the multiple repetition or accumulation of such measures. Interference also takes place where the measures themselves originate from outside the protected site or object.

(9) “Conservation objectives of a European area of conservation” means the maintenance or restoration at a favourable conservation status:

- (a) of the natural habitats specified in Annex I to the Habitats Directive or of the species of fauna and flora specified in Annex II to that directive;
- (b) of the species of birds in Annex I to the Birds Directive, of regularly occurring migratory species (Article 4(2) of that directive), and of their habitats, paying particular attention to wetlands of international importance.

(10) “European areas of conservation” means:

- (a) sites of Community importance which are entered on the list envisaged in Article 4(2) of the Habitats Directive;

(b) sites which, until the list referred to in (a) exists, have been included in a list pursuant to Article 4(1) of the Habitats Directive;

(c) bird protection areas under Article 4(1) and (2) of the Birds Directive.

...'

¹⁹ Paragraph 22a of the Sbg NSchG provides:

‘ ...

2. For European areas of conservation, the Provincial Government shall enact by regulation protective provisions which in any event contain the protective purpose and the necessary requirements and prohibitions. The regulation shall also define the boundaries of the area of conservation. The protective purpose shall indicate the conservation objectives (Paragraph 5(9)) of the area of conservation in question. ...

3. The regulation governing a European area of conservation may prohibit or require measures, and allow certain interference generally or by dispensation granted by the Provincial Government. It shall be ensured by prohibitions, requirements and provisos to dispensations that those natural habitats and those

species of fauna and flora in respect of which, in accordance with the protective purpose, a favourable conservation status is to be maintained or restored are, respectively, not impaired and not significantly disturbed.

4. Before a dispensation is granted, the Provincial Government shall examine whether the interference may have a significant effect on the components of the European area of conservation that are essential for the conservation objectives (Paragraph 5(9)) (assessment of implications). The dispensation shall be granted only if no significant effect is to be anticipated.

5. The adoption of a regulation in accordance with subparagraphs 2 and 3 is not required if adequate protection and achievement of the conservation objective are already ensured for the area by other measures. More stringent protective provisions shall remain unaffected.

6. If necessary, countryside maintenance plans and also detailed plans ... shall be drawn up and implemented for European areas of conservation, having regard to Article 4(1) and (2) of the Birds Directive and Article 6(1) of the Habitats Directive. The conservation status of European areas of conservation shall be regularly monitored by the Provincial Government and, in so doing, particular regard is to be had to priority natural habitat types and priority species.'

20 Paragraph 22b of the Sbg NSchG states:

'1. Until adequate protective provisions have been enacted ..., measures in enjoyment of land may be carried out only in the way, and to the extent, that they were lawfully undertaken ...

2. All measures going beyond what is referred to in subparagraph 1 which may have a significant effect on natural habitats or species of fauna or flora in respect of which, in accordance with the Habitats Directive or the Birds Directive, a favourable conservation status is to be maintained or restored may be undertaken only with authorisation from the Provincial Government.

3. Authorisation is to be granted where the measure can cause no deterioration of the habitats covered by subparagraph 2 or significant disturbance of the species covered by subparagraph 2 and, in addition, it does not run counter to the objective of maintaining or creating a favourable conservation status for those habitats or species.

4. More stringent protective provisions shall remain unaffected.'

21 Paragraph 29 of the Sbg NSchG provides:

'1. Wild plants growing in the open whose population is threatened generally or in specific areas and in whose conservation there is a public interest on grounds of nature protection, and plants which are necessary for maintaining a balanced ecosystem, in particular for safeguarding the population of other plant species and of animals, may be protected entirely or partially by regulation of the Provincial Government. The protection can be limited both in time and in area.

2. The protection of plants in their entirety extends to all their parts, above and below ground. It encompasses a prohibition on damaging them, destroying them,

removing them from their location or treating the location of such plants in such a way that their further existence is jeopardised or precluded, and on keeping or transporting plants taken in the wild or accepting or furnishing such plants against or without payment. The prohibition on keeping or transporting plants or accepting or furnishing them against or without payment also relates to any derivative of the plant and any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of the plant.'

22 Paragraph 34 of the Sbg NSchG provides:

'1. The competent nature protection authority may, on application, authorise derogations from the prohibitions under [inter alia] Paragraph 29(2) and (3) ... Authorisation may ... only be granted for measures which serve one of the following purposes:

- (1) public health including the production of medicinal products;
- (2) the production of beverages;
- (3) public safety;
- (4) air safety;

- (5) the protection of wild flora and fauna or the conservation of their habitats;
- (6) research or teaching;
- (7) the building up of populations or resettlement elsewhere;
- (8) the prevention of serious damage to crops and forests, to animals for production or domestic animals, to fishing grounds or to waters;
- (9) the construction of installations;
- (10) other grounds of overriding public interest.

2. Points 9 and 10 of subparagraph 1 are inapplicable to birds. Points 2 and 9 of subparagraph 1 do not apply to plant species named in Annex IV to the Habitats Directive.

3. Authorisations under subparagraph 1 may be granted only if the purpose of the measure cannot be satisfactorily achieved by other means and the relevant population of the animal or plant species in question also does not suffer deterioration in the area of the interference.

