REPORT FOR THE HEARING
delivered in Case 252/85 *

I — Outline of the facts

1. *Relevant legal provisions*

(a) *Community provisions*

Article 1 of 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'), as amended by Council Directive 81/854/EEC of 19 October 1981 adapting, consequent upon the accession of Greece, Directive 79/409/EEC on the conservation of wild birds (Official Journal 1981, L 319, p. 3), provides as follows:

'1. This directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.

2. It shall apply to birds, their eggs, nests and habitats.

3. . . .'.

Article 2 requires the Member States to take

'the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements'.

Article 5 provides as follows:

'Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:

(a) deliberate killing or capture by any method;

(b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;

(c) taking their eggs in the wild and keeping these eggs even if empty;

(d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this directive;

* Language of the Case: French.

(e) keeping birds of species the hunting and capture of which is prohibited.'

Article 7 (1) provides as follows:

'Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation . . . '.

Article 8 (1) provides as follows:

'In respect of the hunting, capture or killing of birds under this directive, 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).'

The first indent of Annex IV (a) includes 'snares, limes, hooks' and the fourth indent 'nets'.

Finally, Article 9 provides as follows:

'1. Member States may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution, for the following reasons:

(a) — in the interests of public health and safety,

— . . .

— to prevent serious damage to crops, livestock, forests, fisheries and water,

— . . .

(b) . . .

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogations must specify:

— the species which are subject to the derogations,

— the means, arrangements or methods authorized for capture or killing,

— the conditions of risk and the circumstances of time and place under which such derogations may be granted,

— the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom,

— the controls which will be carried out.

. . . '.

(b) *French legislative provisions*

With regard to birds which are not detrimental to agriculture, the International Convention of 19 March 1902 (Journal Officiel of 19 December 1905) prohibits the removal of nests, the taking of eggs and the taking and destruction of clutches at any time and in whatsoever manner. Nevertheless, Article 2 (3) of the Convention provides that the

'prohibition does not cover the destruction by the owner or tenant, or their agent, of nests which the birds have constructed in or against a dwellinghouse or buildings in general or in a courtyard . . . '.

With regard to game birds, Article 372 (10) of the code rural provides as follows:

'It shall be prohibited, outside the hunting season, to remove the nests or to take, destroy, deal in, offer for sale, sell, buy, transport or export the eggs or clutches of partridges, pheasants, quails and all other birds, or the brood or young of any animal which has not been declared harmful by a decree adopted by the Minister for Agriculture'.

Article 374 (4) of the code rural provides for the imposition of a fine on the following:

'Those persons who, outside the hunting season and without authority, remove the nests, or take, destroy, deal in, offer for sale, sell, buy, transport or export the eggs or clutches of partridges, pheasants, quails and all other birds, or the brood or young of any animal which has not been declared harmful by a decree adopted by the Minister of Agriculture'.

Article 1 of the Ministerial Decree of 17 April 1981 (Journal Officiel of 19 May 1981) prohibits, without restriction, within the whole of the territory of France and at any time, the destruction or removal of the eggs or nests of the non-domesticated birds listed therein.

Article 2 prohibits the following:

'The mutilation or the skinning for taxidermic purposes of the following non-domesticated birds or, whether alive or dead, their transportation, trade, use, offer for sale, sale or purchase'.

The list of species referred to contains the names of two species of birds.

Article 3 prohibits 'dealing in, offering for sale or the sale or purchase of the following non-domesticated birds, whether alive or dead, . . . '.

The list of species referred to contains the names of 27 species of birds.

According to the first paragraph of Article 3 of Law No 76-629 of 10 July 1976, birds, their habitat and their clutches are protected 'where a specific scientific interest or the

need to preserve the national biological heritage justifies the conservation of non-domesticated animals or non-cultivated plants'.

The first paragraph of Article 6 provides as follows:

'Without prejudice to the provisions in force concerning scheduled premises for the protection of the environment, a licence issued on the conditions and in the manner to be laid down in an order of the conseil d'état is required for the establishment of premises for the breeding, sale, hire or transit of non-domesticated animals and for the establishment of premises for viewing by the public of live specimens of local or foreign fauna'.

The first paragraph of Article 10 provides as follows:

'Every person has the right to keep animals on the conditions laid down in Article 9 above and to use them in the circumstances provided for in Article 276 of the Code Rural, subject to the rights of third persons, the requirements of public health and safety and the provisions of this Law'.

Article 9, to which Article 10 refers, provides as follows:

'Since every animal is a creature capable of feeling and perceiving, it should be kept by its owner in conditions which are compatible with the biological requirements of its species'.

