JUDGMENT OF THE COURT (Third Chamber)
20 March 2003 *

In Case C-143/02,

Commission of the European Communities, represented by G. Valero Jordana and R. Amorosi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by U. Leanza, acting as Agent, and M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for a declaration that, in adopting legislation transposing 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), which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of Directive 92/43,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive,

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann (Rapporteur) and F. Macken, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 9 January 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 17 April 2002, the Commission of the European Communities brought an action under Article 226 EC in which it sought a declaration that, in adopting legislation transposing 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 habitats directive'), which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of the habitats directive,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive.

The law

2 Article 5 of the habitats directive provides:

'1. In exceptional cases where the Commission finds that a national list as referred to in Article 4(1) fails to mention a site hosting a priority natural habitat

type or priority species which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

2. If, on expiry of a consultation period not exceeding six months, the dispute remains unresolved, the Commission shall forward to the Council a proposal relating to the selection of the site as a site of Community importance.

3. The Council, acting unanimously, shall take a decision within three months of the date of referral.

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6(2).'

3 Article 6(2) to (4) of the habitats directive provide:

'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.'

4 Article 7 of the habitats 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.'

Pre-litigation procedure

5 Considering that Decree No 357 of the President of the Republic of 8 September 1997 (GURI No 248, Ordinary Supplement No 219/L of 23 October 1997, 'the presidential decree'), notified to it by the Italian authorities, did not bring about a correct implementation of the habitats directive, the Commission sent a letter of formal notice to the Italian Republic on 4 April 2000 requesting it to submit its observations in that regard.

6 By letter of 27 June 2000, the Italian Government forwarded to the Commission a note from the Ministry of the Environment stating that it was already aware of the shortcomings pointed out by the Commission and that it had identified other issues likely to give rise to serious problems when it came to applying the presidential decree, and submitting that, for a year, it had been in consultations with the regional authorities with a view to amending the text of that decree.

7 On 8 September 2000, the Italian Government sent to the Commission a further note from the Ministry of the Environment dated 29 August 2000 stating that the draft legislation amending the presidential decree had been approved and that any subsequent amendment made during the revision and adoption process would be notified to the Commission.

8 Since it received no further information concerning the adoption of the legislation amending the presidential decree, the Commission issued a reasoned opinion to the Italian Republic on 25 July 2001 repeating the complaints set out in the letter of formal notice and requesting that Member State to adopt the measures necessary to comply with that opinion within a period of two months from the date of its notification.

9 As the Commission received no reply from the Italian authorities, it decided to bring the present action.

The action

10 The Italian Republic does not deny the complaints alleged against it. Indeed, it intended, in line with the Commission's proposals, to amend Articles 5 and 6 of the presidential decree in particular, concerning respectively the assessment of the implications for the environment of certain projects and the protection of areas other than special protection areas, and to insert into that decree an Article 4b transposing Article 5 of the habitats directive. However, the question of the competent authority to act in the matter gives rise to conflict between the regions and the Italian State.

11 It suffices to point out, in that regard, that according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, *inter alia*, Case C-148/00 *Commission* v *Italy* [2001] ECR I-9823, paragraph 7) and that a Member State

cannot rely on provisions, practices or circumstances in its own legal order to justify failure to implement a directive within the prescribed period (see, to that effect, Case C-276/98 *Commission* v *Portugal* [2001] ECR I-1699, paragraph 20 and Case C-392/01 *Commission* v *Spain* [2002] ECR I-11111, paragraph 9).

12 Article 6(3) of the habitats directive does not allow projects not directly connected with or necessary to the management of sites to be excluded from the scope of the directive where they are likely to have a significant effect on those sites. Article 7 of that directive provides, in particular, that Article 6(2) applies to special protection areas designated under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). As for Article 5 of the habitats directive, this provides that during the period of bilateral consultation between the Member State and the Commission, and pending a Council decision, the site concerned is to be subject to the scheme of protection laid down by Article 6(2) of that directive.

13 Since Articles 5, 6 and 7 of the habitats directive were not fully implemented within the period prescribed by the reasoned opinion, the action brought by the Commission must be regarded as well founded.

14 Therefore, in adopting a measure transposing the habitats directive which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of the habitats directive,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive.

Costs

15 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 to be awarded against the Italian Republic and the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Declares that, in adopting a measure transposing Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of Directive 92/43,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive;

2. Orders the Italian Republic to pay the costs.

Puissochet Gulmann Macken

Delivered in open court in Luxembourg on 20 March 2003.

R. Grass — Registrar

J.-P. Puissochet — President of the Third Chamber