JUDGMENT OF THE COURT (Second Chamber)

9 December 2004 *

In Case C-79/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 21 February 2003,

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

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), J. Makarczyk, P. Kūris and J. Klučka, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2004,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by allowing hunting using limed twigs in the Community of Valencia (Spain) by means of the method known as 'parany', the Kingdom of Spain has failed to fulfil its obligations under Articles 8(1) and 9(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, 'the directive').

2 The 'parany' is a device used to capture birds. It consists of a structure of limed twigs arranged in a tree to which the hunted birds are lured with decoys. As soon as a bird comes into contact with a limed twig, it generally loses its ability to fly and may be caught and killed by the hunter.

Community law

3 Article 8(1) of the directive provides that, 'in respect of the hunting, capture or killing of birds ... , Member States shall prohibit the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV(a)'.

4 Annex IV(a) to the directive mentions, inter alia, 'limes' (limed twigs).

5 Article 9(1) of the directive states that Member States may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution, for the reasons set out under (a) to (c). Inter alia, such a derogation is possible 'to prevent serious damage to crops ...' (under (a), third indent) or 'to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers' (under (c)).

National law

6 Decree 135/2000 adopted by the Government of the Community of Valencia on 12 September 2000 lays down a scheme for the grant of special licences to hunt thrush by means of the 'parany' method in the Community of Valencia ('the decree'). The decree specifies:

— the requirements which the 'parany' must satisfy, inter alia the distance between the limed twigs and the properties of the birdlime to be used;

— the species of bird whose capture is permitted: song-thrush (Turdus philomelos), fieldfare (Turdus pilaris), redwing (Turdus iliacus) and mistle-thrush (Turdus viscivorus);

— the hunting season and the hours of the day when hunting is permitted;

— the maximum number which may be captured per device.

7 This decree was annulled by judgment of the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia) (Spain) of 26 September 2002. An appeal against that judgment has been lodged at the Tribunal Supremo (Supreme Court) by the autonomous Government of Valencia.

Pre-litigation procedure

8 Since the Commission had received complaints concerning hunting using the 'parany' in the Community of Valencia, it added that question to the agenda of a meeting on the environment held in Madrid on 12 and 13 November 1998. At that meeting, the Spanish authorities confirmed that they had authorised hunting by such means on the basis of the derogations provided for in Article 9(1)(a) of the directive on the ground that there were no other more satisfactory methods of preventing harm to crops.

9 Taking the view that, by tolerating hunting by means of the 'parany' in the Community of Valencia and by failing to justify the claim that there is no alternative satisfactory solution in the case of the derogations granted in that region, the Kingdom of Spain had failed to fulfil its obligations under Articles 8(1) and 9(1) of the directive, on 25 October 2000 the Commission sent it a letter of formal notice.

10 By letter of 20 December 2000, the Spanish Government replied to the Commission, pointing out that with regard, in particular, to Law 40/97, which transposes into Spanish law Article 9(1)(c) of the directive, the Government of the Community of Valencia had striven to place hunting of thrush by means of the 'parany' in an appropriate legal framework to ensure observance of the principle of restraint, selectivity and appropriate supervision. The Government of that Community adopted the decree in consequence.

11 In May 2001, during a meeting with Commission representatives, the Spanish authorities stated that hunting using limed twigs was a practice with deep roots in

the Valencia region and that prohibiting it could cause social malaise. According to those authorities, there were no other methods which would avoid causing damage to crops.

12 On 26 July 2001, the Commission issued a reasoned opinion setting out, in essence, the grounds for complaint put forward in the letter of formal notice and requiring the Kingdom of Spain to adopt, within two months, appropriate measures to fulfil its obligations under the directive.

13 In its reply of 28 September 2001, the Spanish Government reiterated and expanded the arguments previously put forward in support of the hunting practice in issue.

14 Taking the view that the Kingdom of Spain's infringement of the directive was continuing, the Commission decided to bring the present action.

The action

15 The Commission submits that hunting for thrush by means of the 'parany' method is non-selective in nature and cannot be justified either on the ground of the prevention of serious damage to crops under Article 9(1)(a) of the directive or as the capture of certain birds in small numbers under Article 9(1)(c).

The non-selective nature of hunting by means of the 'parany'

Arguments of the parties

16 The Commission submits that, despite the measures adopted by the Spanish authorities, such as those regarding, in particular, the dimensions of the 'parany', the way in which the limed twigs are set up, the use of decoys and the requirement that owners of 'paranys' clean and release trapped birds other than thrushes, hunting using limed twigs is a non-selective method of capture prohibited by Article 8 of the directive. Those measures do not have the effect of preventing the capture of birds of species not covered by the derogations.

