OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 19 May 1987 *

Mr President,
Members of the Court,

1. In the series of actions instituted against various Member States for failing to comply with Council Directive No 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Commission on this occasion is challenging the legislation of the Federal Republic of Germany, and in particular the Bundesnaturschutzgesetz [Federal law on the protection of nature] of 20 December 1976.

2. Originally, the Commission made three complaints concerning the incompatibility of that law with the Community directive. However, in the course of the action the Federal Republic of Germany amended the law on the protection of nature by a law of 18 December 1986; consequently, the Commission acknowledged at the hearing that two of those complaints were no longer justified, since they were remedied by the new text of the law.

3. The Commission has not, however, withdrawn the other complaint, concerning Article 22 (3) of the law on the protection of nature, which was reproduced in its entirety in Article 20 (f) (3) of the Law of 18 December 1986.

4. According to the Commission, the derogation contained therein, affecting some of the prohibitions included in Articles 5 and 6 (1) of Directive No 79/409, is too general and does not comply with the strict criteria laid down in Article 9 of the directive. In particular, the German legislation does not contain any reference to the principle of proportionality or to the requirement contained in Article 9 of the directive that the derogations may be permitted only to prevent 'serious damage' (unlike the provision contained in Article 26 (3) (1)). In the conflict of interests between the protection of wild birds and ordinary use of the land related to agriculture, forestry and fishing, the German legislation always gives precedence to the latter, whereas the directive permits that order of priorities only in order to prevent serious damage to crops, livestock and forests, and not for reasons of an economic nature.

5. The Federal German Government contends first that Articles 5 and 6 of the directive concern only intentional acts, in the sense of acts committed with a specified purpose and in order to achieve that purpose. The rules on derogating from those articles laid down in Article 9 of the directive are also in its view limited to the intentional acts referred to in those articles. Since acts which are not intentional are not covered by Articles 5 and 6, they are not prohibited, and the problem of the application of Article 9 of the directive does not arise with regard to them.

6. Article 22 (2) of the law on the protection of nature (Article 20 (f) (1) of the 1986 version of the law), which is contained in a Law which is intended to protect nature in general, is wider-reaching than the directive itself, since the protection

* Translated from the Portuguese.

which it confers on wild birds covers both intentional acts and negligent acts.

7. The derogations laid down in Article 22 (3) must therefore, according to the German Government, be assessed by reference to the level of protection provided for in Article 22 (2) (Article 20 (f) (1) of the 1986 version of the law); in that context, Article 22 (3), in particular when it refers to 'normal use of the land', covers only acts which are not intentional, since these are the only acts compatible with the objectives of the provision and of the law on the protection of nature in general, including the need to protect nature and the countryside.

8. How is this question to be resolved?

9. It is clear that the prohibition laid down in Article 22 (2) of the law on the protection of nature (Article 20 (f) (1) of the new law) does not distinguish between intentional and unintentional acts, but covers (as is clear from the prohibition laid down in Article 30) harmful acts committed through negligence.

10. But the derogation provided for in Article 22 (3) (Article 20 (f) (3) of the present version) also draws no distinction between the two types of acts, both of which are included in the provision in question.

11. Thus the whole problem resides in the interpretation to be given to the term 'normal use of the land', by which the scope of the derogation is defined.

12. It is not disputed that according to a strict interpretation that term, and hence the derogation linked to it, can include only negligent acts or, at most, acts committed recklessly. That result could thus be consistent with the customs prevalent among the farmers and fishermen of the Federal Republic of Germany.

13. Basically, it would be the idea of 'inevitable consequence' — or, possibly, the 'impossibility of any other conduct' — which would enable the scope of the derogation to be defined so as to avoid any incompatibility with the directive.

14. However, the distinction — which is in any event difficult to establish — is not apparent from the wording of the provision or from any other legislative text.

15. It cannot be excluded that a wider interpretation of the term 'normal use of the land' would enable intentional acts, especially those committed without heed to the consequences or even wilfully, to be included therein. The derogation would then have to satisfy the criteria laid down in Article 9, in particular the reference to any of the reasons set out therein and the inexistence of any other satisfactory solution.

16. This clearly is not the case.

17. Thus, under the law, acts which are not in need of protection become lawful, which is precisely what the directive seeks to avoid.

18. Apart from that, the term 'normal use of the land' is compatible with acts — committed, for example, with 'deliberate negligence' or 'gross negligence' — which should be discouraged in the context of such activity, in accordance also with the objectives of the directive.

19. The obligation imposed on the courts of each Member State to interpret its own national law in the light of the wording and purpose of the directive which that law was intended to implement [1] does not affect the

1 — See judgments of 10 April 1984 in Case 14/83 *Von Colson and Kamann* v *Land Nord Westfalen* and Case 79/83 *Harz* v *Deutsche Tradax*, [1984] ECR 1891, at p. 1909, paragraph 26, and 1921 at p. 1942, paragraph 26.

obligation imposed on all the other authorities of that Member State, particularly the legislature, to adopt all the measures necessary, within the scope of their competence, to ensure that the Community rule is implemented and the objectives thereof are attained.

20. That does not mean that the contested provision flagrantly infringes the rules of the directive; however, it fails to remove an ambiguity as regards the scope of the obligations which it imposes, and therefore cannot be regarded as satisfying fully the requirements of clarity and certainty of the rights and obligations flowing from the directive, which according to the judgments of the Court of Justice may be considered a condition for recognizing the conformity with directives of the legislative text by which they are supposed to be implemented.[2]

21. Evidence of such ambiguity may perhaps be found in the following fact cited by the Government of the Federal Republic of Germany in its reply to the notice that it had failed to fulfil the directive: certain *Länder* have reproduced Article 22 (3) of the law on the protection of nature in their own laws for the protection of nature, whereas others have adopted narrower provisions in derogation from that provision. That was the case of Lower Saxony, which restricted the derogation in question to cases in which *it is not possible to avoid* the damaging consequences of normal agricultural and forestry operations on plants and animals especially protected.

22. For these reasons I propose that the Court should declare that the Federal Republic of Germany has failed to adopt within the period prescribed the provisions necessary fully to comply with the obligations arising from Council Directive No 79/409 of 2 April 1979 and has therefore failed to comply with an obligation under the EEC Treaty.

23. In accordance with Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs.

2 — See for example, judgment of 6 May 1980 in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473 *et seq.*; similarly, judgment of 30 January 1985 in Case 143/83 *Commission* v *Denmark* [1985] ECR 427 *et seq.*