JUDGMENT OF THE COURT
27 April 1988 *

In Case 252/85

Commission of the European Communities, represented by its Legal Adviser, Jean Amphoux, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

French Republic, represented by Régis de Gouttes, agent of the French Government, with an address for service in Luxembourg at the French Embassy, 2 rue Bertholet,

defendant,

APPLICATION for a declaration that by not adopting within the prescribed period all the laws, regulations and administrative provisions needed to comply with Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the French Republic has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, O. Due and J. C. Moitinho de Almeida, Presidents of Chambers, T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: B. Pastor, Administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 1 December 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 February 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 13 August 1985, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by not adopting within the prescribed period all the laws, regulations and administrative provisions needed to comply with Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Official Journal 1979, L 103, p. 1, hereinafter referred to as 'the Directive'), the French Republic has failed to fulfil its obligations under the EEC Treaty.

2 Article 18 of the Directive provides that the Member States must implement the laws, regulations and administrative provisions needed to comply with the Directive within two years from its notification. Since the Directive had been notified on 6 April 1979, that period expired on 6 April 1981.

3 After examining the provisions of the relevant French legislation and deciding that it was not in conformity with the Directive in a number of respects, the Commission commenced the procedure provided for in Article 169 of the Treaty. After giving formal notice to the French Republic to submit its observations, the Commission delivered a reasoned opinion on 20 February 1985. Since there was no response to the reasoned opinion, the Commission brought this action in which it has submitted six complaints against the French legislation concerning the protection of birds. Two of these complaints became devoid of purpose following the Commission's discontinuance of part of its action.

4 Reference is made to the Report for the Hearing for the background to the case, the provisions of the French legislation in question, the course of the procedure and the submissions and arguments of the parties which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 Before examining the different complaints submitted by the Commission regarding the conformity of the French legislation with the Directive, it must be observed that the transposition of Community legislation into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision; a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficently clear and precise manner (see the judgment of 23 May 1985 in Case 29/84 *Commission* v *Federal Republic of Germany* [1985] ECR 1661). However, a faithful transposition becomes particularly important in a case such as this in which the management of the common heritage is entrusted to the Member States in their respective territories.

First complaint: Failure to transpose Article 5 (b) and (c) of the Directive

6 The Commission considers that the French legislation is not in conformity with the abovementioned provision in two respects.

7 First, the Commission alleges that, in the 10th paragraph of Article 372 and Article 374 (4) of the code rural, the French Government has only provided for the protection of nests and eggs during the close season. Secondly, it complains that the nests and eggs of a certain number of birds are not protected since the provisions of Articles 1, 2 and 3 of the Ministerial Decree of 17 April 1981 taken in conjunction, exclude certain species from the scope of that Decree.

8 The French Government considers that the objective set out in Article 5 of the Directive is achieved by the abovementioned provisions of the code rural. The protected species of birds in question do not nest during the hunting season and there would therefore be no real purpose in protecting their nests and eggs throughout the year. The possibility of destroying nests under Article 2 of the abovementioned decree is justified by the threat which the birds represent to

mussel farming, other species of sea birds and air safety. The French Government states that Article 3 of that decree was repealed by a decree of 20 December 1983.

9 As regards the first aspect of this complaint, it must be stressed that the prohibitions set out in Article 5 (b) and (c) of the Directive must apply without any limitation in time. An uninterrupted protection of the birds' habitat is necessary since many species re-use each year nests built in earlier years. To suspend that protection throughout a particular period of the year cannot be considered to be compatible with the abovementioned prohibition.

10 As regards the second aspect of the Commission's first complaint, it must be stated that even after Article 3 of the Decree of 17 April 1981 was repealed in 1983, the decree none the less excludes a certain number of protected birds from the scope of the prohibition on the destruction of nests and eggs.