17 The Spanish Government submits that, according to the recitals to the decree, limed twigs are, of themselves, a non-selective instrument, but, used appropriately in accordance with the restrictions and limitations put in place by that decree, they become an entirely selective method or means of capture. Any capture of birds of species for which hunting using limed twigs is not permitted is thus purely accidental. The obligation placed on hunters by the decree to clean all birds accidentally captured and to release them ensures the selective nature of hunting by means of the 'parany'.

Findings of the Court

18 In respect of the hunting, capture or killing of birds, Article 8(1) of the directive provides that Member States are to prohibit the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV(a) to that directive, which includes limed twigs.

19 It is common ground that hunting thrush using limed twigs as organised in the Community of Valencia cannot avoid the capture of birds other than thrushes. In that regard, it is apparent from the third report of the Spanish ornithological society on the capture of thrushes by means of the 'parany' in the Community of Valencia ('the SEO/BirdLife report'), lodged in September 2001 during a dispute pending before the Tribunal Superior de Justicia de la Comunidad Valenciana and placed on the file in the present case by the Commission, that, amongst the birds captured by that method, the ratio of thrushes to other species is in the range of 1.24 to 4. Furthermore, there is no evidence to the contrary in the Court's file.

20 It follows that hunting by means of the 'parany' is based on a non-selective method of capture. The fact that, when birds other than those covered by the decree are caught in the limed twigs, the hunters are required to clean them and release them is not sufficient to cast doubt on the non-selective nature of that method of capture.

21 In the light of the above considerations, it should be held that hunting by means of the 'parany' does fall under the prohibition laid down in Article 8(1) of the directive.

The prevention of serious damage to crops, covered by Article 9(1)(a) of the directive, as a justification for hunting by means of the 'parany'

Arguments of the parties

22 According to the Commission, the conditions which could justify, under Article 9(1)(a) of the directive, a derogation from the prohibition set out in Article 8(1) of

the directive allowing the capture of birds using limed twigs are not present in this case. Firstly, there are other satisfactory solutions for preventing the alleged serious damage caused by the thrushes to vineyards and olive groves. Hunting with guns and the use of bird scarers are successfully carried out in other autonomous communities in Spain. Secondly, the Commission disputes the extent of the damage claimed by the Spanish Government. Both the populations of the species of thrush covered by the hunting derogations put in place by the decree and their daily intake of food of vegetable origin have been overestimated. Thirdly, according to the Commission, the geographical concentrations of the permits issued for use of the 'parany' and those of the vineyards and olive groves do not coincide.

23 The alternatives referred to by the Commission for preventing damage to crops do not, according to the Spanish Government, provide a satisfactory solution. The use of bird scarers is too expensive in relation to the cost of the damage caused and their use can cause fires. The use of guns would entail an increase in the number of hunting permits and an extension of the hunting season. These alternatives would affect the balance of the population of game birds in the area in question, particularly as the Valencian hunters do not operate in the same way as hunters in other autonomous communities. With regard to the extent of the damage to vineyards and olive groves, the Spanish Government submits that its claims on that subject are correct and that the Commission has failed to take account of all the relevant factors in its assessment.

Findings of the Court

24 A derogation under Article 8 of the directive, according to Article 9(1) thereof, can be made only where there is no other satisfactory solution and for reasons

exhaustively listed in Article 9(1)(a) to (c) (see, inter alia, Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 7), including serious damage to crops.

25 In that regard, in other regions of Spain such as Castilla-La Mancha and, in particular, Andalusia, where there is large-scale cultivation of olives and grapes and where there are also large populations of thrushes, hunting using limed twigs is not permitted. Thrush may be shot, which is a selective method of culling. It is not apparent that the olive groves and vineyards in those regions suffer greater damage than the same crops in the Community of Valencia.

26 The Spanish Government's argument that replacing hunting thrush by means of the 'parany' with shooting, because of the increase in the number of guns and hunting days which it would entail, would cause harassment to other species of game birds to such an extent that their populations would decrease in size is not supported by anything in the file relating to the present case. In that regard, on the Spanish Government's own admission, the red-legged partridge, a species which may be hunted within the meaning of Article 7 of and Annex II/1 to the directive, and thrushes are hunted in the Community of Valencia at the same time and without problems. That fact, in the absence of any other relevant factor to the contrary, does not, moreover, speak for the existence of hunting methods particular to Valencian hunters.

27 Furthermore, it is apparent from the preamble to the decree that the absence of other more satisfactory solutions than hunting thrush by means of the 'parany' is connected to the fact that the latter is a deeply rooted tradition in the Community of Valencia rather than to the prevention of serious damage to crops.

