OPINION OF MR ADVOCATE GENERAL VAN GERVEN

delivered on 21 September 1993 *

Mr President,
Members of the Court,

1. In this case, the Administrative Court of Nantes has referred three questions to the Court concerning the interpretation of Article 7(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1] (hereinafter 'the Wild Birds Directive' or 'the Directive').

Relevant law and facts

2. The questions referred were raised in the course of six actions for annulment which were brought before the Administrative Court of Nantes by various environmental associations and a hunters' association against the decisions of the Prefect of Maine-et-Loire and of the Prefect of Loire-Atlantique fixing the closing dates for their respective departments for the 1992-1993 hunting season. The various parties base their action for annulment in particular on alleged contraventions of the Wild Birds Directive.

3. Article 1(1) provides that the Wild Birds 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.'

Article 2 provides generally that 'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements...'.

Article 5 of the Directive requires the Member States to take steps to prohibit the deliberate killing, capture, disturbance or keeping of all birds referred to in the Directive.

In derogation from that prohibition, Article 7 permits certain birds to be hunted, albeit subject to restrictive conditions. The

* Original language: Dutch.
1 — OJ 1979 L 103, p. 1.

provisions of Article 7 which are relevant to the questions referred read as follows:

'1. Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation. Member States shall ensure that the hunting of these species does not jeopardize conservation efforts in their distribution area. ...

4. Member States shall ensure that the practice of hunting,... as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2. They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds...'.

It is particularly this last passage, namely the third sentence of Article 7(4), relating to the return of migratory birds to their rearing grounds, which is important in this case.

4. In France the rules concerning the fixing of the hunting season are to be found in Articles R.224-3, R.224-4 and R.224-5 of the Rural Code. [2]

Article R.224-3 provides that shooting and hunting with birds of prey shall be open during periods to be fixed anew each year by decision of the prefect of each department, on the motion of the departmental director of agriculture and forestry and after the departmental council on hunting and wild animals and the hunters' federation have given their opinions. The decision must be published at least twenty days before it comes into force.

Article R.224-5 prescribes for certain wild species, including migratory birds and waterfowl, parameters within which the opening and closing dates set by the prefects must lie. [3] For migratory birds the latest permitted closing date is the last day of February. [4] For waterfowl the latest closing date is

2 — These articles derive from Decree No 86-571 of 14 March 1986, JORF of 18 March 1986, p. 4521, as amended.

3 — For the wild species not mentioned in Article R.224-5, Article R.224-4 prescribes the earliest permitted general opening date and the latest permitted general closing date. The earliest general opening date is different for four geographical parts of France (the first Sunday in September in Corsica, the second Sunday in September in the south-eastern part, the third Sunday in September in the south-western part and the fourth Sunday in September in the northern and central part) while the latest general closing date for the whole country is the last day of February.

4 — The earliest permitted opening date is the general opening date as laid down in Article R.224-4, except for the turtle dove for which it is 15 August.

also the last day of February, except for mallard for which it is set at 15 February. [5]

5. By decision of 7 July 1992 the Prefect of the department of Maine-et-Loire set the closing date for the hunting of migratory birds and waterfowl as follows:

MIGRATORY BIRDS 28 February 1993

WATERFOWL:

mallard	10 February 1993
greylag goose, shoveler, pochard and lapwing	20 February 1993
other waterfowl	28 February 1993

The Prefect of the department of Loire-Atlantique set the following closing dates by decision of 22 July 1992:

MIGRATORY BIRDS:

woodcock and wood pigeon	28 February 1993
other migratory birds	10 January 1993

WATERFOWL:

mallard	7 February 1993
lapwing, golden plover, oystercatcher greylag goose and other *anatidae*	14 February 1993
other waterfowl	28 February 1993

5 — The earliest permitted opening date for all waterfowl is the general earliest opening date as laid down in Article R.224-4.

6. An action for the annulment of the decision of the Prefect of Maine-et-Loire was brought before the Administrative Court of Nantes by the Association pour la Protection des Animaux Sauvages, which argued *inter alia* that the decision was unlawful because it authorized an overly long hunting season for migratory birds and waterfowl.

Actions for the annulment of the decision of the Prefect of Loire-Atlantique were brought before the same Administrative Court by the same Association pour la Protection des Animaux Sauvages, and by the Groupe Ornithologique de Loire-Atlantique, the Société pour l'Etude et la Protection de la Nature en Bretagne and the Rassemblement des Opposants à la Chasse, on the ground that the decision authorized an overly long hunting season for migratory birds and waterfowl. The Fédération Départementale des Chasseurs de Loire-Atlantique also seeks the annulment of the decision, but on the ground that it closes the hunting season for a number of species too early.

