JUDGMENT OF THE COURT
17 September 1987 *

In Case 412/85

Commission of the European Communities, represented by its Legal Adviser, Peter Kalbe, and by Thomas van Rijn, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, also a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Martin Seidel, Ministerialrat in the Federal Ministry of Economic Affairs, and Dietrich Ehle, of the Cologne Bar, with an address for service in Luxembourg at the Chancery of the Embassy of the Federal Republic of Germany, 20-22 avenue Emile-Reuter,

defendant,

APPLICATION for a declaration that by authorizing derogations from the measures for the protection of birds without providing for the restrictions prescribed by Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, T. Koopmans, K. Bahlmann and R. Joliet, Judges,

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

* Language of the Case: German.

having regard to the Report for the Hearing and further to the hearing on 19 February 1987, at which the Commission was represented by P. Kalbe and T. van Rijn, acting as Agents, and the Federal Republic of Germany by M. Seidel, Ministerialrat in the Federal Ministry of Economic Affairs, and D. Ehle, of the Cologne Bar,

after hearing the Opinion of the Advocate General delivered at the sitting on 19 May 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 10 December 1985, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that by authorizing derogations from the measures for the protection of birds without providing for the restrictions prescribed by Council Regulation 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 Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

2 After considering the provisions of the relevant German legislation and concluding that it was not entirely in conformity with the directive, the Commission initiated the procedure laid down in Article 169 of the Treaty. After giving the Federal Republic of Germany formal notice to submit its observations, it delivered a reasoned opinion on 6 December 1984. Since no action was taken pursuant to the issue of that opinion, it brought this action.

3 Originally, the Commission's action concerned three provisions of the Bundesnaturschutzgesetz [Federal law on the protection of nature) authorizing derogations from the legislation concerning the protection of birds. Following an amendment made to the Bundesnaturschutzgesetz on 10 December 1986, that is to say, after the written procedure had ended, the Commission stated at the hearing on 19 February 1987 that it considered the case settled in regard to the second and third complaints as set out in the Report for the Hearing.

4 Reference is made to the Report for the Hearing for the background to the dispute, the provisions of the German legislation at issue, 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 The only point on which the parties remain in disagreement concerns the conformity of the first sentence of Paragraph 22 (3) of the Bundesnaturschutzgesetz with Article 5 of the directive read in conjunction with Article 9 thereof.

6 Article 5 of the directive provides for general prohibitions on the deliberate killing or capture of the species of birds referred to in Article 1 of the directive and on the deliberate destruction of, or damage to, their nests and eggs and the deliberate disturbance of those birds in so far as their disturbance would be significant having regard to the objectives of the directive.

7 Those general prohibitions laid down in the directive were transposed into German law by Paragraph 22 (2) of the Bundesnaturschutzgesetz. That provision prohibits, *inter alia*, the deliberate commission of the acts set out in Article 5 of the directive.

8 The first sentence of Paragraph 22 (3) of the Bundesnaturschutzgesetz provides that the prohibitions contained in subparagraph (2) do not apply where the acts concerned take place in the course of 'the normal use of the land for agricultural, forestry or fishing purposes' or in the context of 'the exploitation of the products obtained from such activities'.

9 The Commission complains that Paragraph 22 (3) of the Bundesnaturschutzgesetz derogates from the prohibitions contained in Article 5 of the directive, as transposed in Paragraph 22 (2) of the Bundesnaturschutzgesetz, without complying with the restrictions imposed by Article 9 of the directive on national legislatures wishing to adopt derogations from the general prohibitions concerning the protection of birds.

10 The Commission claims in this regard that Article 9 of the directive authorizes the Member States to provide for derogations only if the protective criteria laid down in Article 9 are met. Thus, the Commission finds that there is no reference in the German legislation to the fact that a derogation may be granted only where there is no other satisfactory solution or to one of the reasons set out in Article 9 (1) of the directive.

