REPORT FOR THE HEARING
delivered in Case 412/85 *

I — Facts

1. *Legal background to the case*

(a) *Community rules*

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), as amended by Council Directive 81/854 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), hereinafter referred to as 'the directive', 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 5 of the directive reads 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;

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

Article 6 of the directive requires the Member States to prohibit, for all the bird species referred to in Article 1, except under certain conditions in respect of the species referred to in Annex III to the directive, the sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognizable parts or derivatives of such birds.

Finally, Article 9 of the directive provides that:

'(1) Member States may derogate from the provisions of Articles 5, 6, 7 and 8,

* Language of the Case: German.

where there is no other satisfactory solution, for the following reasons:

(a) . . . ,

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

. . . ;

(b) for the purposes of research and teaching, of repopulation, of reintroduction and for the breeding necessary for these purposes;

(c) . . .

(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.

(3) . . .'

(b) *The German legislation on the conservation of wild birds*

The protection of birds in the Federal Republic of Germany is part of the legislation on the protection of nature. Legislative power in that matter is shared between the Bund (Federal Government) and the *Länder.* The Bund has the power to adopt framework laws on the protection of nature. In exercising that power it may adopt the necessary general provisions. Within the limits of those general provisions, the *Länder* have a certain discretion in adopting complementary regional Laws.

The framework law, the Bundesnaturschutzgesetz (Federal law on the protection of nature, hereinafter referred to as 'the law') of 20 December 1976 (*Bundesgesetzblatt* I, p. 3574) lays down the basic conditions of fact and law.

Paragraph 22 (2) of the law prohibits:

'(1) . . . ;

(2) the hunting, capturing, wounding or killing of animals of species given special protection or the removal, destruction or damaging of their eggs, larvae, cocoons or other forms in which they develop;

(3) the disturbing of animals of species designated by the regulation adopted for the implementation of Paragraph 4 as being in danger of extinction at the places where they nest, hatch, live or hide, by seeking them, photographing them, filming them or engaging in any similar conduct;

(4) (a) . . . ;

(b) the taking possession or acquiring of animals of species given special protection, whether living or dead, or of parts of such animals, their eggs, larvae, cocoons or other forms in which they develop or their nests or any derivatives of

such animals or objects, the use of any actual violence against them, the use of such animals as raw material, giving them away, offering them for sale or selling them or placing them in circulation in any other way.'

According to the first sentence of Paragraph 22 (3) of the law, the prohibition contained in subparagraph (2) does not apply if the conduct takes place

'in the course of the normal use of the land for agricultural, forestry or fishing purposes, in the exploitation of products obtained from such activities or in the performance of an action authorized under Paragraph 8 [of the law]'.

Moreover, Paragraph 22 (4) of the law enables the Federal Minister for Food, Agriculture and Forestry to determine by order other derogations from certain of the prohibitions laid down in subparagraph (2) of the same paragraph, concerning, in particular, the holding of animals for private purposes or for trade in specialized shops.

Finally, Paragraph 26 (3) of the law enables the *Länder* to authorize derogations from the prohibitions laid down in Paragraph 22 (2) and from any implementing provisions which might be adopted under Paragraph 22 (3).

In particular, Paragraph 26 (3) 1 provides for a derogation intended to prevent serious damage to agriculture, forestry, water resources or other damage of a socio-economic nature and Paragraph 26 (3) 3 authorizes a derogation for the purposes of research, teaching or breeding.

2. *Background to the case*

Since the Commission considered that Paragraphs 22 and 26 of the law did not comply with the directive, it initiated against the Federal Republic of Germany, by a letter of 23 February 1984, the procedure laid down in Article 169 of the EEC Treaty.

Since it considered that neither the reply to that letter nor the reply to the reasoned opinion of 6 December 1984 were convincing, the Commission decided to bring an action before the Court.

II — Written procedure

By an application lodged at the Court Registry on 10 December 1985, the Commission brought an action before the Court under the second paragraph of Article 169 of the EEC Treaty alleging that the Federal Republic of Germany had failed to fulfil its obligations in regard to 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.

III — Conclusions of the parties

The *Commission* claims that the Court should:

(1) Declare that, by providing in Paragraphs 22 (3) and (4) and 26 (3) of the Bundesnaturschutzgesetz [Federal law on nature conservation] for exemptions from the provisions relating to the protection of birds without laying down the restrictions provided for in that connection in Articles 6 and 9 of the directive, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

(2) Order the defendant to pay the costs.