The questions referred

7. In six orders of 17 December 1992 — one for each of the six actions for annulment — the Administrative Court of Nantes decided to refer three questions to the Court for a preliminary ruling, namely:

— whether the closing date for the hunting of migratory birds and waterfowl should

be fixed as the date of the commencement of pre-mating migration or the varying date of commencement of migration;

— whether, by virtue of Article 7(4) of the Wild Birds Directive, it is unlawful for the national authorities to fix closing dates for the hunting season which vary according to species; and

— whether the power of the Prefects to set the closing dates for hunting in their department is compatible with the protection provided by the Directive.

I shall examine these three questions in turn. In addition I shall discuss some of the arguments of the various parties before the Court (namely the Prefect of Maine-et-Loire, the Rassemblement des Opposants à la Chasse, the Fédération des Chasseurs de Loire-Atlantique, the French Government and the Commission of the European Communities). However, reference is made to the Report for the Hearing for a full review of the arguments of the various parties.

Answer to the first question

8. The first question referred is the question whether the closing date for the hunting of migratory birds and waterfowl should be fixed as the date of the commencement of pre-mating migration or the varying date of commencement of migration. It is apparent from the orders for reference of the Administrative Court of Nantes that by those dates that court means two dates as interpreted in a joint report 'Pattern and Timing of Pre-mating Migration and Reproduction of Waterfowl in France' drawn up by the Muséum National d'Histoire Naturelle and the Office National de la Chasse in March 1989 by order of the French Secretary of State for the Environment (hereinafter 'joint report'). In order fully to understand the question referred it seems to me indispensable to go in some detail into this joint report and the related circular of the French Ministry of the Environment, which is also mentioned by the referring court in its orders.

9. The first part of the joint report, which has been put before the Court by various parties, contains the results of a study concerning the pre-mating migration of waterfowl in France. [6] It is apparent from the preface by the Secretary of State for the Environment that the study was expressly intended to assemble scientific data for the application of Article 7(4) of the Wild Birds Directive, in particular of the provision therein that the Member States 'In the case of migratory species... shall see... that the species to which hunting regulations apply are not hunted... during their return to their rearing grounds' (see paragraph 3 above).

6 — The report thus contains no information concerning migratory birds other than waterfowl. At the hearing the expert called by the French Government confirmed that scientific knowledge concerning those other migratory birds is more limited. Further research may show that their migration exhibits a greater geographical range than is the case for waterfowl. My Opinion concerns all migratory birds; see however paragraph 17 and footnotes 21 and 31 in particular for the other migratory birds.

In the conclusions of that study the joint report states that the date of the commencement of pre-mating migration varies on the basis of three factors. First, there are differences between the species of birds: some start their migration early, others late. Secondly, there are differences from year to year. For some species this annual variation is considerable, for other species it is limited. [7] Thirdly, there are geographical differences. This geographical variation seems however to be relatively unimportant compared with the variation from year to year.

By way of a summary, the joint report then contains the following data for the different species of waterfowl:

1) One generally applicable date for the commencement of pre-mating migration. This involves a sort of average which — as I understand it — was arrived at by first taking for each year the median (that is the middle value) date for the various geographical areas, and then taking the median value for the different years which appears most frequently (this is the 'modus'). It is this average starting date which the referring court means when it refers to 'the date of the commencement of pre-mating migration.'

2) The parameters (earliest and latest dates) within which the date of the commencement of pre-mating migration varies both from year to year and also geographically. This earliest date is what is called the 'varying date of commencement of migration' in the question referred.

3) The period of maximum migratory activity. This is — as I understand it — the period within which the greatest number of birds are migrating. [8]

10. On the basis of this joint report a memorandum was drawn up in December 1991 by the French Ministry of the Environment in cooperation with the Muséum National d'Histoire Naturelle which summarizes and puts into effect the findings of the joint report. In addition the Ministry of the Environment also drew up a memorandum concerning the use of quantitative criteria for setting the dates for the opening and closing of the hunting season. That last memorandum advocated deeming the commencement of pre-mating migration to be significant only when 10 % of the birds have started their migration.

Finally, on 9 January 1992 the Ministry of the Environment addressed a circular to the Prefects of the departments — this circular

7 — Thus it is apparent from the study that the commencement of the pre-mating migration of teal varies from year to year between the beginning of January and the end of February, while the commencement of the pre-mating migration of garganey always falls between the middle and the end of February.

8 — All these data are expressed with ten days (a decade) as the base unit — each month contains three decades. Thus it is stated for the greylag goose that (1) the commencement of pre-mating migration is the first decade of February; (2) this commencement varies from the first to the third decade of February; and (3) the period of maximum migratory activity is from the second decade of February to the first decade of March.

to which were annexed the two abovementioned memoranda was submitted to the Court by the French Government. [9] The circular states that the closing date for the hunting of each species of bird must be set within the decade [10] in which, according to the previous year's statistics, 10% of birds of that species started their migration. The decisions of the Prefects of Maine-et-Loire and Loire-Atlantique which are the subject matter of the main proceedings before the Administrative Court of Nantes (see paragraph 5) accord with this circular.

