JUDGMENT OF THE COURT (Sixth Chamber)

11 September 2001 *

In Case C-220/99,

Commission of the European Communities, represented by P. Stancanelli and O. Couvert-Castéra, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger and D. Colas, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), together with the information on each site required by the second subparagraph of Article 4(1) thereof, the French Republic has failed to fulfil its obligations under that directive,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, V. Skouris, R. Schintgen, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 18 January 2001,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 9 June 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive

92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the directive'), together with the information on each site required by the second subparagraph of Article 4(1) thereof, the French Republic had failed to fulfil its obligations under that directive.

Community law

2 According to its Article 2, the aim of the directive is to contribute towards biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies.

3 Article 3(1) and (2) of the directive provides:

'1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.'

4 A 'site' is defined by Article 1(j) of the directive as a geographically defined area whose extent is clearly delineated. Article 1(k) of the directive defines a 'site of Community importance' as being a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000, and/or contributes significantly to the maintenance of biological diversity within the biogeographical region or regions concerned. For animal species ranging over wide areas, sites of Community importance must correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction.

5 The procedure governing the designation of special areas of conservation ('SACs'), which is laid down in Article 4 of the directive, consists of four stages. First, each Member State must propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II native to its territory the sites host (Article 4(1)). Second, the Commission, on the basis of the lists of the Member States and in agreement with each of them, must establish a draft list of sites of Community importance (Article 4(2), first and second subparagraphs). Third, the list of sites selected as sites of Community importance must be adopted by the Commission in accordance with the procedure laid down in Article 21 of the directive (Article 4(2), third subparagraph, and 4(3)). Fourth, Member States are required to designate sites of Community importance as SACs (Article 4(4)).

6 With more specific regard to the first stage, Article 4(1), first subparagraph, of the directive requires Member States to propose the list of sites there mentioned on the basis of the criteria set out in Annex III (Stage 1) to the directive and relevant scientific information.

7 Annex III (Stage 1), Parts A and B, to the directive sets out the following criteria:

'A. *Site assessment criteria for a given natural habitat type in Annex I*

(a) Degree of representativity of the natural habitat type on the site.

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

B. *Site assessment criteria for a given species in Annex II*

(a) Size and density of the population of the species present on the site in relation to the populations present within national territory.

(b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.

(c) Degree of isolation of the population present on the site in relation to the natural range of the species.

(d) Global assessment of the value of the site for conservation of the species concerned.'

8 Under Annex III (Stage 1), Part C, to the directive, Member States are required, on the basis of the criteria set out in Annex III (Stage 1), Parts A and B, to classify the sites which they propose on the national list as sites eligible for identification as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

9 Under the second subparagraph of Article 4(1) of the directive, the list of sites proposed must be transmitted to the Commission within three years of notification of the directive, together with information on each site. This information must include a map of the site, its name, location, extent and the

data resulting from application of the criteria specified in Annex III (Stage 1), and must be provided in a format established by the Commission in accordance with the procedure laid down in Article 21 of the directive ('the format').

10 Since the directive was notified on 10 June 1992, Member States ought to have transmitted the list of proposed sites and the information on those sites to the Commission before 11 June 1995.

11 The format was established only by Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1997 L 107, p. 1). That decision was notified to the Member States on 19 December 1996 and published in the *Official Journal of the European Communities* on 24 April 1997.

Pre-litigation procedure

12 Having failed to receive from the French authorities either a full list of sites hosting the natural habitat types and native species referred to in Annexes I and II to the directive respectively or the information on those sites, and in the absence of anything else indicating to it that the French Republic had adopted the measures necessary to meet its obligations under Article 4 of the directive, the Commission, on 27 March 1996, put the French Government on formal notice to submit its observations on that matter within two months.

13 Bearing in mind the fact that the format had been available only from 19 December 1996, the Commission sent to the French Government on 3 July 1997 an additional letter of formal notice in which it once again criticised it for failing to transmit a full list of sites and relevant site information and called on it

to submit its observations on that infringement of Article 4(1) of the directive within one month. The Commission stressed, in particular, the need to use the format for transmission of the relevant data.

14 By letter of 21 October 1997, the French authorities forwarded an initial list of 74 sites. Partial information on those sites was submitted only in respect of 25 of them. The remaining 49 sites were mentioned only by name, with no reference to the area which they covered or to the types of natural habitats or native species which they hosted.

15 Since its correspondence with the French authorities did not allow it to conclude that the French Republic had forwarded a full list of the sites hosting the natural habitat types and native species listed in Annexes I and II to the directive respectively or the information relating to those sites, the Commission, on 6 November 1997, issued a reasoned opinion to that Member State requesting compliance within two months of notification.