4. Applications for authorisation under subparagraph 1 must state grounds and contain the following details:

...

6. Authorisation cannot be granted to the following persons:

...

7. The authorisation must contain all the details laid down in subparagraph 4 and state that it does not replace the agreement under private law of the person having the power of disposal over the land in question. In the case of authorisations for scientific purposes, the authority shall in addition require that the documentation is to be held in safekeeping, in agreement with a recognised scientific institution.

...'

²³ Paragraph 104 of the Sbg JagdG provides:

‘...

4. The authority may authorise further derogations from the prohibitions ... where that does not jeopardise the population of the species of game concerned and there is no satisfactory alternative for achieving the purpose pursued. Such derogations may be granted only for the following purposes:

- (a) to protect other wild animals and plants and to conserve their natural habitats;
- (b) to avoid serious damage to crops, livestock, forests, fishing waters and, in the case of furred game, to other forms of property;
- (c) in the interests of public health and public safety or, in the case of furred game, also for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purposes of research and teaching;
- (e) to increase the population of those species or reintroduce them, and for the breeding required to that end;
- (f) for trade in a small number of animals (or parts of animals or products obtained from those animals) of those species of feathered game which ... are allowed to be captured or killed.'

Province of Tyrol

24 The following provisions are at issue: Paragraphs 1(1), 2(2), 5 to 9, 22 to 24 and 28(3) of the Law of Tyrol on Nature Protection (Tiroler Naturschutzgesetz 1997, LGBL. (Tirol) No 33/1997; 'the Tiroler NSchG'); Paragraph 1(1) and (2)(a) and (b), Paragraph 3, the first sentence of Paragraph 6(1) and Paragraph 6(2) of the Regulation of Tyrol on Nature Protection (Tiroler Naturschutzverordnung 1997, LGBL. (Tirol) No 95/1997; 'the Tiroler NSchVO').

25 Paragraph 1(1) of the Tiroler NSchG provides:

'This Law has the objective of conserving and maintaining nature, a foundation of human life, in such a way that:

- (a) its diversity, special features and beauty,
- (b) its recreational value,
- (c) the richness of species in the indigenous animal and plant world and its natural habitats, and
- (d) its balance, as unimpaired and efficient as possible,

are preserved and sustainably safeguarded or restored. The conservation and maintenance of nature extend to all its manifestations, in particular to the landscape, and indeed irrespective of whether the landscape is in its original state or has been fashioned by man. Environmentally friendly agriculture and silviculture have particular importance in this regard. Demands can be made on nature only to the extent that its value remains preserved for subsequent generations.'

²⁶ Paragraph 2(2) of the Tiroler NSchG provides:

'Measures that are customary in agriculture and silviculture require no authorisation under this Law.

That does not apply to measures in alluvial forests ..., in wetlands ..., in nature reserves and special protection areas ...'

²⁷ Paragraph 5 of the Tiroler NSchG provides:

'The following are prohibited throughout the territory of the Province:

- (a) the conduct of sporting competitions with motor vehicles powered by an internal combustion engine, except on areas for which an authorisation ... exists;

- (b) the use of helicopters to transport persons for tourism purposes, except between airports;
- (c) the use of watercraft which are powered by a combustion engine on natural watercourses, except to implement schemes for which an authorisation under nature protection law exists and to the extent necessary for those schemes;
- (d) any lasting impairment of glaciers and their drainage basins, except in the case of the operation, maintenance and repair of existing installations and their alteration ...'

28 Paragraph 22 of the Tiroler NSchG provides:

'1. The Provincial Government shall by regulation declare to be protected plant species those species of wild plants whose population is threatened generally or in specific areas but whose conservation is required in order to safeguard the interests of nature protection in accordance with Paragraph 1(1).

2. In regulations adopted under subparagraph 1, the Provincial Government may, in so far as this is necessary in order to safeguard the population of particular species of plants, prohibit any person from:

...'

29 Paragraph 23 of the Tiroler NSchG states:

‘1. The Provincial Government shall by regulation declare to be protected animal species those species of non-huntable wild animals whose population is threatened generally or in specific areas but whose conservation is required in order to safeguard the interests of nature protection in accordance with Paragraph 1(1).

2. In regulations adopted under subparagraph 1, the Provincial Government may, in so far as this is necessary in order to safeguard the population of particular species of animals, prohibit any person from:

- (a) disturbing, pursuing, capturing, holding, keeping whether alive or dead, transporting, offering for sale, selling, acquiring or killing animals of protected species;
- (b) removing from their natural surroundings, damaging or destroying, keeping, transporting, offering for sale, selling or acquiring developing forms (such as eggs, larvae and chrysalises) of animals of protected species;
- (c) keeping, transporting, offering for sale, selling or acquiring parts of animals of protected species (such as feathers, skins);

- (d) removing or destroying breeding places or nests of animals of protected species;
- (e) treating the habitat ... of animals of protected species ... in such a way that their continued existence in that habitat becomes impossible.