11. As it explains in its orders for reference, the Administrative Court of Nantes was thus faced with four categories of data or four possible methods of fixing the closing date for the hunting of migratory birds and waterfowl: three from the joint report (the average date of commencement, the earliest variable date and the period of maximum migratory activity; see paragraph 9 above) and a fourth from the ministerial circular (the point at which 10% of the birds have started their migration).

The Administrative Court states in its orders for reference — quite correctly, as I shall explain below (paragraph 18) — that two of these four possibilities, namely the period of maximum migratory activity and the point at which 10% of the birds have started their migration are in any event incompatible with the third sentence of Article 7(4) of the Wild Birds Directive, as interpreted by the Court in its judgment in Case C-157/89. [11] There thus remain the average date of commencement and the earliest variable date as interpreted in the joint report. As I understand it, the question referred seeks a ruling on the interpretation of Community law so as to enable the national court to rule on the compatibility of these two methods with the Wild Birds Directive.

12. It appears to me that the guidance requested is implicit, but certainly present, in the abovementioned judgment in Case C-157/89. In that judgment the Court has already given a ruling on the interpretation of (*inter alia* [12]) the third sentence of Article 7(4) of the Wild Birds Directive:

'As far as [concerns]... the interpretation of the... third [sentence] of Article 7(4) of the Directive, it appears from the documents before the Court that birds'... migratory movements are subject to a degree of variability which, owing to meteorological circumstances, affects in particular the periods during which... migration [takes] place. Thus... a number of birds of a given migratory species may begin their return journey to their rearing grounds comparatively early relative to average migratory flows.

9 — At the hearing it was stated by the Rassemblement des Opposants à la Chasse — without contradiction by the other parties — that the Muséum National d'Histoire Naturelle expressly distanced itself from this circular, commenting that the contents had no scientific basis.

10 — See footnote 8 for an explanation of this unit.

11 — *Commission* v *Italy*[1991] ECR I-57.

12 — The judgment also concerns the second sentence of that provision. In the following quotation I omit the references to that sentence.

The question is therefore whether a Member State may authorize hunting to take place... so long as most birds of a given migratory species are not yet flying over the territory of that Member State towards their rearing grounds, or whether the national legislature has to add to the habitual... migration period an additional period designed to take account of the variations mentioned above.

... the third [sentence] of Article 7(4) of the Directive [is] designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat. Consequently, protection against hunting activities cannot be confined to the majority of the birds of a given species, as determined by average... migratory movements. It would be incompatible with the objectives of the Directive if, in situations characterized by... early migration, part of the population of a given species should fall outside the protection laid down.' [13]

13. In this case the French Government and the Fédération des Chasseurs de Loire-Atlantique argue for a restrictive interpretation of that judgment. Presented somewhat schematically, their position appears to come down to the proposition that the judgment establishes solely that a closing date for hunting (or a method of setting that date) is incompatible with the third sentence of Article 7(4) of the Wild Birds Directive if the effect of that date (or method) is that not more than 50% of birds of a particular species are protected against hunting while they are migrating. Conversely, the Directive would be complied with as soon as it was guaranteed that more than 50% of birds of a particular species could not be hunted while migrating. The method set in the circular letter of 9 January 1992 from the French Ministry of the Environment, according to which the hunting season must close when 10% of birds have begun to migrate, is thus compatible with the Directive, because a much higher percentage than 50%, namely 90%, of birds are protected by it.

This restrictive interpretation does not appear to me to be correct. It is true that the judgment in Case C-157/89 speaks of a 'majority', but this must be understood as only one application of a broader principle contained in the judgment. The central proposition of the judgment seems to me to be that 'the... third [sentence] of Article 7(4) of the Directive [is] designed to secure a *complete* system of protection in the periods during which the survival of wild birds is particularly under threat' (see paragraph 12 above; emphasis added), including pre-mating migration. The Court then concludes from that principle that 'It would be incompatible with the objectives of the Directive if, in situations characterized by... early migration, part of the population of a given species should fall outside the protection laid down.' That conclusion seems to me to be equally applicable to a 10% part of the population as to a 50% part.

14. For a full understanding of all this I think that it would be useful to analyse further the objective and general structure of the Wild Birds Directive. In this case the

13 — Case C-157/89, cited above, paragraphs 12-14 of the judgment.

various parties seem to start from very different interpretations, although in my view the Directive and the judgment of the Court are unambiguous.

The objective of the Wild Birds Directive is the preservation of species of birds occurring in the wild state. This is apparent from the title of and the preamble to the Directive, and is also explicitly provided in Article 1(1) (see paragraph 3 above). In order to achieve this objective the Directive contains first in Article 2 (see paragraph 3 above) a general obligation on the Member States to take 'the requisite measures' and secondly a number of specific obligations set out in the subsequent articles of the Directive. One of these specific obligations, laid down in Article 5, concerns the prohibition on hunting species of birds occurring in the wild state. In derogation from that prohibition, Article 7 provides that Member States may permit the hunting of a limited number of species (namely those mentioned in Annex II to the Directive) and subject to a number of restrictive conditions. These restrictive conditions can be divided into two categories. First there are more generally formulated restrictions, namely in the last sentence of Article 7(1) and the first sentence of Article 7(4), which reflect the general obligation set out in Article 2 of the Directive. Secondly there are two restrictions, set out in the second and third sentences of Article 7(4), which are very clear and specific in nature and which apply 'in particular'. The second of these last restrictions concerns the prohibition on hunting migratory birds during their period of reproduction and during their return to their rearing grounds.