11 In determining whether this derogation is compatible with Article 9 of the Directive it should be noted that, as the Court held with regard to the Belgian rules in this field in its judgment of 8 July 1987 in Case 247/85 *Commission* v *Belgium* [1987] ECR 3029, the French rules in question do not specify the reasons set out in Article 9 (1) or the criteria and conditions referred to in Article 9 (2), particularly as regards the circumstances of time and place in which a derogation may be granted. Consequently, the French legislation is not in conformity with Article 5 (b) and (c) of the Directive.

12 The first complaint must therefore be upheld.

Second complaint: The term 'national biological heritage'

13 The Commission stresses that the protection provided for by the first paragraph of Article 3 of the Law of 10 July 1986 is limited to the preservation of the national

biological heritage whereas Article 1 of the Directive extends the protection of the Directive to all species of naturally occurring birds in the wild state in the European territory of the Member States.

14 The French Government contends that the list of species protected by virtue of the national rules contains numerous migratory species which nest in the other Member States but not in France.

15 In this respect, it should be recalled, as the Court stated in its judgment of 8 July 1987 in Case 262/85 *Commission* v *Italian Republic* [1987] ECR 3073, that, as is indicated by the third recital of the preamble to the Directive, the protection of migratory species is typically a transfrontier environment problem entailing common responsibilities for the Member States. The importance of complete and effective protection of wild birds throughout the Community, irrespective of the areas they stay in or pass through, causes any national legislation which delimits the protection of wild birds by reference to the concept of national heritage to be incompatible with the Directive.

16 The second complaint must therefore be upheld.

Third complaint: Failure to transpose Article 5 (e) of the Directive

17 The Commission points out that French Law No 76/629 contains a general authorization concerning the keeping of protected birds. However, under Article 5 (e) of the Directive Member States are obliged to prohibit the keeping of species of birds the hunting and capture of which is prohibited. Such a general prohibition on the keeping of birds other than species referred to in Annex III to the Directive, pursuant to Article 6 (2) and (3), is not to be found in the French legislation which limits such protection to a restricted number of birds.

18 While stating that the list of species protected by virtue of the Decree of 17 April 1981 is to be extended, the French Government considers that the French rules allow the result sought by the Directive to be achieved. The abovementioned Decree prohibits the capture, the removal, the use and in particular the offering

for sale or the purchase of those birds. Taken in conjunction, those prohibitions make the keeping of those protected species impossible.

19 In this respect, it should be noted that in order to guarantee complete and effective protection of birds on the territory of all the Member States it is vital that the prohibitions set out in the Directive be expressly embodied in national law. However, the French rules contain no prohibition relating to the keeping of the protected birds, and thus allow the keeping of birds captured or obtained illegally, in particular those captured or obtained outside French territory. Furthermore, it should be stated that, as the French Government admitted, the list of birds which may be kept under the French rules does not correspond to the restricted number of birds species which may be kept under Annex III to the Directive.

20 Consequently, the third complaint must be upheld.

Fourth complaint: Failure to transpose Article 7 of the Directive

21 The Commission declared at the hearing that it considered that the fourth complaint, concerning the failure to implement Article 7 of the Directive, had become devoid of purpose following amendments to the French rules in 1987. In this respect, therefore, it must be held that the Commission has discontinued part of its action because of the conduct of the defendant.

Fifth complaint: Failure to implement Article 7 (4) of the Directive

22 At the hearing the Commission also indicated that the complaint relating to the hunting of turtle-doves in the Médoc region no longer formed part of the subject-matter of its action. The Commission has accepted that a judgment of the conseil d'état annulling a number of decrees authorizing the hunting of turtle-doves in the Médoc region has brought the relevant national rules into conformity with the requirements of the Directive. Since that judgment of the conseil d'état was given on 7 December 1984, that is to say before the delivery of the reasoned opinion on

20 February 1985, it must be held that by its partial discontinuance the Commission has acknowledged that its fifth complaint was unfounded.