Prohibitions under (a) to (d) above may be limited to a specific number of animals and their developing forms, to specific developing forms and to specific periods and areas; prohibitions under (e) above may be limited to specific periods and areas.

3. Any person who claims that animals of protected species which he, for the purposes of his occupation, transports, holds, uses or offers for sale have been obtained by him from rearing in Tyrol or have been brought by him into Tyrol from another province or from abroad must, upon request, prove that to the authority.

4. An authorisation under nature protection legislation is required for the release into the wild of animals which are not subject to the provisions of hunting or fisheries law and are not of a native species. Such an authorisation may be granted only if neither a major alteration to existing plant life and wildlife nor prejudice to the interests of nature protection in accordance with Paragraph 1(1) is to be anticipated.

5. In regulations under subparagraph 1, the Provincial Government may enact provisions on the capture and gathering of wild animals of protected species,

including their developing forms, in order to ensure that those activities are carried out properly. In this context, certain methods of capture and the use of certain means of capture may be prohibited.'

30 Paragraph 24 of the Tiroler NSchG provides:

'It is prohibited deliberately to disturb or to pursue wild non-huntable animals of unprotected species, to capture them without justified reason and to remove, damage or destroy their breeding places, nets or developing forms without justified reason.'

Pre-litigation procedure

31 After analysing the various Laws and regulations relating to the transposition of the Directive of which the Republic of Austria had produced copies, on 13 April 2000 the Commission sent that Member State a letter of formal notice complaining that it had not transposed a number of the Directive's provisions completely or correctly.

32 By letter of 27 July 2000, the Republic of Austria submitted observations in this connection to the Commission. It informed the Commission in particular that measures were being taken to amend a number of domestic provisions. However, it put forward arguments divergent from those of the Commission as regards other aspects of the Directive's transposition.

33 By letter of 17 October 2003, the Commission delivered a reasoned opinion in which it concluded that, by not transposing a number of the Directive's provisions completely or correctly, the Republic of Austria had failed to fulfil its obligations under the Directive.

34 By letter of 23 December 2003, the Republic of Austria replied to the reasoned opinion along similar lines to its reply to the letter of formal notice.

35 In those circumstances, the Commission decided to bring the present action.

Procedure before the Court

36 In its application the Commission put forward 27 grounds of infringement against the defendant.

37 In its defence, the defendant accepted that 17 of those grounds were well founded and adhered to its position as to the remainder.

38 In its reply, the Commission withdrew two grounds of infringement.

- 39 Following a request, made by the Court under Article 54a of the Rules of Procedure, to submit additional information concerning the domestic legal instruments covered by the action the Commission also withdrew its action in so far as it concerned the grounds of infringement relating to Articles 6(3) and (4), 7, 11 and 15 of the Directive.
- 40 As a result, the action in fact concerns 14 grounds of infringement, which relate to the transposition of Article 1, Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of the Directive.
- 41 The Republic of Austria does not dispute that Austrian law, as it stood on expiry of the period laid down in the reasoned opinion, was not consistent with the Directive's requirements with regard to a number of points, which are covered by seven grounds of infringement.

The action

Uncontested grounds of infringement

Arguments of the Commission

— Breach of Article 12 of the Directive in the Provinces of Styria and Tyrol

- 42 The Commission observes that Paragraph 13d(1) of the Law of Styria on Nature Protection (Steiermärkisches Naturschutzgesetz; 'the Stmk NSchG') provides that

the Government of the Province of Styria is to transpose Article 12 of the Directive by adopting a regulation for that purpose. However, Paragraph 4 of the Regulation of Styria on Nature Protection (Steiermärkische Naturschutzverordnung; 'the Stmk NSchVO'), which sets out the list of animals protected throughout the year, does not fully transpose Article 12 of the Directive, because it does not concern all the species protected by virtue of Annex IV(a) to the Directive.

- 43 The Commission states that, under Paragraph 23(l)(a) of the Tiroler NSchG, the Government of the Province of Tyrol must, by regulation, declare to be protected species those mentioned in Annex IV(a) to the Directive. However, the provisions of the Tiroler NSchVO do not set out all the species referred to.

— Breach of Article 13 of the Directive in the Provinces of Carinthia, Styria and Tyrol

- 44 The Commission submits that Annex 1 to the Regulation of the Province of Carinthia on the Protection of Plant Species (Kärntner Pflanzenartenschutzverordnung), which concerns Paragraph 1 of that regulation, does not adequately protect all the plant species listed in Annex IV(b) to the Directive.

- 45 The Commission asserts that, in accordance with Paragraph 13c(1) of the Stmk NSchG, the Government of the Province of Styria must adopt a regulation transposing Article 13 of the Directive. However, no such regulation has been adopted. Nor do Paragraphs 1 and 2 of the Stmk NSchVO, which lay down the plant species that are wholly or partially protected, fully transpose the Directive, given that they do not set out all the protected species referred to in Annex IV(b) to the Directive.

- ⁴⁶ The Commission states that, under Paragraph 22(1)(a) of the Tiroler NSchG, the Government of the Province of Tyrol must, by regulation, declare to be protected plant species those listed in Annex IV(b) to the Directive. However, the Tiroler NSchVO does not establish a regime protecting all the species included in Annex IV (b).