Article 1 of the Ministerial Decree of 12 June 1979 (Journal Officiel of 22 August 1979) listing species of game sets out the species of birds which may be hunted in the European territory of France and includes snipe, redshank and related species except for the common sandpiper, jackdaws, American partridges, rooks, crows, curlew, starlings, jays, plover, magpies, teal and turnstone.

Two successive Ministerial Decrees of 20 April 1982 and 20 April 1983 provided for a hunting season for doves from 1 May to 23 May in each year in question in the Médoc region.

Article 1 of the Ministerial Decree of 27 July 1982 provides as follows:

'The use of limes for the capture of thrushes for personal purposes to act as call-birds is permitted from 10 October 1982 to 12 December 1982 inclusive . . .'.

Article 1 of the Ministerial Decree of 7 September 1982 provides as follows:

'The capture of skylarks by means of horizontal nets known as "pantes" is permitted from 8 a.m. on 1 October 1982 (official time) until the evening of 11 November 1982, in those areas registered in 1968 where it was still practised in 1981 . . .'.

Article 1 of the Ministerial Decree of 15 October 1982 provides as follows:

'The period during which skylarks may be captured by means of horizontal nets known as "pantes" and "matoles" in the *département* of Lot-et-Garonne provided for by the aforementioned Decree of 7 September 1982 is hereby extended until the evening of 20 November'.

2. *The background to the dispute*

By a letter dated 22 February 1984 the Commission, being of the opinion that certain provisions of the relevant French rules were not consistent with the directive and that complete implementation of the directive still required the adoption of additional measures, instituted against France the procedure provided for by Article 169 of the EEC Treaty.

The Commission was not satisfied with the reply of the French Government to its letter of 22 February 1984 and considered that the French legislation was still not in conformity with the provisions of the directive. It therefore delivered a reasoned opinion by a letter dated 20 February 1985 setting the French Republic a time-limit of two months within which to comply with the opinion.

The Commission did not receive any reply to that letter.

II — Written procedure

By an application lodged at the Court Registry on 13 August 1985 under the second paragraph of Article 169 of the EEC Treaty, the Commission brought an action before the Court of Justice alleging that the French Republic had failed to fulfil its obligations in the field of the conservation of wild birds.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It nevertheless invited the French Government to produce certain documents and the Commission to provide certain further details of the facts of the case.

III — Conclusions of the parties

The *Commission* claims that the Court should:

(1) Declare that, by not adopting within the prescribed period all the 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 Treaty and that directive;

(2) Order the French Republic to pay the costs.

The *French Republic* contends that the Court should:

(1) Dismiss the Commission's application;

(2) Order the applicant to pay the costs.

IV — Submissions and arguments of the parties in the written procedure

The Commission claims that the French legislation is not in conformity with the directive in six respects.

First complaint: Failure to implement Article 5 (b) and (c) of the directive

The Commission contends that Article 5 (b) and (c) provides for the protection without restriction of the nests and eggs of all species of wild birds naturally occurring in the European territory of the Member States. In its view the French legislation does not provide such comprehensive protection.

In the first place, the Commission interprets the 10th paragraph of Article 372 and Article 374 (4) of the code rural as meaning that nests and eggs are protected only outside the hunting season. However, it states that uninterrupted protection is required, especially in the case of migratory species which each year use the nests and habitats constructed in the previous years. In addition, it states that it is not impossible for the start of the hunting season to coincide for certain species of birds and in certain regions with the period of nest-building and reproduction. Such a correlation was established in a case decided by the conseil d'état on 7 December 1984 concerning the hunting of doves.

In the second place, the Commission complains that Article 1 of the Decree of 17 April 1981 does not protect all species of wild birds occurring in the European territory of the Member States. In particular the species listed in Articles 2 and 3 of the Decree fall outside the protection given by Article 1.

In the third place, the Commission refers to Article 2 (3) of the International Convention of 19 March 1902 which provides for a derogation from the prohibition of the destruction of birds' habitats in favour of the owner or tenant, or their agent, in respect of birds nesting on their property. In its view, that provision is not in conformity with the requirements of Article 5 of the directive.

Finally, the Commission points out that Article 9 of the directive cannot be used as justification for the aforementioned derogations of principle, which generally and systematically deprive certain species of birds of protection.

The French Government is of the opinion, in the first place, that the directive obliges the Member States to achieve a given result. That result was achieved in France by the provisions of the Decree of 17 April 1981, in conjunction with those of the 10th paragraph of Article 372 and Article 374 (4) of the code rural.

With regard to the period during which nests and eggs are protected, the French Government contends that the protected species of birds do not nest during the hunting season. Protection throughout the year would therefore have no real effect. The hunting season is fixed for each *département* in such a way that the species which breed in France have finished nesting.