The *Federal Republic of Germany* contends that the Court should:

(1) Dismiss the application;

(2) Order the applicant to pay the costs.

IV — Arguments of the parties during the written procedure

The *Commission* criticizes three provisions of the Bundesnaturschutzgesetz, namely the first sentence of Paragraph 22 (3), Paragraph 22 (4) 2 and Paragraph 26 (3) 3. It considers that those provisions do not make the derogations which they grant from the rules protecting wild birds subject to the conditions laid down in Articles 6 and 9 of the directive.

On the other hand, the *German Government* considers that it has properly fulfilled its obligations under the directive. It emphasizes that it fully supports the objectives of the directive and that it has taken advantage of the possibility of laying down more stringent provisions for the protection of nature with a view to protecting wild birds and that the derogations provided for in the Bundesnaturschutzgesetz may be granted only in the context provided for in the directive. In that regard, the directive has been transposed into national law in a way which corresponds to the requirements of clarity and legal certainty of the directive.

First complaint: The first sentence of Paragraph 22 (3) is not in conformity with the directive

The *Commission* observes that, under the first sentence of Paragraph 22 (3) of the law, the prohibitions laid down in subparagraph (2) of the same paragraph are not of general application. The species of birds protected may be hunted, captured, killed, held or sold as long as those acts take place in the course of normal use of the land. Article 9 of the directive is much more stringent and permits the Member States to grant derogations only if the criteria narrowly defined in paragraph (1) of that article are met.

Moreover, the Commission cannot find in the provision in question any reference to the fact that a derogation may be granted only if there is no other satisfactory solution, as provided for in Article 9 (1) of the directive.

Furthermore, under the third indent of Article 9 (1) of the directive, derogations may, in particular, be granted only in order to prevent serious damage. The term 'serious damage' does not appear in the German provision in question.

According to the Commission, the conflict of purpose between the use of the land for agricultural, forestry and fishing purposes and the protection of wild birds was settled by Article 9 (1) of the directive by giving priority to the protection of birds except in cases in which it is necessary to prevent serious damage. However, the terms of Paragraph 22 (3) of the law do not require farmers to concern themselves with the protection of birds as long as their activities are part of the normal agricultural use of the land.

Only the terms of the Bundesnaturschutzgesetz define the obligations of those concerned. It is for that reason that clarity and legal certainty require that its wording make quite clear that the derogations for which it makes provision are in conformity with the terms of the directive. In that context, a comparison of the terms of the first sentence of Paragraph 22 (3) with those of Paragraph 26 (3) (1) of the law, which limits the powers of the *Länder* to derogate

from the rules providing for the protection of birds to cases in which it is necessary to prevent serious damage, shows that the exception provided for in the first sentence of Paragraph 22 (3) is not limited to the prevention of such damage.

Finally, the first sentence of Paragraph 22 (3) of the law is not to be read as limiting the exception to unintentional acts, which are not mentioned in Articles 5 and 6 of the directive. Thus, the first sentence of Paragraph 22 (3) permits the German legislature to act as it sees fit in that regard. Although an unintentional failure to protect birds during normal use of the land may be accepted without there being an infringement of the directive, the Commission considers that the exception in the first sentence of Paragraph 22 (3) applies to all the provisions of subparagraph (2) of the same article. Therefore, that exception also applies to activities which, like the hunting, capture and holding of birds or the collection of their eggs, can only occur intentionally.

It is also not correct to argue that the provisions of the directive have been complied with merely because a deliberate failure to protect birds would not itself constitute a normal use of land and would not be covered by the exception laid down in the first sentence of Paragraph 22 (3) of the law.

The *Government of the Federal Republic of Germany* states first of all that Articles 5 and 6 of the directive prohibit only certain intentional acts. On the other hand, Article 9 of the directive relates only to acts prohibited by Articles 5 and 6 of the directive. Other acts do not therefore come within the scope of Article 9. That article thus does not regulate the question whether and to what extent derogations from the prohibitions contained in provisions adopted by the Member States which go beyond the minimum conditions of protection required by the directive are permissible. The Member States are therefore at liberty to provide for independent exceptions in that regard.