15. It is quite clear from the objective and structure of the Wild Birds Directive and from the wording of the third sentence of Article 7(4) that the prohibition on hunting migratory birds during their return to their rearing grounds [14] is not to be interpreted restrictively but requires full ('complete', to use the word employed in the judgment in Case C-157/89) compliance. Moreover, it seems to me — contrary to the arguments put forward by the French Government and the Fédération des Chasseurs de Loire-Atlantique — that there is no scope for derogating from that prohibition, or for qualifying it in any other way, by reference to the 'recreational requirements' mentioned in Article 2 of the Directive. The third sentence of Article 7(4) contains a clear and specific obligation which is independent of the general obligation laid down by Article 2. On this point a parallel may be drawn with Article 4(4) of the Wild Birds Directive. That provision contains several specific obligations relating to special protection areas for birds. Member States have repeatedly argued in connection with these obligations that exceptions or derogations should be possible on the ground of the 'economic and recreational requirements' mentioned in Article 2. The Court has however consistently dismissed that argument, and has clearly stated that Article 2 is not 'an autonomous derogation from the general system of protection established by the directive'. [15] Since this is

14 — I shall discuss no further the prohibition in the same sentence on hunting migratory birds during their period of reproduction or the analogous prohibition in the previous sentence, since they are not in issue in this case. My reasoning is however also applicable, *mutatis mutandis*, to those prohibitions.

15 — Judgment in Case C-57/89 *Commission* v *Germany* [1991] ECR I-883, at paragraph 22, referring to the judgments in Case 247/85 *Commission* v *Belgium* [1987] ECR 3029 and Case 262/85 *Commission* v *Italy* [1987] ECR 3073.

so for Article 4(4) of the Directive, it appears to me *a fortiori* to apply to the even more clear and specific prohibition in the third sentence of Article 7(4).

16. In my Opinion in Case C-157/89, cited above, I explained as follows the importance attached in the Wild Birds Directive to the general prohibition on hunting during the pre-mating migration:

'The prohibition is prompted by concern that hunting migratory birds during that period places excessive pressure on the numbers of the migratory species concerned. This is true especially of certain species such as the varieties of ducks which migrate in large groups and could be killed in large numbers if the hunting season was opened during the period of their migration. The ban on hunting is also important in order to allow the birds to feed without disturbance in the areas which they fly over, to rest there and hence to recover the necessary energy in order to continue their exhausting migration to their rearing grounds. It is also important for migratory birds which spend the winter in a particular region that the hunting season in that region should be closed on time. If the hunting season is closed as soon as migration starts, birds which have not yet started off can prepare for their departure undisturbed. Lastly, it must be pointed out that migratory birds cross frontiers and the Member States concerned therefore manifestly share responsibility for the preservation of those species (third recital in the preamble to the Directive).' [16]

I also referred to the case-law of the Court holding that the faithful transposition of the Wild Birds Directive into national law is 'particularly important in a case such as this in which the management of the common heritage is entrusted to the Member States in their respective territories.' [17]

17. What is the import of all this in practice for the closing date for hunting migratory birds? In my view a general rule can be deduced from the third sentence of Article 7(4) of the Wild Birds Directive, as interpreted in the judgment in Case C-157/89, to the effect that the closing date for hunting migratory birds must be set so as to secure complete protection during the pre-mating migration, or even that the closing date must be fixed *in accordance with a method which is such as to make possible complete protection during the pre-mating migration.*

This does not mean that there would be a contravention of the Directive as soon as it was shown that one single stray bird had started migrating at a time when hunting was still open. As a number of parties observe, such an approach would be ineffective and unreasonable. On this point I can also follow the Commission when it states that the aim

16 — See my Opinion in Case C-157/89, cited above, paragraph 21.

17 — See *inter alia* the judgment in Case 262/85 *Commission v Italy* [1987] ECR 3073, at paragraph 9.

of the Directive is the protection of species of birds, not the protection of individual birds. I consider however that there is a contravention of the Directive when the closing date for hunting is set in such a way that an 'incomplete' protection of a species of bird during its migration can be expected. In my view this means that the Directive requires Member States to fix the closing of hunting in accordance with a method which is such as to *make possible* complete protection during migration, even though in practice there may be lacunae in the protection. No method can guarantee that each individual bird is protected at all times.