— Breach of Article 16(1) of the Directive in the Provinces of Styria and Tyrol

- ⁴⁷ The Commission observes that Paragraph 62(2) of the Law of Styria on Hunting (Steiermärkisches Jagdgesetz) fails to take account of the fact that derogations are permitted only if it is ensured that the populations of the protected species are maintained at a 'favourable conservation status'.

- ⁴⁸ The Commission submits that, for priority natural habitat types, the prohibition laid down in Paragraph 3 of the Tiroler NSchVO fails to take account of the requirement of a 'favourable conservation status'. The same applies to the plant species referred to in Paragraph 1(2)(b) of the Tiroler NSchVO and the animal species referred to in Paragraph 6(2)(e) of that regulation.

- ⁴⁹ The Austrian Government states that a number of measures transposing the Directive are in the process of being drawn up within the competent bodies of the provinces concerned. Those provinces are thereby seeking to make all the domestic enactments at issue consistent with the Directive.

Findings of the Court

- 50 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, and that the Court cannot take account of any subsequent changes in primary or secondary legislation (see, *inter alia*, Case C-323/01 *Commission v Italy* [2002] ECR I-4711, paragraph 8, and Case C-23/05 *Commission v Luxembourg* [2005] ECR I-9535, paragraph 9).
- 51 Since the reasoned opinion was notified to the Republic of Austria on 17 October 2003, and given the period laid down in the opinion, the date by which the defendant had to ensure that provisions of domestic law were consistent with the Directive's requirements was 17 December 2003.
- 52 It is apparent from the information provided regarding the aforementioned grounds of infringement that the Austrian Government does not dispute that the measures necessary to transpose the Directive in respect of all the points concerned had not been adopted within the period set in the reasoned opinion.
- 53 It must therefore be held that the action is well founded so far as concerns the grounds of infringement relating to the transposition of Article 12 of the Directive in the Provinces of Styria and Tyrol, Article 13 of the Directive in the Provinces of Carinthia, Styria and Tyrol and Article 16(1) of the Directive in the Provinces of Styria and Tyrol.

Contested grounds of infringement

Breach of Article 1 of the Directive in the Province of Salzburg

— Arguments of the parties

54 The Commission states that Paragraph 5 of the Sbg NSchG lays down a set of definitions which do not transpose correctly the definitions set out in Article 1(e), (g), (i) and (l) of the Directive of the terms ‘conservation status of a natural habitat’, ‘species of Community interest’, ‘conservation status of a species’ and ‘special area of conservation’.

55 The Commission adds that, while it is true that Paragraph 5(9) of the Sbg NSchG refers to the concepts of maintenance and restoration of a favourable conservation status, it does not define them. Furthermore, neither Paragraph 3(a) of the Sbg NSchG, which merely provides for a weighing of interests, nor Paragraphs 22a, 22b and 29 of that Law, which relate to a number of complementary protective measures, amount to a correct transposition of Article 1 of the Directive.

56 The Austrian Government submits that the transposition of Article 1 of the Directive into the law of the Province of Salzburg is consistent with Community law. All the elements of that provision are reproduced in the applicable Law, as a result of the use of the concept of ‘interference’ in conjunction with the conservation objectives. The following legal terms in the Directive and national provisions are involved:

— ‘conservation status of a natural habitat’: Article 1(e) of the Directive; Paragraphs 5(8) and (9) and 22a(3) and (4) of the Sbg NSchG;

- ‘species of Community interest’: Article 1(g) of the Directive; ‘conservation status of a species’: Article 1(i) of the Directive; Paragraphs 3a, 22a, 22b and 29 of the Sbg NSchG;

- ‘special area of conservation’: Article 1(l) of the Directive; Paragraphs 5(9) and (10) and 22a of the Sbg NSchG.

— Findings of the Court

⁵⁷ It should be remembered at the outset that, as is apparent from the 4th and 11th recitals in the preamble to the Directive, the habitats and species covered by the Directive form part of the Community’s natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States.

⁵⁸ With regard to the field under consideration, the Court has pointed out that faithful transposition is particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, paragraph 25, and Case C-98/03 *Commission v Germany* [2006] ECR I-53, paragraph 59).

⁵⁹ The Court has held with regard to the definitions set out in Article 1 of the Directive that the terms concerned must be transposed into the Member States’ national law (see Case C-72/02 *Commission v Portugal* [2003] ECR I-6597, paragraph 17).