Having regard to the fact that Paragraph 22 (2) of the law prohibits not merely certain intentional acts but also negligent acts, the three derogations set out in the first sentence of Paragraph 22 (3) of the law all presuppose that the acts concerned are not intentional. The first sentence of Paragraph 22 (3) of the law does not permit a derogation where the acts prohibited by subparagraph (2) of the same paragraph have been committed intentionally.

Furthermore, use of the land is normal only if it respects the need to protect nature. Therefore, acts committed with the intention of killing, capturing, disturbing, holding or selling wild birds cannot be regarded as normal agricultural, forestry or fishing activities. Normal use of the land for agricultural, forestry or fishing purposes and the exploitation of products obtained from such normal use presupposes in fact that no intentional acts are committed. However, since the Bundesnaturschutzgesetz was not adopted solely for the protection of birds, it was necessary to provide for a derogation in Paragraph 22 (2) for the case in which the products of protected plants are unintentionally used with other plant products in the course of the normal use of land.

With regard to the reference in the first sentence of Paragraph 22 (3) of the law to Article 8 of the same law, the latter article does not permit deliberate acts inimical to the protection of wild birds either.

The first sentence of Paragraph 22 (3) of the law therefore constitutes a general prohibition of any deliberate act contrary to

the provisions of Articles 5 and 6 of the directive. It is therefore impossible for that provision to contravene Article 9 of the directive.

Second complaint: Paragraph 22 (4) (2) of the law does not comply with the directive

The *Commission* considers that Paragraph 22 (4) (2) of the law provides for an even wider power to grant derogations than subparagraph (3) of the same paragraph. The authorization to grant derogations contained in Paragraph 22 (4) 2. of the law does not contain the limitations laid down in Articles 5 (e), 6 and 9 (1) (b) and (c) of the directive. The said provision of the Bundesnaturschutzgesetz expressly empowers the competent minister to disregard the directive if need be.

The reference to the fact that the interpretation and application of that general enabling provision are at present in accordance with Article 9 of the directive does not remove the conflict between that provision and the directive. The assurance that the Federal authorities also intend to comply with the directive in the future in their internal procedure is not sufficient to ensure that the provisions and protective aim of the directive are applied as required.

Legal certainty and legal clarity require that the powers granted to the competent bodies to grant derogations should be unquestionably linked to the conditions laid down in that regard in the directive.

The *Government of the Federal Republic of Germany* points out first of all that Paragraph 22 (4) 2 of the law does not in itself contain any derogation from the prohibitions but merely provides a basis enabling regulations to be adopted. That paragraph also does not provide for derogations from the fundamental prohibitions contained in the directive. Since, according to the third paragraph of Article 189 of the Treaty, a directive binds the Member States only as to the result to be achieved, the form and methods whereby it is achieved may be freely chosen by the Member States. The competent minister empowered to grant derogations by the provision at issue is therefore required to comply with the directive as far as the result to be achieved is concerned. That provides a guarantee that the said provision will not be used in a way which is contrary to the directive. Finally, the competent minister is only empowered to adopt regulations which do not endanger the objective of protecting birds. That also guarantees that all potential derogations will come within the framework laid down in Article 9 (1) of the directive.

Third complaint: Paragraph 26 (3) 3 of the law does not comply with the directive

The *Commission* states that, according to Paragraph 26 (3) 3, it is sufficient in order to grant a derogation that it should be done 'for the purposes of breeding' in a very general sense, which includes breeding for commercial purposes. On the other hand, Article 9 (1) (b) of the directive expressly provides that the breeding of protected species of birds is permitted only for the purposes of repopulation and reintroduction.

Since it is obvious that the provision at issue is not in conformity with the directive, the Government of the Federal Republic of Germany has already emphasized in a communication dated 25 February 1985 that it was prepared 'to refer to the directive and to make clear, at least by way of example, the extent of the power to adopt rules derogating from the prohibitions contained in Paragraph 22 (2) of the law [and] to repeal the powers of the *Länder* to define in legislation the fact constituting a derogation'.

The *Government of the Federal Republic of Germany,* on the other hand, states that the

provision in question does not itself grant any derogation from the provisions of the directive. It merely grants a power to adopt regulations. However, the *Länder* cannot adopt, on the basis of that provision, legal provisions going beyond the derogations contained in Article 9 (1) of the directive. Since the *Länder* are bound by Article 189 of the Treaty, they are therefore required to adopt legal provisions which come within the framework of Article 9 (1) of the directive.

K. Bahlmann
Judge-Rapporteur