11 The Government of the Federal Republic of Germany replies that Paragraph 22 (3) of the Bundesnaturschutzgesetz does not constitute a derogation from the prohibitions laid down in subparagraph (2). The derogations provided for in Paragraph 22 (3) presuppose the absence of any intentional acts. The activities defined by Paragraph 22 (3) of the Bundesnaturschutzgesetz, such as the normal use of land, can never be regarded as constituting a deliberate failure to protect birds, because actions performed with the intention of killing, capturing, disturbing, keeping or selling wild birds cannot be described as forming part of normal agricultural, forestry or fishing activities.

12 It is necessary to consider first the question whether Paragraph 22 (3) of the Bundesnaturschutzgesetz constitutes a derogation from the prohibitions laid down in subparagraph (2) of the same provision. More precisely, it must be determined whether Paragraph 22 (3) concerns intentional acts inimical to the protection of birds.

13 With regard to the scope of paragraph 22 (3) of the Bundesnaturschutzgesetz, it should be noted that the terms of that provision refer expressly to the previous subparagraph, which contains the general prohibitions provided for in Article 5 of the directive. Since those prohibitions concern intentional acts, the exception necessarily covers the same acts.

14 It should also be noted that Paragraph 22 (3) of the Bundesnaturschutzgesetz does not define its scope by defining the activities harmful to the environment which are to be permissible on the basis of a subjective criterion. In fact, the German legislation permits derogations from the provisions for the protection of birds as long as the acts concerned are carried out 'in the course of the normal use of the land for agricultural, forestry or fishing purposes'.

15 That reference to a particular use of the land does not provide a precise indication of the extent to which damage to the environment is permitted. The concept of the normal use of the land and the concept of an unintentional infringement of the provisions for the protection of birds belong to two different legal planes. Since the German legislation does not define the concept of 'normal use', unintentional damage to the life and habitat of birds is not excluded from the scope of Paragraph 22 (3) of the Bundesnaturschutzgesetz in so far as such damage is necessary in the course of the normal use of the land.

16 Thus, the argument of the Federal German Government equating the normal use of the land with acts involving no intention to infringe the rules for the protection of birds cannot be upheld.

17 Consequently, since Paragraph 22 (3) of the Bundesnaturschutzgesetz constitutes a derogation from the prohibitions laid down in Article 5 of the directive, the German rules must meet the criteria laid down in Article 9 of the directive in order to be justified.

18 According to that provision, Member States must restrict the derogation to cases in which there is no other satisfactory solution. The derogation must be based on at least one of the reasons listed exhaustively in subparagraphs (a), (b) and (c) of Article 9 (1) and it must meet the criteria laid down in Article 9 (2), the purpose of which is to limit derogations to what is strictly necessary and to enable the Commission to supervise them.

19 In that regard, it must be held that the derogations provided for in Paragraph 22 (3) of the Bundesnaturschutzgesetz do not meet the requirements laid down in Article 9 of the directive since the activities defined in Paragraph 22 (3) cannot be attributed to any of the reasons set out in Article 9 of the directive.

20 Consequently, it must be held that by authorizing in Paragraph 22 (3) of the Bundesnaturschutzgesetz derogations from the measures for the protection of birds provided for by Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

Costs

21 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Under Article 69 (4), a party who discontinues or withdraws from proceedings is to be ordered to pay the costs, unless the discontinuance or withdrawal is justified by the conduct of the opposite party.

22 At the hearing, the Commission withdrew two of the complaints made in its application on the ground that the Federal Republic of Germany had complied with its obligations concerning those points subsequent to the bringing of the action.

23 Consequently, the partial withdrawal on the part of the Commission is justified by the conduct of the Federal Republic of Germany, which has been unsuccessful in its defence so far as the remainder of the application is concerned.

24 The Federal Republic of Germany must therefore be ordered to bear the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by authorizing in Paragraph 22 (3) of the Bundesnaturschutzgesetz derogations from the measures for the protection of birds provided for by Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty;

(2) The Federal Republic of Germany is ordered to bear the costs.

Mackenzie Stuart O'Higgins Schockweiler

Bosco Koopmans Bahlmann Joliet

Delivered in open court in Luxembourg on 17 September 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President