Sixth complaint: Failure to comply with Article 8 (1) of the directive

23 The Commission points out that, as regards certain French *départements*, the Decree of 27 July 1982 authorizes the use of limes for the capture of thrushes and that the Decrees of 7 September 1982 and 15 October 1982 allow the capture of skylarks by means of horizontal nets known as 'pantes' or 'matoles'. However, the use of limes and horizontal nets is expressly forbidden by Article 8 (1) of the Directive in conjunction with Annex IV (a) thereto.

24 The Commission takes the view that the use of limes and horizontal nets cannot be justified on the basis of Article 9 (1) (c) of the Directive since those means of capture do not constitute selective methods and do not therefore allow 'judicious use of certain birds in small numbers' within the meaning of the Directive.

25 The French Government considers that those measures, which were notified to the Commission on 25 May 1983, are justified under Article 9 (1) (c) of the Directive because such capture is subject to strict territorial, temporal and personal controls in order to guarantee the selective nature of the capture.

26 The French Government contends that the capture of birds with limes and horizontal nets is subject to an extremely strict and controlled system of individual authorizations. The decrees in question do not merely specify the places where and the period when such capture is permitted but also limit the number and the surface area of the means of capture as well as the maximum number of birds which may be captured. Furthermore, the competent authorities ensure that those conditions applying to such capture are complied with.

27 It must be observed at the outset that under Article 9 of the Directive, in particular on the basis of Article 9 (1) (c), Member States are authorized to provide for derogations from the prohibitions set out in Article 8 (1) of the Directive.

28 In order to establish whether national legislation complies with the various criteria of Article 9 (1) (c) of the Directive it is necessary, as the Court stated in its judgment of 8 July 1987 (in Case 262/85 *Commission* v *Italy* [1987] ECR 3073), to examine whether the legislation guarantees that the derogation is applied on a strictly controlled and selective basis so that the birds in question are captured in only small numbers and in a judicious manner. In this respect, it is apparent from Article 2, in conjunction with the 11th recital of the preamble to the Directive, that the criterion of small quantities is not an absolute criterion but rather refers to the maintenance of the level of the total population and to the reproductive situation of the species concerned.

29 It should be pointed out that the French rules concerning the capture of thrushes and skylarks in certain *départements* are very precise. The abovementioned Decrees make the grant of authorizations to capture such birds subject to a considerable number of restrictive conditions.

30 Furthermore, it should be noted that the Commission has not shown that the French rules permit the capture of birds in a manner incompatible with a judicious use of certain birds in small numbers. The Commission has not contested the defendant's argument that the number of birds captured constitutes a very small percentage of the population concerned.

31 It should be added that the defendant notified the Commission of those derogations in accordance with Article 9 (4) of the Directive and showed its willingness to reach agreement with the Commission regarding the detailed rules concerning those two hunting methods. However, the Commission did not respond to that initiative.

32 In the light of the foregoing, the French provisions in question cannot, on the basis of the documents before the Court, be considered to be incompatible with the requirements of Article 9 (1) (c) of the Directive.

33 The sixth complaint must therefore be dismissed.

34 It must therefore be held that by not adopting within the prescribed period all the laws, regulations and administrative provisions needed to comply with Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the French Republic has failed to fulfil its obligations under the EEC Treaty.

Costs

35 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However under the first subparagraph of Article 69 (3), the Court may order the parties to bear their costs in whole or in part if each party succeeds on some heads and fails on others. Since the Commission has succeeded in only some of its claims, each party should be ordered to pay its own costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by not adopting within the prescribed period all the laws, regulations and administrative provisions needed to comply with Council Directive

79/409/EEC of 2 April 1979 on the conservation of wild birds, the French Republic has failed to fulfil its obligations under the EEC Treaty;

(2) Orders each party to bear its own costs.

Mackenzie Stuart Due Moitinho de Almeida Koopmans

Everling Bahlmann Galmot Kakouris O'Higgins

Delivered in open court in Luxembourg on 27 April 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President