In seeking a method which makes complete protection possible, the Member States must of course take into account 'available scientific and technical data', as the Community itself must do in preparing its action in accordance with Article 130r(3)(i) of the EEC Treaty. [18] If the available data are insufficiently precise to determine with the necessary accuracy the date on which the pre-mating migration of the various species of birds begins — which appears to be the case for migratory birds other than waterfowl (see footnote 6 above) — then the Member States are inevitably driven to estimates and forecasts which involve a degree of uncertainty. If this occurs they should, in order to make complete protection nonetheless possible, build in safety margins, as is clear from the judgment in Case C-157/89. [19]

18. It is accordingly for the Member States to choose the actual method to be used for setting in practice the closing date for hunting. It is therefore not for the Court to select a specific method, let alone to involve itself in technical disputes over statistics. The Court can only emphasize, as indicated above, that it follows from the Directive that the closing date must be set in accordance with a method which is such as to make complete protection during pre-mating migration possible (see paragraph 17 above). Although such a position does not involve a positive choice of one method or another, it nonetheless rules out a number of methods because they do not satisfy that condition.

The methods ruled out by the Directive seem to me to include in any event those methods of which the objective or intrinsic effect is the protection of only a certain (even if high) percentage of birds of a species. Such methods do not make complete protection possible, but leave a proportion of the birds unprotected. I can can accordingly understand why the Administrative Court of Nantes considered a method such as that prescribed in the ministerial circular of 9 January 1992 — which refers to the point at which 10% of the birds have started to migrate — to be incompatible with the Directive (see paragraphs 10 and 11 above).

18 — See as to this my Opinion in Case C-157/89, cited above, at paragraph 11.

19 — Paragraphs 12 and 13, set out in paragraph 12 above.

The methods precluded by the Directive seem to me also to include those which consist in calculating an average date [20] of the commencement of pre-mating migration (for the different species of birds, the different years and/or the different geographical areas) and in setting this, without adding a safety margin, as the general closing date. It is inherent in such an average date that in approximately half the cases it will fall later than the actual commencement of the migration of a particular species of bird in that year and/or in a particular region. [21] Such a method thus does not make complete protection possible. If I understand it, the starting date of pre-mating migration, as referred to in the joint report (paragraph 9 above), is such an average date. [22]

On the other hand, it is clearly compatible with the Directive to close hunting generally on the earliest of the parameter dates within which the start of migration varies between the different species of birds, the years and/or the different regions. This method clearly makes complete protection possible.

Moreover I can also concur with the Commission in its view that the practice of levelling, in particular the grouping of numbers by decade (see paragraphs 9 and 10 above), is in itself compatible with the Directive. As the Commission explains, it is customary for practical and technical reasons to group the observations relating to migratory movements by decade. The fact that this technique is used in itself says nothing about the question whether the method of setting the closing date is such as to make complete protection during migration possible. This depends on other things, as a simple example can illustrate. Suppose that observations have shown that a specific species of bird in a particular region always begins pre-mating migration in the second decade of February, that is between 10 and 20 February. If the closing date for hunting, on the basis of that datum, were set at 15 February, then there would be a contravention of the Directive, given that the species concerned would then not be protected during the first days of its migration. Setting the closing date for hunting at 10 February would alone be compatible with the Directive.

Answer to the second question

19. The second question is whether Article 7(4) of the Wild Birds Directive precludes national authorities from fixing closing dates for hunting which vary according to species. In its orders for reference the Administrative Court of Nantes points to two problems,

20 — By 'average' I mean here in the wide sense all statistical methods directed at a central trend, such as the modus (most frequently-occurring value, in this case most frequently-occurring date) and the median (middle date).

21 — This is all the more serious in proportion to the wideness of the variations in the starting date; see, in so far as concerns the geographical variability, the observation in footnote 6 concerning migratory birds other than waterfowl.

22 — It is however for the national court to determine whether this is in fact so.

namely the risk of confusion and the disturbance which is caused by hunting:

'A working document submitted by the French delegation on the ORNIS committee and a memorandum from the Muséum National d'Histoire Naturelle of July 1992 show that the distinction between birds belonging to closely-related species is a delicate matter when hunting is actually under way and that the risk of confusing species is high. Moreover, in Case C-157/89 the Judge-Rapporteur, quoting from a report presented in May 1986 to the International Congress "Wildtiere und Umwelt" (Wild animals and environment), observed that "If the hunting season is excessively extended it may have an adverse effect not only on the species which are hunted but also, owing to the disturbance it causes, on various species which are not hunted but occupy the same habitat and it may be regarded as a factor limiting the possibilities for the colonization of new territory by pioneer migratory species".'

20. The Rassemblement des Opposants à la Chasse argues before the Court for an affirmative answer to the second question, relying principally on the protective aim of Article 7(4) of the Directive and taking account of the gravity both of the risk of confusion and of the disturbance caused by hunting. The French Government and the Fédération des Chasseurs de Loire-Atlantique argue for a negative answer, on the basis of the coherence of the Directive and the case-law of the Court. Finally, the Commission puts forward arguments in both directions. Personally I consider that I can sooner agree with the first view, for the reasons set out below.