- 60 So far as concerns, first, the terms defined in Article 1(e) and (i) of the Directive ('conservation status of a natural habitat' and 'conservation status of a species'), it is to be noted that, while the words 'favourable conservation status' are used in Paragraph 5(9) of the Sbg NSchG, the wording of the contested provisions of national law does not, however, encompass all the features set out in Article 1(e) and (i) of the Directive.
- 61 Such a legislative technique does not ensure that all the elements of the definitions in question are actually taken into account when the Directive is implemented, although those elements are decisive for the meaning and scope of the protection afforded to the habitats and species covered.
- 62 Consequently, Paragraph 5(8) and (9) and Paragraphs 3a, 22a, 22b and 29 of the Sbg NSchG cannot be regarded as amounting to an adequate legislative transposition of Article 1(e) and (i) of the Directive.
- 63 So far as concerns, second, Article 1(g) of the Directive, this provision equally contains a large number of parameters, intended to define the term 'species of Community interest'.
- 64 Paragraphs 3a, 22a, 22b and 29 of the Sbg NSchG, on the other hand, concern solely a weighing of interests, supplementary measures of delegated legislation that relate to European areas of conservation, detailed rules governing the grant of dispensations from the prohibitions laid down by the Law, and the specific protection of wild plants. The concept of species of Community interest is not mentioned there.

- 65 Those provisions accordingly cannot be regarded as transposing Article 1(g) of the Directive.
- 66 So far as concerns, third, Article 1(l) of the Directive, it is to be noted that Paragraph 5(10) of the Nbg NSchG, which must be read in conjunction with Paragraph 5(9) which lays down as objective the maintenance or restoration of a favourable conservation status, uses the words 'European area of conservation' instead of 'special area of conservation'. The areas referred to by Paragraph 5(10) include the sites which have been entered by the Commission on the list of sites of Community importance, pursuant to Article 4(2) of the Directive, and the sites proposed by the Province of Salzburg for entry on that list, in accordance with Article 4(1) of the Directive.
- 67 In addition, Paragraph 22a(2) to (4) of the Sbg NSchG indicates with precision the measures to be taken in order to achieve the protective objectives relating to 'European areas of conservation'.
- 68 It follows from the foregoing that Paragraphs 5(9) and (10) and 22a of the Sbg NSchG provide with sufficient legal precision a definition of the sites which are included in the term 'special area of conservation' within the meaning of Article 1(l) of the Directive.
- 69 That provision has therefore been transposed correctly in the Province of Salzburg.

70 Accordingly, the present complaint is well founded only with regard to the failure to transpose Article 1(e), (g) and (i) of the Directive.

Breach of Article 6(1) of the Directive in the Province of Lower Austria

— Arguments of the parties

71 The Commission states that Paragraph 9(5) of the Nö NSchG confines itself to laying down an obligation to take, 'if need be', appropriate maintenance, development and conservation measures. However, it is apparent from Article 6(1) of the Directive that the 'necessary conservation measures' must be adopted in all cases, and not 'if need be'. In Article 6(1) the words 'if need be' concern only management plans and cannot be understood as a general restriction on the obligation to adopt the necessary statutory, administrative or contractual measures.

72 The Austrian Government contends that the obligation laid down in Article 6(1) of the Directive is not to adopt conservation measures in all cases, but only the 'necessary' conservation measures. In any event, where such measures are required in addition to the obligations and prohibitions to be laid down pursuant to Paragraph 9(4) of the Nö NSchG, they are indeed taken by the competent authorities of the Province in order to achieve a favourable conservation status.

— Findings of the Court

- ⁷³ It should be noted first of all that the Directive lays down complex and technical rules in the field of environmental law and that, accordingly, the Member States are under a particular duty to ensure that their legislation intended to transpose the Directive is clear and precise (see *Commission v United Kingdom*, paragraph 26).
- ⁷⁴ Regarding the complaint set out by the Commission, both Article 6(1) of the Directive and Paragraph 9(5) of the Nö NSchG use the words ‘if need be’. However, in the provision of domestic law, those words refer generally to all conservation measures, which means that under that provision the implementation of such measures is not mandatory.
- ⁷⁵ In Article 6(1) of the Directive, on the other hand, the same words relate only to particular cases, that is to say to certain means or technical choices for achieving conservation which are defined as ‘appropriate management plans specifically designed for the sites or integrated into other development plans’.
- ⁷⁶ Thus, the Directive requires the adoption of necessary conservation measures, a fact which excludes any discretion in this regard on the part of the Member States and restricts any latitude of the national authorities when laying down rules or taking decisions to the means to be applied and the technical choices to be made in connection with those measures.
- ⁷⁷ It follows that Paragraph 9(5) of the Nö NSchG cannot be regarded as adequately transposing the obligation to take, in all cases, the conservation measures necessary for special areas of conservation.

78 The argument put forward by the Austrian Government that, in any event, this provision of domestic law is interpreted in a manner consistent with the Directive where conservation measures are necessary cannot be upheld.

79 Such interpretation of provisions of domestic law in a manner consistent with a directive cannot in itself achieve the clarity and precision needed to meet the requirement of legal certainty (see, to this effect, Case C-236/95 *Commission v Greece* [1996] ECR I-4459, paragraph 13, and Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541, paragraph 21).

80 Moreover, mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting fulfilment of the obligations owed by the Member States in the context of transposition of a directive (see Case C-197/96 *Commission v France* [1997] ECR I-1489, paragraph 14; Case C-145/99 *Commission v Italy* [2002] ECR I-2235, paragraph 30; and Case C-33/03 *Commission v United Kingdom* [2005] ECR I-1865, paragraph 25).

81 It must therefore be found that the legislation of the Province of Lower Austria is not consistent with Article 6(1) of the Directive.