In addition, the French Government points out that Article 3 of the Decree of 17 April 1981 was repealed by Article 5 of the Decree of 20 December 1983.

With regard to the species in respect of which Article 2 of the Decree of 17 April 1981 envisages the possibility of nests being destroyed, the French Government observes that it notified that derogation to the Commission on 28 July 1981. The reason for that exception is the threat posed by

those species of birds to mussel-farming, other species of sea-birds and air safety.

Finally, the French Government states that the relevant provisions of the Convention of 19 March 1902 are no longer applicable.

Second complaint: The concept of national biological heritage

The Commission states that the protection provided for by the first paragraph of Article 3 of the Law of 10 July 1976 is limited *inter alia* to cases where the need for such protection is justified for the preservation of the 'national biological heritage'. In contrast, the directive calls for protection to be given to all wild birds naturally occurring in the European territory of the Member States. The protection requirement extends to birds which, without being part of the national biological heritage, may at any given moment be found in the territory of the Member State in question, such as migratory species. In reply to a question put by the Court, the Commission listed 24 species of migratory birds which, in its view, fell outside the protection provided for by the French legislation although they were protected under the directive.

The French Government replies that the list of protected species set out in the Decree of 17 April 1981 contains numerous migratory species which do not nest in France. It therefore provides extended protection of the wide nature desired by the Commission.

Third complaint: Failure to implement Article 5 (e) of the directive

The Commission states that pursuant to Article 5 (e) of the directive the general system of protection for all species of birds referred to in Article 1 thereof must include, in particular, a prohibition of the keeping of species of birds the hunting and capture of which is prohibited. That general prohibition of the keeping of birds other than species referred to in Annex III to the directive is not to be found in the French legislation. Whilst it is true that Law No 76-629 lays down the conditions for keeping species of non-domesticated animals, it nevertheless contains a general authorization of the keeping of animals. However, a provision expressly implementing the aforementioned prohibition is necessary if only to exclude the possibility of lawfully keeping birds which have been captured or obtained in an unlawful manner.

In contrast, the French Government considers that the French rules enable the result sought by the directive to be achieved. The Decree of 17 April 1981 prohibits *inter alia* the capture of birds, their removal, their use and, in particular, their sale or purchase. In the French Government's opinion, those prohibitions together have the effect of making the keeping of those species impossible. The French Government states that the list of species protected under the Decree of 17 April 1981 is to be extended.

Fourth complaint: Failure to implement Article 7 of the directive

The Commission contends that the list of game birds, that is to say those birds which may be hunted, set out in Article 1 of the Decree of 12 June 1979 is not in conformity with Article 7 of the directive which limits the species which may be hunted to those listed in Annex II thereto. The French list of game birds includes the great snipe and the wood-sandpiper which are two of the

species mentioned not in Annex II but in Annex I to the directive as being subject to special conservation measures. In addition, the French list of game birds includes 13 species which are not listed in Annex II to the directive.

The Commission goes on to state that, by a letter dated 26 August 1981 the French Government informed the Commission that, with regard to rooks, crows, starlings, jays, magpies and jackdaws, measures for their destruction were authorized because those birds were capable of damaging crops. The Commission did not respond to that letter but that fact cannot justify the said derogation. The adoption or application of a national derogation is not dependent upon any action on the part of the Commission. Moreover, Article 9 of the directive does not empower the Commission itself to suspend, amend or repeal a derogation from the directive upon which a Member State has decided. Article 9 merely imposes upon the Commission a general duty to ensure that the Community measures are properly implemented. This action is the result of studies by the Commission pursuant to Article 9 (4). The Commission's silence with regard to the derogations of which it was informed cannot be regarded as acceptance or approval thereof.

With regard to the substance of the derogation, the Commission emphasizes the fact that the derogation must be exceptional and may be adopted only in response to certain specific situations and subject to strict limits. Under no circumstances are abstract, general and permanent derogations permitted.

With regard to derogations for the purpose of preventing serious damage to crops, such damage must be real. Authorization to destroy the birds in question must necessarily be adapted to the circumstances of time and place and must always be appropriate in the light of those factors since the aim is to limit such destruction as far as possible to the minimum necessary. In contrast, general and permanent measures which class certain species of birds as harmful as a matter of principle and in a general manner and which, for that reason, deprive them of protection permanently and in all places, are outside the framework of the permissible derogations under Article 9. For a Member State to deprive in general certain species of birds classed as harmful of the protection intended to be given by the directive amounts, in effect, to seeking to amend the provisions of the directive.

The French Government begins by pointing out that the Decree of 12 June 1979 is currently being amended so as to exclude several species from the list of birds classed as game birds. With regard to the 'Virginia partridge', that was an American species of bird introduced specifically for hunting purposes.