21. As the Administrative Court of Nantes has itself indicated — and all the parties seem to agree — there are two factors which raise the question whether closing dates for hunting are compatible with the system of protection provided by Article 7(4) of the Directive.

First there is a risk of confusion between species of birds for which hunting has already been closed and species for which hunting is still permitted. The Administrative Court of Nantes refers in this connection to a memorandum from the French Muséum National d'Histoire Naturelle of July 1992 in which this problem is discussed. This memorandum was submitted to the Court by the Rassemblement des Opposants à la Chasse and no other party has put in question its scientific nature or put forward any evidence to different effect. In the memorandum it is explained that the risk of confusion depends on a whole series of factors, such as the observation distance, the brightness of the sky, the length of time the bird is visible and the experience of the hunter. The memorandum notes further that 'it is important to emphasize that *anatidae* frequently move in flocks of mixed species. A group of ducks may sometimes include three, four or even five different species. As a result, "selective" shooting becomes practically impossible.' The memorandum concludes as follows:

'Apart from the difficulties which a hunter may experience in adequately memorizing the period in February which corresponds to a particular waterfowl, he must first correctly identify its species. Given the French practices for hunting that category of game, in particular at dusk and during the night,

and knowing moreover that several species have similar appearances, the risk of killing birds which cannot be guaranteed to have been correctly identified seem to us very significant.'

Secondly there is the problem of migrating birds being disturbed by the hunting of birds which have not yet started migrating. As I have indicated above, the Administrative Court of Nantes refers in this connection to the Report for the Hearing in Case C-157/89, cited above, where on this point there is a quotation from a report presented to a German congress. The Rassemblement des Opposants à la Chasse has also submitted to the Court an extract from an expert's report drawn up by A. Tamisier at the request of the Administrative Court of Grenoble. In this report it is stated on the basis of an empirical study that the quantitative effect of disturbance caused by hunting has a more important influence on the birdlife in an area than the actual hunting itself. The other parties before the Court have not disputed the reliability of these results or put forward other factual data to the contrary.

22. It appears to me hardly disputable that both the risk of confusion and the disturbance due to hunting are important in the context of the system of protection set up by the Wild Birds Directive.

So far as concerns the risk of confusion, it seems to me that the third sentence of Article 7(4), in so far as it contains a prohibition on hunting birds during their return to their rearing grounds, also applies to birds which are not deliberately hunted but which are killed as a result of confusion with another species of bird which may lawfully be hunted.

So far as concerns the disturbance of birds which may not lawfully be hunted caused by the hunting of other birds, this appears to me to be covered both by the last sentence of Article 7(1) of the Directive and by the first sentence of Article 7(4). The first of those provisions requires the Member States to ensure that the hunting of the species listed in Annex II 'does not jeopardize conservation efforts in their distribution area.' The second requires the Member States generally to take account in the practice of hunting of 'the principles of wise use'. As the Rassemblement des Opposants à la Chasse correctly observes, an additional indication is contained in Article 5(d) of the Directive, which contains a general prohibition on deliberate disturbance of the birds protected by the Directive.

23. In discussing the first question referred I emphasized — with reference to the judgment in Case C-157/89 — that the third sentence of Article 7(4) of the Wild Birds Directive has as its aim a *complete* system of protection during pre-mating migration. The facts and law summarized above seem to indicate that staggering the closing of hunting by species is difficult to reconcile with the Directive.

Before coming to a final conclusion, I should however examine the parties' arguments to the contrary. A first argument, put forward by the French Government in particular, is to the effect that a prohibition on staggering the closing of hunting by species would be disproportionate because the protection of birds must be balanced against other requirements including hunting. That argument seems to me irreconcilable with the objective and structure of the Wild Birds Directive and the case-law of the Court. As already indicated in answering the first question referred (see paragraph 15 above), the third sentence of Article 7(4) contains a clear and specific obligation to protect migratory birds from hunting during their migration, which cannot be limited by reference to the other interests mentioned in Article 2 of the Directive.

24. A second argument, put forward by the French Government, the Fédération des Chasseurs de Loire-Atlantique and the Commission, refers to the fact that the Directive is based on a system of lists of different bird species, of which some may be hunted and others not. It follows, it is argued, that the prohibition on hunting during the pre-mating migration must also be considered species by species. That seems to me an erroneous deduction. It is true that Article 7(1) of the Directive permits hunting of the species mentioned in Annex II and that it could be inferred therefrom that certain species of birds may be hunted at the same time as the hunting of other species is prohibited. Article 7(1), however, simply contains a permissive provision which applies generally throughout the year and thus also during periods of the year which are less sensitive from the point of view of the protection of birdlife. Article 7(4) on the other hand refers to exceptions, including for the period of migration, which aim to provide particular protection for birds during sensitive periods. For such periods, as the Court accepted in Case C-157/89, the Directive is intended to establish a complete system of protection because the survival of birds occurring in the wild state is then particularly threatened. If it should prove, as I have explained above, that a uniform closing date for hunting is indispensable for the realization of such complete protection, then no argument can be drawn from the general permissive provision in Article 7(1), and more specifically from the fact that various species of birds are there referred to, *against* an interpretation of the third sentence of Article 7(4) which precludes the setting of closing dates which vary according to bird species.