16 By letters of 9 December 1997, 22 and 26 January 1998, 12 February 1998, 17 November 1998, 21 and 28 January 1999 and 18 February 1999, the French authorities forwarded to the Commission site lists containing a total of 672 sites hosting natural habitat types and species' habitats listed in Annexes I and II to the directive respectively and representing a land area of 1 453 000 hectares, together with 381 formats relating to a number of those sites.

17 Taking the view that those communications did not allow it to conclude that the French Republic had put an end to the infringement in question, the Commission decided to bring the present action before the Court.

Admissibility

18 The French Government argues that the part of the application relating, first, to the inadequate number of sites proposed when considered against the number of sites worthy of inclusion on the national list and, second, to the exclusion of sites on grounds not provided for under the directive must be declared inadmissible on the ground that the Commission did not raise those heads of complaint in the reasoned opinion.

19 It must be noted in this regard that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that the Commission's reasoned opinion and application must consequently be based on the same complaints (see, *inter alia*, Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraph 24).

20 That rule, however, does not prevent the Commission from setting out its initial complaints in greater detail in its application, on condition that it does not alter the subject-matter of the dispute (see, along these lines, Case C-256/98 *Commission* v *France* [2000] ECR I-2487, paragraphs 30 and 31).

21 In its reasoned opinion, the Commission criticised the French Republic for having failed to forward either the complete list of sites eligible for designation as SACs or the information relating to those sites, as required under Article 4(1), first and second subparagraphs, of the directive. The Commission has pointed out in that regard that the partial list forwarded by the French authorities on 21 October

1997 could not be treated as being a full list either from the geographical point of view or with regard to the types of natural habitats and species' habitats to be covered, and that the site information communicated did not relate to all of the sites in question.

22 In its application, the Commission set out the same heads of claim as in the reasoned opinion. It first pointed out that the French Republic had not proposed any site situated in military areas but had stated that sites of this type which were eligible for inclusion in the Natura 2000 network would be forwarded subsequently. Second, the Commission noted that no site had been proposed for several types of natural habitats under Annex I and several native species under Annex II to the directive which were none the less to be found on French territory. Third, it pointed out that a comparison between the lists sent and the available scientific data concerning the natural habitat types and native species occurring in France indicated that several of these were not included on those lists. The Commission noted in particular that, of the 1 695 natural areas of ecological interest catalogued and classified according to value in the national scientific inventory compiled by the Muséum national d'histoire naturelle (National Museum for Natural History) under the aegis of the French Government, the latter had decided to exclude 319 of them. Likewise, the Commission contended that the French authorities had, in selecting sites and excluding some of them, taken account of criteria not mentioned in the directive.

23 It follows that, in its application, the Commission did not alter the subject-matter of the dispute but merely illustrated the head of complaint set out in its reasoned opinion, concerning failure to forward a list featuring all sites eligible for designation as SACs, by providing precise examples of the shortcomings in the lists already forwarded by the French Republic.

24 The plea of inadmissibility raised by the French Republic must for those reasons be rejected.

Substance

The first plea in law

25 With regard to the obligation to transmit the site list referred to in Article 4(1), first subparagraph, of the directive, the Commission points out that each Member State's contribution to the setting up of a coherent European ecological network depends on the representation on its territory of the natural habitat types and species' habitats listed in Annexes I and II to the directive respectively. It is clear from a combined reading of Article 4(1) of and Annex III to the directive that Member States enjoy a certain margin of discretion when selecting sites for inclusion in the list. The exercise of that discretion is, however, in the Commission's view, subject to compliance with the following three conditions:

— only criteria of a scientific nature may guide the choice of the sites to be proposed;

— the sites proposed must provide a geographical cover which is homogeneous and representative of the entire territory of each Member State, with a view to ensuring the coherence and balance of the resulting network. The list to be submitted by each Member State must therefore reflect the ecological variety (and, in the case of species, the genetic variety) of the natural habitats and species present within its territory;

— the list must be complete, that is to say, each Member State must propose a number of sites which will ensure sufficient representation of all the natural

habitat types listed in Annex I and all the species' habitats listed in Annex II to the directive which occur within its territory.

26 So far as the French national list is concerned, the Commission notes that, when the period laid down in the reasoned opinion expired on 6 January 1998, the French Republic had forwarded to it a list of 535 sites; when it brought its action before the Court, this list had increased to 672 sites; at the date of the hearing, 18 January 2001, the French Republic had forwarded in total a list of 1 030 sites.

27 The Commission states that it instituted the present proceedings with a view to securing a declaration that the French national list was manifestly inadequate, and that such inadequacy far exceeded the margin of discretion given to Member States. Such inadequacy is evident with regard to the situation existing when the period set in the reasoned opinion expired, since the French Republic subsequently almost doubled the number of sites proposed. That inadequacy, moreover, still persists, notwithstanding indubitable progress. The French national list, the Commission concludes, does not therefore meet the criteria set out in Article 4(1) of the directive, read in conjunction with Annex III thereto.