82 The action is thus well founded in this regard.

Breach of Article 6(1) of the Directive in the Province of Upper Austria

— Arguments of the parties

- ⁸³ The Commission states that Paragraph 15(2) of the Oö NSchG provides for the possibility of countryside management plans being drawn up. An option of that kind is not, however, sufficient in view of the obligation laid down in Article 6(1) of the Directive.
- ⁸⁴ The Commission further observes that, under that provision, the Provincial Government may draw up for the protected areas countryside maintenance plans including measures which are 'necessary in the public interest and which do not significantly hamper the authorised economic use of the affected land'. The subordinate clause concerning 'economic use' is intended as a restriction on the obligation to draw up countryside management plans.
- ⁸⁵ The Austrian Government submits that Article 6(1) of the Directive confers on the Member States the power to determine the nature of the protective measures to be taken.
- ⁸⁶ It also pleads that Paragraph 15(2) of the Oö NSchG is consistent with the Directive since the term 'economic use' can only be understood as use complying with the protective rules applicable to the protected areas. Use contrary to the protective objectives which are laid down in Article 6(1) of the Directive cannot therefore be authorised by the competent legislative or administrative authorities.

— Findings of the Court

- ⁸⁷ It should be noted at the outset that, by means of the words used in Article 6(1) of the Directive, the Community legislature sought to impose on the Member States the obligation to take the necessary conservation measures that correspond to the ecological requirements of the natural habitat types and species covered by Annex I and Annex II to the Directive respectively.
- ⁸⁸ It is clear, however, that Paragraph 15(2) of the Oö NSchG, according to which ‘European areas of conservation’ and ‘nature reserves’ ‘may’ be the subject of countryside maintenance plans, confers discretion on the Provincial Government with regard to whether the taking of ‘necessary conservation measures’ is required.
- ⁸⁹ As has been stated in paragraph 76 of the present judgment, consideration of that kind does not fall within a discretionary power of the Member States. On this basis alone, Paragraph 15(2) of the Oö NSchG does not transpose Article 6(1) of the Directive correctly.
- ⁹⁰ In addition, Paragraph 15(2) of the Oö NSchG does not specify the scope of the term ‘authorised economic use’ and it is conceivable that operations of that kind may prevent necessary conservation measures from being taken. That provision is therefore incompatible with Article 6(1) of the Directive in this respect too.
- ⁹¹ It follows from the foregoing that the legislation of the Province of Upper Austria is not consistent with Article 6(1) of the Directive.

92 The Commission's action is therefore well founded in this regard.

Breach of Article 6(2) of the Directive in the Province of Tyrol

— Arguments of the parties

93 The Commission submits that it cannot be inferred either from Paragraphs 1 and 2 or from Paragraph 5 or 14 of the Tiroler NSchG that Article 6(2) of the Directive has been transposed in a manner consistent with Community law. Paragraphs 22, 23 and 24 of the Tiroler NSchG concern the protection of plant, animal and bird species and measures relating to unprotected species, but they do not lay down a prohibition to prevent the deterioration of special areas of conservation.

94 The Austrian Government contends that the obligation laid down in Article 6(2) of the Directive is taken into consideration in the abovementioned provisions of the Tiroler NSchG.

95 While the Austrian Government accepts that these provisions do not contain a specific prohibition to prevent the deterioration of special areas of conservation, it considers, however, that transposition of that obligation does not necessarily require the wording of Article 6(2) of the Directive to be reproduced verbatim. The provincial legislature took care to have due regard to this requirement for protection, and it is thus ensured that natural habitats and the habitats of species do not deteriorate and that the species for which the areas have been designated are not disturbed.

- 96 The Austrian Government adds that, in any event, the legislative amendments introduced by Paragraph 14 of the Tiroler NSchG have made that Law consistent with the Directive.

— Findings of the Court

- 97 It must be stated at the outset that Paragraph 14 of the Tiroler NSchG was not inserted until after the period laid down in the reasoned opinion had expired. In accordance with the Court's case-law set out in paragraph 50 of the present judgment, this legislative amendment is therefore irrelevant for the purposes of assessing the present ground of infringement.

- 98 With regard to the first obligation laid down in Article 6(2) of the Directive, requiring Member States to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species, it must be stated, in light of the proposition advanced by the Austrian Government concerning the manner in which Article 6(2) of the Directive is transposed, that the law of the Province of Tyrol as in force at the end of the period laid down in the reasoned opinion did not contain a provision endowed with the necessary legal precision requiring the competent authorities to avoid the deterioration of those habitats (see, to this effect, *Commission v United Kingdom*, paragraph 37).

- 99 In those circumstances, the proposition that the general legal context resulting from the legislation in force in the Province of Tyrol meets the aforementioned requirements cannot be upheld.