25. A third argument put forward by the parties based on the proposition that the setting of staggered closing dates is compatible with the Directive refers to earlier decisions of the Court. In the view of the French Government, the Court accepted implicitly in its judgment in Case C-157/89, cited several times above, that staggered closing dates are reconcilable with the Directive. In the view of the Fédération des Chasseurs de Loire-Atlantique, this is even more clear from the judgment in Case 262/85. [23] The Commission also observes that the Court has never

23 — Case 262/85 *Commission* v *Italy* [1987] ECR 3073.

previously raised the problem of confusion or disturbance arising from staggered closing dates.

I think, on re-reading the case-law of the Court, in particular the two judgments referred to, that the Court has already ruled on the problem of staggered closing dates, and not implicitly. The two judgments to which parties refer concerned actions for failure to fulfil obligations under Article 169 of the EEC Treaty. In such actions the Court confines itself strictly to examining the grounds of failure to fulfil obligations argued by the Commission during the preliminary administrative procedure and repeated before the Court. It is settled law 'that, in proceedings under Article 169 of the EEC Treaty for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption.' [24]

In neither of the abovementioned cases had the Commission put forward specific arguments supported by evidence that the fact of staggering the closing dates for hunting amounted to a failure to fulfil an obligation under the Directive. In Case 262/85 the Commission had argued very generally that the Italian legislation took no account of the different protection periods as required by Article 7(4), such as the protection period for migratory birds during their pre-mating migration. [25] The Court rejected this claim as unfounded, since it appeared that the legislation did in fact contain provisions relating to the pre-mating migration of migratory birds, among other things. [26] It is true that in that case staggered closing dates were in issue, but the question whether staggering is compatible with the system of protection established by the Directive was not in issue at all. In Case C-157/89 the Commission complained about the late closing of the hunting season for nineteen species of migratory birds. [27] The Commission based this argument on scientific data relating to the migratory period for each of those birds separately over Italian territory. However, for two of those species that evidence did not corroborate the Commission's claim: it showed that they migrate over Italian territory only after the closing date for the hunting season laid down for them in Italy. The Court accordingly accepted the Commission's claim for all the birds concerned except those last two. [28] In my view, it cannot be deduced from this that staggered closing dates are compatible with the Directive. The Commission had not expressly argued the contrary, and in any event had adduced no evidence whatsoever to that effect. Since the Commission based itself solely and exclusively on the data concerning the migratory period of each species, the Court could not do otherwise than take that evidence alone into account. [29]

24 — Judgment in Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, at paragraph 6; see also *inter alia* the judgment in Case C-62/89*Commission* v *France* [1990] ECR I-925, at paragraph 37.

25 — In its reply the Commission had also stated that the closing dates had been erroneously chosen. This claim was however inadmissible because it had not been part of the administrative procedure; see paragraph 24 of the judgment.

26 — Paragraph 23 of the judgment.

27 — Paragraphs 21 to 27 of the judgment.

28 — Paragraphs 25 and 26 of the judgment.

29 — At the hearing it was observed by the Rassemblement des Opposants à la Chasse — without any contradiction by the other parties — that the Italian legislature had in the meantime implemented that judgment by a new law establishing a uniform closing date.

26. I turn now to a final argument, which is put forward by the Commission. The Commission recognizes that the problems of confusion and disturbance arising from staggered closing of the hunting season must be taken into account in applying the Directive. It considers however that there is no reason for the Court to rule that staggered closing is to that extent incompatible with the Directive. The national authorities can take these problems into account in the light of the actual circumstances. Moreover there are other possible solutions, such as a strict check on ornithological knowledge when granting hunting permits and rigorous prosecution of contraventions.

I am at one with the Commission's view that the Directive in many respects gives the Member States a broad discretion and that the Court in its interpretation of the Directive must not go further than is necessary in the light of the Directive's objective of protection. In this case however I am not wholly convinced by the Commission's reasoning. In so far as concerns the risk of confusion, I can certainly accept that there are solutions other than the imposition of a uniform (early) closing date for the hunting season. Accordingly, the checking of hunters' ornithological knowledge when granting hunting permits and the rigorous prosecution of contraventions are undoubtedly appropriate. I doubt however whether that will suffice. The abovementioned memorandum from the French Muséum National d'Histoire Naturelle (see paragraph 21) indicates various other relevant factors, unconnected with the hunters' ornithological knowledge, such as the meteorological conditions, the time of day or night and the fact that birds of different species travel in a flock. In so far as concerns on the other hand the problem of the disturbance caused by hunting, I see no alternative whatsoever — and neither does the Commission put forward any alternative — to the imposition of a uniform closing date. [30] However, it is reported that the risk of disturbance interferes with bird conservation at least as much as the danger of confusion (see paragraph 21 above).