28 Moreover, it is not in dispute that 80% of the 'paranys' set up in that Community are to be found in the province of Castellón, 69.5% of which are in areas without olive groves or vineyards. Thus, the justification based on prevention of serious damage to those crops does not appear to be consistent with such a situation.

29 In the circumstances, it cannot be considered established that there is no other satisfactory solution than hunting by means of the 'parany' for the prevention of serious damage to crops, nor that this type of hunting is carried out for that purpose.

30 It follows that hunting by means of the 'parany' is not justified under Article 9(1)(a) of the directive.

31 The Commission's action must therefore be upheld on that point.

The capture of certain birds in small numbers, within the meaning of Article 9(1)(c) of the directive, as justification for hunting by means of the 'parany'

Arguments of the parties

32 According to the Commission, the hunting at issue in the present case fulfils neither the condition that capture should be on a selective basis nor the condition that that relates to birds in small numbers within the meaning of Article 9(1)(c) of the directive.

33 The Spanish Government contends that hunting using limed twigs as governed by the decree entails a selective method of capture. Furthermore, in light of the ratio of the number of thrushes which may be hunted using limed twigs and the total number of thrushes present within the Community of Valencia, there are grounds for holding that such hunting equates to judicious exploitation of small numbers of certain birds.

Findings of the Court

34 It should be noted that, for a derogation from the prohibition of the use of limed twigs to capture birds, instituted in a Member State, to comply with Article 9(1)(c) of the directive, it must, in any event, be applied selectively and cover the capture of birds in small numbers only (see, to that effect, Case 252/85 *Commission* v *France* [1988] ECR 2243, paragraph 28).

35 In the present case it is appropriate to examine firstly whether the latter condition is effectively met in this instance.

36 In that regard, the Second report (of the Commission) on the application of Directive 79/409/EEC on the conservation of wild birds (COM(93) 572 final, 24 November 1993) indicates that, according to the work of the ORNIS committee, 'small numbers' should be understood as any sample of less than 1% of the total annual mortality of the population in question (average value) for those species which are not to be hunted and in the order of 1% for those species which may be hunted, and 'population in question' is to be understood, with regard to migratory species, as the population of those regions from which come the main contingents passing through the region to which the derogation applies during its period of

application. The ORNIS committee is the Committee for the Adaptation to Technical and Scientific Progress, instituted under Article 16 of the directive. It consists of representatives of the Member States and is chaired by a representative of the Commission.

37 The SEO/BirdLife report states that the most exhaustive handbook on the natural history of birds of the Western Paleartic region (Snow and Perrins, *The Birds of the Western Palearti*, ed. Cramp 1988) states that the annual mortality rate of the song-thrush can vary from 40% to 54%, whilst that of the redwing is between 57% and 58%.

38 It is established that the populations of thrushes in the regions from which the main migratory contingents come amount to some 16 million song-thrushes and 5.9 million redwings. For the song-thrush, a sample corresponding to 1% of the total annual mortality of that species does not exceed 86 400 specimens and for the redwing does not exceed 34 200 specimens.

39 It is also established that, in 2001, the licences to hunt by means of the 'parany' issued by the competent authorities in the Community of Valencia covered captures of up to 429 600 individual birds.

40 It therefore appears that, whatever the proportion of song-thrushes and redwings captured, the number of thrushes for which hunting by means of the 'parany' is authorised greatly exceeds the threshold of small numbers as defined by the ORNIS committee and relied upon by the Commission.

41 Although it is true that the criteria of small numbers as defined by the ORNIS committee is not legally binding on the Member States concerned, in this instance it can, by reason of the acknowledged scientific value of that committee's opinions and the absence before the Court of any element of scientific proof to the contrary, be used by the Court as a basis of reference for assessing whether the derogation granted by the defendant Member State under Article 9(1)(c) of the directive fulfils the condition that the capture of the birds in question should be carried out in small numbers (see, to this effect, Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraphs 69 and 70).

42 It follows from the above and, in particular, from paragraph 40 of this judgment that hunting by means of the 'parany' as carried out in the Community of Valencia does not fulfil that condition.

43 The Commission's complaint that hunting by means of the 'parany' does not fulfil the requirements of Article 9(1)(c) of the directive must therefore also be upheld.

44 Consequently, and without the necessity of examining the other arguments put forward in support of that complaint, it must be held that, by allowing hunting using limed twigs in the Community of Valencia by means of the method known as 'parany', the Kingdom of Spain has failed to fulfil its obligations under Articles 8(1) and 9(1) of the directive.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by allowing hunting using limed twigs in the Community of Valencia by means of the method known as 'parany', the Kingdom of Spain has failed to fulfil its obligations under Articles 8(1) and 9(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;**

2. **Orders the Kingdom of Spain to pay the costs.**

Signatures.