- 100 As to the second obligation resulting from Article 6(2) of the Directive, requiring Member States to take appropriate steps to avoid disturbance of the species for which the special areas of conservation have been designated, Paragraphs 22 to 24 of the Tiroler NSchG likewise do not transpose this obligation, since they concern not species whose conservation makes designation of those areas necessary, that is to say species referred to in Annex II to the Directive, but species referred to in Annex IV(a) thereto, whose protection falls under Article 12 of the Directive.
- 101 Protection of the species for which special areas of conservation have been designated must be complete (see Case C-75/01 *Commission v Luxembourg* [2003] ECR I-1585, paragraph 43).
- 102 Consequently, the legislation of the Province of Tyrol does not comply with Article 6(2) of the Directive.
- 103 The Commission's action is therefore well founded in this regard.

Breach of Article 16(1) of the Directive in the Provinces of Lower Austria and Salzburg

— Complaint relating to the legislation of the Province of Lower Austria

Arguments of the parties

- 104 The Commission submits that Paragraphs 20, 21 and 22 of the Nö NSchG do not refer to the criterion of 'maintenance at a favourable conservation status' and that

the conditions and criteria to be met in order to be able to derogate from the system of protection laid down by the Directive are not listed exhaustively, contrary to Article 16(1) thereof.

105 The Commission adds that the prohibitions set out in Paragraph 95 of the Nö JagdG concern solely animal species living in the wild and therefore that they do not apply to other species.

106 The Austrian Government contends that, by virtue of the legislative technique chosen, the protection required by the Directive is ensured by Paragraph 20(4) of the Nö NSchG. The competent authorities must, first, act in a manner consistent with the Directive and, second, observe the prohibitions laid down in hunting legislation. In practice, derogations are granted only very restrictively, that is to say solely where no significant risk to protected species of wild plants and animals is to be feared.

107 The Austrian Government also maintains that Paragraph 20(4) of the Nö NSchG ensures that the principle of legal certainty is complied with, because it requires the competent authorities to specify expressly the means, devices and methods of capture or killing that are authorised.

108 The Austrian Government explains finally that the derogations provided for in Paragraph 21(1) and (2) of the Nö NSchG can never apply in the case of deliberate harm to protected flora, fauna or habitats.

Findings of the Court

- ¹⁰⁹ Articles 12 to 14 and 15(a) and (b) of the Directive form a coherent body of provisions which require the Member States to establish strict regimes of protection for the animal and plant species concerned (see, to this effect, *Commission v United Kingdom*, paragraph 112).
- ¹¹⁰ Also, Article 16 of the Directive, which defines in a precise manner the criteria on the basis of which the Member States may provide for derogations from the prohibitions set out in Articles 12 to 15, is a provision constituting an exception to the system of protection which the Directive imposes. Consequently, Article 16 must be interpreted restrictively (see *Commission v United Kingdom*, paragraph 111).
- ¹¹¹ It should be added in this regard that under Article 16(1) of the Directive any measure adopted at national level which derogates from the prohibitions laid down by the Directive must be conditional on there being no satisfactory alternative.
- ¹¹² It follows that national provisions under which the grant of derogations from the prohibitions established by Articles 12 to 14 and 15(a) and (b) of the Directive is subject not to all the criteria and conditions set out in Article 16 of the Directive but, incompletely, to certain elements of them, cannot constitute a regime consistent with Article 16.
- ¹¹³ Furthermore, as has been pointed out in paragraph 80 of the present judgment, an administrative practice consistent with a directive's provisions is not sufficient to transpose Community law correctly.

- 114 So far as concerns Paragraph 20(4) of the Nö NSchG, it is to be noted, first, that while it provides that derogations may be granted when there is no reason to fear a risk to flora and fauna in the wild, it does not thereby preclude such derogations where the populations of the species concerned do not have a favourable conservation status.
- 115 However, Article 16(1) of the Directive makes the favourable conservation status of those populations in their natural range a necessary precondition in order for the derogations for which it provides to be granted.
- 116 Accordingly, the ambiguity which characterises the wording of Paragraph 20(4) of the Nö NSchG is incompatible with the requirement for a precise and clear transposition of Article 16(1) of the Directive (see, by analogy, Case C-365/93 *Commission v Greece* [1995] ECR I-499, paragraph 9).
- 117 Second, regarding grounds of derogation, Paragraph 20(4) of the Nö NSchG mentions, by way of example, derogations for scientific or pedagogical purposes.
- 118 While it is true that such derogations are capable of being tied to Article 16(1)(d) of the Directive, the wording of the domestic provision in question does not preclude that derogations may be authorised on grounds other than those which are nevertheless listed exhaustively in Article 16(1)(a) to (d) of the Directive.

- 119 Third, nor does Paragraph 20(4) of the Nö NSchG reproduce the conditions for a derogation which are included in Article 16(1)(e) of the Directive, namely the requirement that any derogation be under strictly supervised conditions and of a selective and limited nature.
- 120 So far as concerns, next, Paragraph 21 of the Nö NSchG, it need merely be pointed out that Article 16(1) of the Directive does not provide for a ground of derogation in favour of a commercial operation of an agricultural or silvicultural nature.
- 121 Finally, so far as concerns the arguments put forward by the Austrian Government which are derived from the provisions of hunting legislation, it is to be pointed out that application of Paragraph 20(4) of the Nö NSchG is liable to infringe Articles 12 to 15 of the Directive outside the field of hunting. Furthermore, even if the competent authorities comply with the domestic nature protection provisions that relate to engaging in hunting, a body of rules of that kind is not capable of establishing a legal framework consistent with the Community provision which lists exhaustively the permitted grounds of derogation: Paragraph 95 of the Nö JagdG does not contain such a list of grounds, but merely prohibits a number of hunting methods for certain animal species.
- 122 It follows from the foregoing considerations that the legislation of the Province of Lower Austria is not consistent with Article 16(1) of the Directive.
- 123 The Commission's action is therefore well founded in this regard.