Although I do not clearly see how, in view of the dangers of confusion and disturbance, setting staggered closing dates can be reconciled with the requirement of complete protection of birds the hunting of which is in any event prohibited, I cannot exclude a priori the possibility that a Member State may succeed in giving sufficient guarantees in that regard. However, a heavy burden of proof rests on the Member State concerned which it will have even more difficulty in discharging in the absence of valid scientific and technical data concerning both the dates over which the migration of the birds concerned is spread and the scale of the abovementioned risks of confusion and disturbance. In a reference for a preliminary ruling it is not for the Court of Justice but for the national court to verify whether the Member State has discharged this burden of proof.

30 — As observed by the Rassemblement des Opposants à la Chasse, it is also the only method which is preventive. Under Article 130r(2) of the EEC Treaty, action by the Community relating to the environment shall be based on the principle, among others, of preventive action.

Answer to the third question

27. The third question referred concerns the compatibility with the Directive of the Prefects' power to fix the closing date for the hunting season in their department. As I understand it on the basis of the orders for reference and the parties' observations, the question in fact comprises two aspects, which are certainly linked but do not necessarily coincide. The first is the question whether the Directive permits the closing of the hunting season to be set on different dates in different parts of a Member State, or whether a uniform closing date is required. The second is the question whether a Member State may leave the implementation or transposition of the Wild Birds Directive to local authorities or whether implementation at the national level is required. As to both aspects there appears to be fairly substantial agreement between all parties before the Court and I can accordingly also be brief in my discussion.

28. That the closing dates for hunting seasons vary from region to region is in itself compatible with the Directive. As I have discussed in detail with reference to the first question referred (see paragraphs 17 and 18), the third sentence of Article 7(4) requires only that the closing date for hunting be set in such a way as to make possible complete protection of migratory birds during their pre-mating migration. If it appears that the pre-mating migration begins at different times in different parts of a Member State, [31] that Member State can therefore implement the Directive by setting a different closing date for each region provided that complete protection is made possible in each region, taking into account in addition the risks of confusion and disturbance discussed above (paragraph 21).

Neither is the fact that power to implement is conferred on a local authority or regional administrative body in itself contrary to the Directive. The Directive contains no specific provision on this point, so that the Member States have ample freedom. As the Commission and the Rassemblement des Opposants à la Chasse rightly observe, this freedom is however limited by the general obligations of the Member States in connection with the implementation of directives, which apply also to the Wild Birds Directive. I am here referring to — in the words of Mr Advocate General Da Cruz Vilaça in Case 247/85 — 'the previous decisions of the Court... according to which it is essential that each Member State should implement directives in a way which fully meets the requirements of clarity and certainty in legal situations which directives pursue. The transposition of the directive into national law must not therefore be left to a national or regional administrative body whose discretionary power is not circumscribed by the applicable statutory provision in such a manner as to ensure full compliance with the conditions laid down by the directive.' [32] So far as concerns the third sentence of Article 7(4) of the Wild Birds Directive, this means specifically that

31 — See footnote 6 with reference to migratory birds other than waterfowl; see also footnote 21.

32 — Opinion of Mr Advocate General Da Cruz Vilaça in Case 247/85 *Commission* v *Belgium* [1987] ECR 3029, at pp. 3055-3056.

legal provisions which confer the power to set the closing date for the hunting season for migratory birds on an independent or subordinate body must at the same time ensure that this date is in any event set in such as way as to make possible complete protection during pre-mating migration. It is for the national court to verify this, among other things in the light of the answers to the first and second questions referred.

Conclusion

29. In the light of the foregoing I propose that the Court give the following answers to the questions referred by the Administrative Court of Nantes:

1) To comply with the third sentence of Article 7(4) of Directive 79/409/EEC the closing date for the hunting of migratory birds must be fixed in accordance with a method which is such as to make possible complete protection of those bird species during pre-mating migration. Methods of which the objective or intrinsic effect is the protection of only a certain percentage of birds of a species do not satisfy this condition. Neither is the condition satisfied by methods which consist in calculating an average date of commencement of pre-mating migration (for the different species of birds, the different years and/or the different geographical areas) and in setting this, without adding a safety margin, as the general closing date.

2) It is incompatible with the third sentence of Article 7(4) of that Directive for a Member State to fix closing dates which vary according to species, unless that Member State, on the basis of valid scientific and technical data, can give sufficient guarantees in the view of the national court that staggering the closing dates in that way does not impede complete protection during pre-mating migration as specified in paragraph (1) above.

3) On condition that complete protection is made possible in each region, the fixing of closing dates varying by region is compatible with the Directive. If power to fix the closing date for the season for hunting migratory birds

is conferred on a local authority or a regional administrative body, the legal provisions which confer that power should ensure that the closing date can be fixed only in such a way as to make possible complete protection during pre-mating migration.