Judgment of the court (Fourth Chamber)

14 April 2011 *

In Case C-522/09,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 15 December 2009,

European Commission, represented by D. Recchia and L. Bouyon, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Romania, represented initially by A. Popescu, L.-E. Batagoi, M.-L. Colonescu, A.-R. Arşinel and J.S. Smaranda, and subsequently by L.-E. Batagoi, M.-L. Colonescu, A.-R. Arşinel and J.S. Smaranda, acting as Agents,

defendant,

* Language of the case: Romanian.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen (Rapporteur), C. Toader and A. Prechal, Judges,

Advocate General: J. Kokott,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 13 January 2011,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare that, by failing to classify as special protection areas ('SPAs') sufficient territories in number and size to protect adequately all the species of birds listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1; 'the Birds Directive') and the migratory species which are not included in

that annex, Romania has failed to fulfil its obligations under Article 4(1) and (2) of that directive.

Legal context

European Union law

2 Article 4(1) and (2) of the Birds Directive provides:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as [SPAs] for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.'

3 The Treaty of Accession of the Republic of Bulgaria and Romania to the European Union (OJ 2005, L 157, p. 11) entered into force on 1 January 2007. Article 53(1) of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on whic]h the European Union is founded (OJ 2005, L 157, p. 203) provides that Romania is to put into effect the measures necessary for it to comply, from the date of accession, with the provisions of directives within the meaning of Article 249 EC, unless another time-limit is provided for in the Act.

That article also provides that Romania is to communicate those measures to the Commission at the latest by the date of accession or, where appropriate, by the time-limit provided for in the Act.

4 Since the Act lays down neither a transitional period for the designation of SPAs in accordance with Article 4(1) and (2) of the Birds Directive nor a specific time-limit for communication of the measures transposing that directive, Romania had to adopt and communicate the measures implementing the directive, in particular those relating to that article, by the date of accession at the latest.

Pre-litigation procedure

5 Since Romania had not communicated the national list of SPAs that was required by virtue of Article 4(1) and (2) of the Birds Directive, the Commission took the view that it had failed to fulfil the obligation laid down by those provisions by not designating the appropriate SPAs and therefore sent a letter of formal notice to it on 23 October 2007.

6 In this connection, the letter of formal notice stated as follows:

'However, to date the Romanian Government has not communicated to the Commission the national list of [SPAs]. On that basis, it can be concluded that Romania has failed to comply with its obligation to undertake the measures provided for in Article 4(1) and (2) of the Birds Directive, given that it has not classified the relevant SPAs.

Consequently, the Commission … takes the view that, since it has not classified the most suitable territories in number and size as SPAs for the protection of the species listed in Annex I to [the Birds Directive] and other migratory species which regularly occur in its territory, Romania has not fulfilled the obligations laid down in Article 4(1) and (2) of that directive.'

7 In its reply of 21 December 2007, Romania stated that a governmental decision relating to the designation of the SPAs had been adopted and published with its annexes containing the list of SPAs in the *Monitorul Oficial al României* of 31 October 2007.

8 Since the Commission took the view that the territories classified as SPAs were not sufficient in number and size having regard to the objectives for protection of the bird species listed in Annex I to the Birds Directive and of migratory species, on 23 September 2008 it issued a reasoned opinion in which it called upon Romania to take the measures necessary to comply therewith.

9 By letter of 25 November 2008, the Romanian authorities responded to the Commission's reasoned opinion, contending, in particular, that the Commission had changed the subject-matter of the procedure since the letter of formal notice was founded on failure to transmit the list of SPAs whereas the reasoned opinion concerned the designation of SPAs that were insufficient in number and size. They also set out the reasons, accompanied by supporting documents, for which certain sites had not been designated in their entirety or in part, as the case may be.

10 Since the Commission took the view that Romania's breach of obligations remained, it brought the present action on 15 December 2009.

The action

Arguments of the parties

11 Romania submits that the action is inadmissible on the ground that the Commission changed its subject-matter. The Commission complained in its letter of formal notice that Romania had not communicated the list of SPAs, whereas in the reasoned opinion its argument was that the SPAs designated were insufficient in number and size. Romania states that, in accordance with settled case-law of the Court, the reasoned opinion must be based on the same complaints as those relied upon in the letter of formal notice.