With regard to the other non-protected species, it maintains that a derogation pursuant to Article 9 of the directive was justified.

It observes that the Commission implicitly accepted the derogations by its silence in response to the notification of 26 August 1981. Under Article 9 (4) of the directive the Commission is required at all times to ensure that the consequences of the derogations are not incompatible with the directive and to take appropriate steps to that end. It must inform the governments

concerned that the derogations adopted on the basis of Article 9 (1) are not compatible with the directive and may, if necessary, request them to adopt appropriate measures before having recourse to the procedure provided for by Article 169 of the EEC Treaty.

In this case, the Commission should have informed the French Government that the derogations notified by it would have consequences which it regarded as incompatible with the directive. Although such a dialogue should have been commenced, in fact none was entered into. Consequently, the French Government was justified in considering that the Commission had no objection to the derogations.

With regard to the substance, the French Government argues that the Commission has not produced any scientific or statistical evidence to show that the French Government has failed to comply with the requirements laid down by Article 9 of the directive. It is indisputable that the species of birds in question cause serious harm to crops (seedlings, young shoots and harvests) and to certain other species of birds throughout the territory of France and at all times.

The French Government goes on to observe that outside the hunting season the permanent rules concerning the administration of hunting provide that authorization for the destruction of species which cause serious damage is to be issued by the commissaire de la république on receipt of an application stating the applicant's identity and status, the reasons for the destruction, the area where the destruction is to take place, the date on which the authorization is to commence and its desired duration and the number of participants. Authorization will be granted only in respect of certain days of the week.

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

The Commission observes in the first place that the successive Ministerial Decrees of 20 April 1982, 1983 and 1984 provided for a hunting season for turtle doves in certain communes in the Médoc region from March to May 1982, from 15 May to 23 May 1983 and during May 1984. Although turtle doves are included in the list of species set out in Annex II to the directive and may therefore be hunted, as migratory birds they are protected against hunting during their period of reproduction and during their return to their nesting sites under the penultimate sentence of Article 7 (4) of the directive. In fact, the hunting season for turtle doves fixed by the aforementioned decrees coincided with their breeding season and applied to their nesting sites. The Commission is aware that the Conseil d'Etat has annulled the decrees in question but considers official ratification of the amended situation to be necessary.

The French Government states that following the annulment by the conseil d'état of the decrees fixing the hunting season for doves, it had been decided that such hunting would no longer be permitted. Consequently, the complaint is without substance.

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

The Commission states that the Ministerial Decree of 27 July 1982 authorized the use of limes for the capture of thrushes. In addition, the Ministerial Decrees of 7

September 1982 and 15 October 1982 authorized, in certain regions in the south-west of France, the capture of skylarks by means of horizontal nets known as 'pantes' or 'matoles'. In fact, the use of limes and horizontal nets is expressly prohibited by the provisions of Article 8 (1) of the directive in conjunction with Annex IV (a) thereto.

The Commission is of the opinion that the use of limes and horizontal nets cannot be justified under Article 9 (1) (c) of the directive. That provision does not enable a derogation to be based upon the need to preserve hunting or methods of hunting regarded as traditional or as part of the cultural heritage of the local population. The maintenance of traditions implies, by its very essence, measures of a permanent nature whereas the derogations permitted under Article 9 of the directive must be regarded exclusively as clearly limited and temporary measures.

Furthermore, limes and nets do not constitute, by their nature, methods for capturing solely certain birds on a selective basis. There remains the danger with limes and nets that birds of all species will be caught indiscriminately and they involve for those birds the risk of injury, mutilation or death which cannot be ignored.

With regard to the question whether or not many thrushes and skylarks are captured by means of the methods in question, the Commission considers that that must be assessed in the light of the number of birds actually captured. Quite apart from the difficulty of carrying out checks, the measures at issue do not contain any provision to prevent the users of limes for the capture of thrushes or the users of horizontal nets for the capture of skylarks from using such means for the intensive hunting of those birds.

The French Government for its part draws attention to the fact that it notified the Commission of the measures in question. It also states that the measures were justified under Article 9 (1) (c) of the directive. In its view, that provision is intended to ensure the survival of traditional methods of hunting such as the capture of birds by means of limes or nets. The capture of birds by those means is strictly supervised by the competent authorities as to its geographical extent, its duration and the method of capture. The birds are captured live and it is a condition that birds of other species are released. In addition, the number of thrushes captured by means of limes is estimated to be several thousand out of a total population of approximately 30 million. With regard to skylarks, approximately 1% of a total population of some 6 million is captured by means of nets. In both cases, therefore, the quantities captured are small. Finally, the Commission has produced no evidence showing that the methods of capture are capable of causing the local disappearance of the species in question.

K. Bahlmann
Judge-Rapporteur