— Complaint relating to the legislation of the Province of Salzburg

Arguments of the parties

¹²⁴ The Commission observes that Paragraph 34 of the Sbg NSchG and Paragraph 104(4) of the Sbg JagdG do not reproduce the criterion of ‘maintenance at a favourable conservation status’ set out in Article 16(1) of the Directive. Nor can the grounds of derogation laid down in points 2 and 9 of Paragraph 34(1) of the Sbg NSchG concerning the production of beverages and the construction of installations be tied to any of the grounds included in Article 16(1) of the Directive.

¹²⁵ The Austrian Government contends that, inasmuch as Article 16(1) of the Directive provides for the possibility of derogation from the prohibitions prescribed by the Directive, it would be contrary to the logic of the system of protection thereby established to lay down an obligation to restore a favourable conservation status within the framework of a provision relating to the authorising of derogations. Furthermore, Paragraph 34(3) of the Sbg NSchG is stricter than Article 16(1) of the Directive since any derogating measure must avoid deterioration in respect of the populations of plant or animal species that are present in the area concerned.

Findings of the Court

¹²⁶ The words ‘maintenance ... at a favourable conservation status’ in Article 16(1) of the Directive relate to a situation which is defined in Article 1(i) of the Directive and which involves, first, general factors referred to in the first subparagraph of Article 1(i) and second, a number of cumulative criteria. As is apparent from paragraph 59

of the present judgment, the Member States have the task of transposing those concepts into national law with sufficient legal precision.

¹²⁷ Paragraph 104(4) of the Sbg JagdG, on the other hand, provides that derogations may be authorised ‘where that does not jeopardise the population of the species of game concerned’. This provision deviates from the system of protection prescribed by the Directive since it allows derogations from the general prohibitions without making them dependent on a requirement to maintain the populations of the species concerned at a favourable conservation status.

¹²⁸ As regards Paragraph 34(1) of the Sbg NSchG, the grounds of justification relating to, respectively, the production of beverages and the construction of installations do not fall within any of the grounds exhaustively listed in Article 16(1) of the Directive.

¹²⁹ The failure to fulfil obligations that has been alleged must therefore be held to be proved.

Breach of Article 22(b) of the Directive in the Province of Lower Austria

— Arguments of the parties

¹³⁰ The Commission observes that Paragraph 17(5) of the Nö NSchG makes the grant of authorisation to introduce non-native species dependent on a criterion not

envisaged by the Directive, namely that any harm must not be 'lasting'. In addition, that provision does not prohibit all prejudice to natural habitats within their natural range and to the wild native fauna and flora that is due to the deliberate introduction of non-native species.

- ¹³¹ The Austrian Government submits that, when Paragraph 17(5) of the Nö NSchG is interpreted consistently with the Directive, authorisation to introduce into the wild a species that is not native or not suited to local conditions will always be refused if that adversely affects native fauna and flora.

— Findings of the Court

- ¹³² Paragraph 17(5) of the Nö NSchG permits the deliberate introduction of non-native animal or plant species provided that natural habitats and native wild fauna and flora will not suffer lasting harm.

- ¹³³ Such a regime does not transpose correctly the system of protection laid down by the Directive. That system requires any derogating measure to comply with the conditions prescribed in Article 22(b) of the Directive, in particular the condition under which authorisation may be granted only in so far as this does not prejudice natural habitats.

134 The words 'not ... prejudice' constitute an unambiguous protective requirement which goes further than that laid down in Paragraph 17(5) of the Nö NSchG.

135 This alleged failure to fulfil obligations must accordingly be held to be proved.

136 It follows from the foregoing considerations that the Republic of Austria has failed to fulfil its obligations under Article 1, Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of the Directive.

Costs

137 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. Since the Commission has applied for costs and the Republic of Austria has been essentially unsuccessful in its pleas remaining at issue in the proceedings, the Republic of Austria should be ordered to pay the costs.

138 As regards the grounds of infringement set out in the application which were withdrawn by the Commission at a subsequent stage in the proceedings, it must be stated that the Commission ceased pursuing the complaints concerned as a result of amendments to the domestic legal instruments at issue. The withdrawal is

accordingly attributable to the defendant, given that the provisions of domestic law were brought into line with the requirements of Community law only belatedly. In accordance with Article 69(5) of the Rules of Procedure, the Republic of Austria should therefore be ordered to bear all the costs of the present proceedings.

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

- 1. Declares that the Republic of Austria has failed to fulfil its obligations under Article 1(e), (g) and (i), Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;**
- 2. Dismisses the remainder of the action;**
- 3. Orders the Republic of Austria to pay the costs.**

[Signatures]