12 In Romania's submission, the Commission relied upon the insufficient number and size of the designated SPAs for the first time in the reasoned opinion, so that the Romanian authorities had no reason to demonstrate, or means of demonstrating, in their reply to the letter of formal notice that the designation of those areas sufficed. The defendant Member State further submits that, in the period that elapsed between the reply to the letter of formal notice and the reasoned opinion, it was kept in a state of uncertainty so far as concerns the insufficiency of the SPAs designated, so that it was unable to prepare an appropriate defence from the beginning of the pre-litigation phase.

13 The Commission counters by stating that in its letter of formal notice it complained that Romania had not communicated to it the national list of SPAs that was required by virtue of Article 4(1) and (2) of the Birds Directive and had failed to fulfil the obligation laid down by those provisions by not designating the appropriate SPAs. In the reasoned opinion, the Commission, after assessing the national implementing measures, specified that the territories classified as SPAs were not sufficient in number and size in light of the provisions in question. In this connection, it notes that, according

to the Court's case-law, and in particular Case C-32/05 *Commission* v *Luxembourg* [2006] ECR I-11323, paragraph 56, a complaint concerning incomplete transposition is necessarily included in a complaint alleging a complete failure to transpose and is subsidiary to that complaint.

14 The Commission also states that, while the letter of formal notice and the reasoned opinion must be based on the same complaints, that procedural requirement cannot go so far as to mean that in every case they must be exactly the same, if the subject-matter of the proceedings has not been extended or altered but, on the contrary, limited. Thus, Romania's rights of defence have not been infringed.

Findings of the Court

15 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the complaints formulated by the Commission (see, inter alia, Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 22 and the case-law cited).

16 The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the FEU Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations (see, inter alia, Case 211/81 *Commission* v *Denmark* [1982] ECR 4547, paragraph 9).

17 In the present case, it is clear that, by its letter of formal notice, the Commission essentially complained that Romania had not communicated to it the national list of SPAs, and that it relies on this complaint to infer, in very general terms, a failure on the part of Romania to fulfil its obligation to classify suitable SPAs for the purposes of Article 4(1) and (2) of the Birds Directive.

18 Also, on 21 December 2007, less than two months after receiving the letter of formal notice, Romania forwarded to the Commission the national list of the SPAs that it had classified in the meantime, a list which shows that a significant number of SPAs were classified by Romania pursuant to Article 4(1) and (2) of the Birds Directive. Nevertheless, in a reasoned opinion issued on 23 September 2008 the Commission complained, relying on detailed arguments, that the SPAs classified by Romania were insufficient in number and size in light of Article 4(1) and (2) of the Birds Directive, without first having given Romania the opportunity to put forward its observations in that regard.

19 Such a situation is therefore clearly distinguishable from the situation, invoked by the Commission, that gave rise to the judgment in *Commission* v *Luxembourg*. In that case, the Grand Duchy of Luxembourg had failed to mention any measure transposing the directive in question in the course of the pre-litigation procedure and had merely let it be understood that the measures necessary for implementation were about to be adopted. It was not until after the Commission brought proceedings before the Court that the Grand Duchy of Luxembourg submitted, in its defence, that a law transposing the directive in question correctly had been adopted. In such circumstances, the Court has held that, if the pre-litigation procedure attained its objective of protecting the rights of the Member State concerned, the latter cannot complain that the Commission has extended or altered the subject-matter of the action as defined by the pre-litigation procedure on the ground that the Commission, after alleging a failure

by the Member State to transpose a directive, has specified in its reply that the implementation pleaded for the first time by the Member State concerned in its defence is incorrect or incomplete so far as certain provisions of the directive are concerned (*Commission* v *Luxembourg*, paragraphs 54 to 56).

20 In light of the foregoing it must therefore be found that the letter of formal notice did not identify sufficiently the failure to fulfil obligations of which Romania was subsequently accused in the reasoned opinion and that the pre-litigation procedure did not attain its objective of guaranteeing the right of the Member State concerned to submit its observations against the complaints formulated by the Commission, so that the action must be held inadmissible.

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 applied for in the successful party's pleadings. Since Romania has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Dismisses the action as inadmissible;

2. Orders the European Commission to pay the costs.

[Signatures]