28 The French Government acknowledges that, when the period set in the reasoned opinion expired, it had not forwarded all of the sites which ought to feature on the list of sites mentioned in Article 4(1), first subparagraph, of the directive.

29 The French Government does, however, point out that, at the date of the hearing, the French national list contained a total of 1 030 sites covering approximately 5% of French territory. The Commission, it argues, has failed to adduce any evidence capable of establishing that this list of 1 030 sites does not satisfy the obligation laid down in Article 4(1) of the directive. The first stage of the procedure for the designation of SACs does not, it contends, involve the establishment of an exhaustive inventory of the sites within the territory of each

Member State which host the natural habitat types and native species listed in Annexes I and II to the directive respectively. The relevance of the national list must be judged, not on the basis of the number of sites proposed, but on the basis of the representative nature of the natural habitats and species' habitats featuring on that list, assessed particularly with regard to their degree of rarity and their distribution throughout national territory.

30 Although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1) of the directive, that Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the directive.

31 It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive (Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 22).

32 Only in that way, moreover, is it possible to realise the objective, set out in the first subparagraph of Article 3(1) of the directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i) of the directive, read in conjunction with Article 2(1) thereof, that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies (*First Corporate Shipping*, cited above, paragraph 23).

33 It must also be recalled that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion. The Court cannot therefore take account of any subsequent changes (see, *inter alia*, Case C-266/99 *Commission* v *France* [2001] ECR I-1981, paragraph 38).

34 When the period laid down in the reasoned opinion expired on 6 January 1998, the content of the French national list sent to the Commission was manifestly inadequate, going well beyond the margin of discretion available to Member States for the purpose of drawing up the list of sites mentioned in Article 4(1), first subparagraph, of the directive. In accordance with the case-law cited in the preceding paragraph of the present judgment, the lists of sites communicated to the Commission after the expiry of that period are irrelevant for purposes of the present action.

35 It must therefore be concluded that, by failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1) of the directive, the French Republic has failed to fulfil its obligations under that directive.

The second plea in law

36 With regard to the obligation to transmit information on the sites eligible for designation as SACs, the French Government acknowledges that it did not send that information by the expiry of the period laid down in the reasoned opinion, but argues that it was quite impossible for it to meet that obligation within the time specified. It considers that the Commission's delay in drafting the format affected the entire national procedure. When the Commission notified Decision 97/266 adopting the format, the French authorities were obliged to transfer and amend all of the data already contained on a national schedule.

37 The Commission submits that the obligation to transmit the site information was to be met before 11 June 1995. Even if certain Member States which already had the list of proposed sites and relevant information before 11 June 1995 wished to await adoption of the format, they could, after the format was notified on 19 December 1996, rapidly have incorporated that information in the format and forwarded it to the Commission.

38 The Commission adds that, in order to take account of the late adoption of the format, it extended the pre-litigation procedure by addressing an additional letter of formal notice to the French Republic on 3 July 1997, thus well after the date on which the format was notified. The French authorities were therefore fully in a position to meet their obligation to transmit the information on each site. When the period laid down in the reasoned opinion expired on 6 January 1998, the French Republic had not sent to the Commission the information on the sites to be proposed.

39 It is necessary first to point out that, even though the Commission had initially sent to the French Government a letter of formal notice on 27 March 1996, that is to say, before the format was notified, it sent to that Government a new letter of formal notice, following notification of the format, giving it a new period within which to comply with Article 4(1), second subparagraph, of the directive.

40 Next, it should be noted that, following notification of the directive on 10 June 1992, the Member States were aware which types of information they would be required to collate for purposes of transmission within three years of that notification, that is to say, by 11 June 1995. They also knew that this information had to be provided on the basis of the format once it had been drawn up by the Commission. Article 4(1), second subparagraph, of the directive expressly states

that the information to be transmitted, in a format established by the Commission, must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1).

41 The period which the Commission gave to the French Government for meeting its obligation to include on the format the site information, which it should have had at its disposal prior to 11 June 1995, must therefore be regarded as reasonable. From 19 December 1996, the date on which the format was notified, to 6 January 1998, when the period laid down in the reasoned opinion expired, the French Government benefited from a period of more than one year to comply with that specific obligation.

42 Since the French Government acknowledges that, when the period laid down in the reasoned opinion expired, it had not transmitted to the Commission, in the format, the information on the sites to be proposed, it must be held that, by failing to transmit to the Commission, within the period prescribed, the information relating to the sites on the list mentioned in the first subparagraph of Article 4(1) of the directive, pursuant to the second subparagraph of Article 4(1), the French Republic has failed to fulfil its obligations under that directive.

Costs

43 Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the French Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by failing to transmit to the Commission, within the period prescribed, the list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, together with the information on those sites required by the second subparagraph of Article 4(1) thereof, the French Republic has failed to fulfil its obligations under that directive;**

2. **Orders the French Republic to bear the costs.**

Gulmann Skouris Schintgen

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2001.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber