Case 57/89 R

Commission of the European Communities
v
Federal Republic of Germany

(Conservation of wild birds —
Construction work in a special protection area)

Order of the President of the Court, 16 August 1989 2849

Summary of the Order

Application for interim measures — Interim measures — Conditions for granting — Urgency (EEC Treaty, Art. 186; Rules of Procedure, Art. 83(2))

ORDER OF THE PRESIDENT OF THE COURT
16 August 1989 *

In Case 57/89 R

Commission of the European Communities, represented by Ingolf Pernice, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

* Language of the case: German.

V

Federal Republic of Germany, represented by Ernst Röder, Regierungsdirektor at the Federal Ministry of Economic Affairs, and Jochim Sedemund, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 avenue Émile Reuter,

defendant,

APPLICATION for interim measures to suspend temporarily the construction work being carried out under a coastal protection project in the area of the Leybucht, pursuant to a decision of 25 September 1985 granting planning permission, in a protection area covered by Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds

T. KOOPMANS, PRESIDENT OF CHAMBER,

replacing the President of the Court in accordance with Article 85, second paragraph, and Article 11 of the Rules of Procedure,

makes the following

Order

1 By an application lodged at the Court Registry on 28 February 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by planning or undertaking construction work which damages the habitat of protected birds in special protection areas, contrary to Article 4 of Council Directive 79/409 of 2 April 1979 on the conservation of wild birds (Official Journal 1979, L 103, p. 1, hereinafter referred to as 'the directive'), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

2 By a separate application lodged at the Court Registry on 14 July 1989, the Commission sought the adoption of interim measures under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure and requested the Court to order the Federal Republic of Germany to take the necessary measures to suspend dike construction work in the area of the Leybucht and in particular to refrain temporarily from starting work on stage IV of the construction programme until the Court has given its decision on the main application.

3 The Leybucht is a bay in the Wattenmeer in East Friesland, to the north of Emden, and is approximately five kilometres in diameter. It has long been a nesting, feeding and staging area for various species of both sedentary and migratory birds and is in particular an important breeding area for the avocet.

4 The Leybucht was placed under special protection on 21 December 1985 by legislation of Lower Saxony establishing the 'Niedersächsisches Wattenmeer' national park. The area covered by this park is shown on the maps appended to the legislation. On 6 September 1988 the German Government informed the Commission under Article 4(3) of the directive that it had classified the Leybucht as a special protection area.

5 The disputed construction work resulted from the introduction by the Bezirksregierung Weser-Ems, the competent regional authority, of a coastal defence project which included development of the Leybucht. That project was approved on 25 September 1985 after planning proceedings which had, *inter alia*, given all interested parties the opportunity to submit comments and raise objections. The project provides for the construction, to the west of the Leybucht, of a reservoir enclosed by a dike with locks leading to the sea and a ship canal from the small fishing port of Greetsiel to these locks; to the south-east, the project provides for the reinforcement, heightening and extension of the existing dike and the construction of a drainage channel behind the new dike; and to the north-east, the closure of part of the bay by a new dike, along with some sluices and drainage work. Work on the first stage, which covers the construction of the reservoir, started at the beginning of 1986.

6 The Commission claims that the construction work in question contravenes Article 4(4) of the directive, since it will result in a sizeable reduction in the ecologically useful area and a fall in the population density of certain birds referred to in Annex 1 to the directive, in particular the avocet, the white-fronted goose and two species of tern. That work, the Commission claims, thus has a significant effect on the protection of birds within the meaning of Article 4(4).

7 According to the Commission, the general structure of the directive, in particular the gradation of protective measures of a general nature (Article 3(1)) and those of a specific nature (Article 4(1)), makes it clear that Member States must comply with specific obligations in regions which they themselves have designated as special protection areas in order to ensure active protection for species of birds which are particularly endangered, listed in Annex 1 to the directive. In accordance with the first sentence of Article 4(4) of the directive, any active interference with these protection areas which is motivated by economic or tourist interests and is likely to disturb the habitat of the birds must be prohibited.

8 The German Government stresses that the measures envisaged are designed to ensure the safety of the dike; there is no tourist project or any other economic project in the Leybucht area. The violent storms of 1953, 1962 and 1976 demonstrated that the existing dikes were no longer thick and high enough to ensure protection for the land and its inhabitants. Since the level of storm tides has risen considerably over the last few decades, it was vital to heighten and strengthen the dikes so that they might be capable of protecting the population against the worst storm tides. The German Government accepts as undeniable that the dike works may disturb the birds. However, completion of the work will bring an end to regular dredging of the navigable channels, which will be beneficial from the ecological point of view.

9 The German Government disputes the interpretation of Article 4 of the directive put forward by the Commission, and takes the view that measures required to protect the coastline take priority over the protection of birds, even in protection areas within the meaning of Article 4(1) of the directive. An interpretation which allows interference only in so far as it is designed to protect the habitat of birds would, it is claimed, be incompatible not only with the letter and intention of the

directive, but also with higher principles of Community law. The defence of birds, the German Government submits, can never take precedence over the protection of human lives.

10 The parties presented oral argument on 9 August 1989. During the hearing of the application for interim measures, the Commission stated that, in view of the progress in construction of the dike as far as kilometre 10.7, its application seeking suspension of work in the Leybucht would confine itself to the south-east and north-east sections, more specifically those east of kilometre 10.7 along the new dike, work on which is planned to start in 1990.

11 The Commission submits that the urgency of interim measures is dictated, as the Court has consistently held, by the risk that serious and irreparable damage might be caused if it were necessary to wait for the Court to reach a decision in the main application. In the present case, there is reason to fear that the rapid progress of work, in particular the completion of stage IV, could result in the disappearance of the habitat of bird species which are specially protected and that the birds could be systematically driven out of the protection area by disturbances directly attributable to the work. Completion of stage IV would itself affect almost 10% of the breeding pairs which have settled in the Leybucht. A subsequent decision by the Court stating that the defendant ought not to have adopted the measures in question could not put right the disturbance and damage caused.

12 The Commission states that the sole disadvantage of a temporary suspension of the work would be to delay completion of the project; it would not have any appreciable financial repercussions. Even if the Court were to adopt interim measures but reject the Commission's main application, the damage incurred by the defendant would amount only to a delay in completion of the project of approximately 18 months.

13 The German Government disputes the urgency of the measures sought and points out that at present almost two-thirds of the total dike construction work has been completed. With regard to the section of the dike up to kilometre 10.7,

construction has been substantially completed. On the next section of work, from kilometre 10.7 to kilometre 13, work is due to commence at the start of 1990. The result of the essential heightening and strengthening of the dike will be that the dike base will be extended out to sea by approximately 40 to 50 metres. According to the German Government, extension of the dike on the landward side is not possible since the available space is restricted by a main road running behind the dike and the drainage channel, for technical drainage reasons, must flow between the main road and the dike. Work on the section from kilometre 13 to kilometre 15 is not due to start before the beginning of 1991. The line of the dike in this section will run approximately 2 000 metres away from the present line in order to form a rounded shape.

14 The German Government accepts that it is not impossible, from a purely technical point of view, to suspend the work at kilometre 10.7, subject, however, to a number of rather costly temporary adjustments. However, the disadvantage of such a solution lies not only in the financial consequences of cessation of work and interference with the performance of contracts concluded with construction companies, but also in the delay in the completion of the coastal defence structures, which could lead to the loss of human life in the event of storm tides.

15 The Court is empowered under Article 186 of the EEC Treaty to prescribe any necessary interim measures in cases before it. For a measure of this type to be ordered, applications for the adoption of interim measures must, in accordance with Article 83(2) of the Rules of Procedure, state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima-facie case for the interim measures applied for.

16 The main problem which this application for interim measures presents is that of urgency. The project for the works in the Leybucht was drawn up in September 1985; work started in 1986; the construction of the reservoir to the west of the Leybucht, which extends a few kilometres into the sea, is almost complete. German nature and environmental protection groups pointed out to the Commission as early as September 1984 the potential threat to the bird population in the area. It was not until August 1987, roughly two years after the contested project had been adopted, that the Commission, by way of a letter of formal notice, set in motion

the procedure outlined in Article 169 of the EEC Treaty; the reasoned opinion was delivered in July 1988. The application for interim measures dates from July 1989, although the main application was lodged on 28 February 1989.

17 This chronology of events shows that the Commission submitted its application after the regional government's project was well under way, through conclusion of the necessary contracts and the start of construction work. It did not apply for interim measures until a large part of the work had already been completed. In effect, the Commission is requesting the Court to stop work which has already been partially completed.

18 In those circumstances, the application for interim measures can only be allowed if it is precisely the next stage in the construction work, that is to say the stage due to be carried out in 1990, which will cause serious harm to the protection of birds in the Leybucht. There is nothing in the file relating to the case or in the arguments presented before the Court to show that that is in fact true. Three different factors must be considered in this regard.

19 In the first place, it is necessary to remember that the work scheduled for 1990 involves the heightening, extension and reinforcement of an existing sea dike. This work is not designed to reduce the area of the bay, as in the case of the work already completed and that scheduled for 1991, but only to extend the base of the dike by between 40 and 50 metres into the sea. Information provided by the German Government concerning the breeding grounds of avocets — the only species for which data were supplied to the Court — shows that, in general, the distance separating these areas from the work scheduled for 1990 is no less than that which separates them from the other work under the 1985 project.

20 Secondly, statistics drawn up by the Lower Saxony authorities show that there has been a steady fall since 1984 in the number of avocets breeding in the Leybucht, with a slight tendency to stabilization since 1987, and that the most significant fall occurred before the disputed work began. Consequently, there are no grounds for

the view that the start of work on stage IV will have the effect of driving the avocet away from its traditional breeding areas in the Leybucht.

21 Finally, the Commission has been unable to substantiate the fears expressed in its application concerning the development, in the short term, of mass tourism likely to disturb the birds. It is agreed that one of the specific objectives of the 1985 project was to reduce considerably the scope for pleasure-boat sailing in the Leybucht. With regard to the dry land, the Commission merely mentioned rumours to the effect that large car parks were to be constructed close to Greetsiel, rumours, moreover, which the German Government says are unfounded.

22 It follows from the foregoing considerations that the facts which the Court has at its disposal do not enable it to conclude that the construction work scheduled for 1990 is characterized, in comparison with other work envisaged under the 1985 project and particularly in comparison with work already completed in the western area of the Leybucht, by the significant effect which it would have on the conservation of birds protected under Annex 1 to the directive. The Commission has thus failed to establish that there is an urgent need to interrupt the work already started.

23 The application for interim measures must therefore be rejected.

On those grounds,

T. KOOPMANS, PRESIDENT OF CHAMBER,

replacing the President of the Court in accordance with Article 85, second paragraph, and Article 11 of the Rules of Procedure,

ruling on an application for interim measures,

hereby orders:

(1) The application for interim measures is rejected.

(2) Costs are reserved.

Luxembourg, 16 August 1989.

J.-G. Giraud
Registrar

T. Koopmans
President of Chamber
acting as President