JUDGMENT OF THE COURT (Sixth Chamber)

2 June 2005 *

In Case C-83/03,

Action under Article 226 EC for failure to fulfil obligations, brought on 26 February 2003,

Commission of the European Communities, represented by R. Amorosi and A. Aresu, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, President of the Chamber, J.-P. Puissochet (Rapporteur) and S. von Bahr, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

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

gives the following

Judgment

1 By its application the Commission of the European Communities seeks a declaration from the Court that, by failing properly to determine whether a project for the construction of a marina at Fossacesia (Chieti) — a project covered by the list in

Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) — had characteristics requiring it to be made subject to a procedure to assess its effects on the environment, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.

Law

Community law

2 Article 2(1) of Directive 85/337 in the version applicable at the material time in this case provides:

'Member States shall adopt all measures necessary to ensure that, before consent is given [which entitles the developer to carry out the works], projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

3 Article 4(2) of that directive states:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

4 Paragraph 10 of Annex II to Directive 85/337 entitled 'Infrastructure projects' refers to 'Yacht marinas'.

5 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) provides for the establishment of a coherent ecological network of special areas of conservation to be set up under the title 'Natura 2000'.

6 That network, composed of sites hosting certain natural habitat types and species, must enable the natural habitat types and species concerned to be maintained or,

where appropriate, restored to a favourable conservation status by means of appropriate protective measures. In order to establish that network, the Member States must, pursuant to Article 4 of Directive 92/43, propose sites to be identified as sites of Community importance, then designated as special areas of conservation (commonly referred to as 'proposed Sites of Community Importance', or 'pSCI').

National law

7 It is clear from the file that, in respect of marinas, the Italian law implementing Directive 85/337 distinguishes between those whose water area exceeds 10 hectares, whose surroundings exceed five hectares, or whose quays are longer than 500 metres and those which do not exceed those dimensions. Only the former are considered to have characteristics requiring them to be made subject to the assessment procedure laid down by that directive. The latter are subject to an ad hoc assessment to determine whether or not it is necessary to initiate such a procedure.

The pre-litigation procedure

8 After the matter was brought to its attention by environmental protection groups, the Commission requested the Italian authorities to provide information on the construction of a marina at Fossacesia in the Abruzzo region ('the Region'). Those works were authorised without being made subject to an assessment of their effects

on the environment and without even determining whether or not such an assessment was necessary.

9 It is clear from the information provided in response by the Italian authorities that this case concerns a marina with mooring for 391 vessels, a total surface area of 59 825 m^2, parking space for 398 vehicles, various services and a shopping centre. The Commission stresses that that project is situated entirely within a pSCI, within the meaning of Directive 92/43, called 'Lecceta litoranea di Torino di Sangro e foce fiume Sangro', which is one of the best-preserved natural sites on the coast of Abruzzo.

10 The Commission notes that the Region gave final building consent on 9 June 1999. According to the Italian authorities, the Region confirmed, by Regional Decree No 14/2000 of 27 January 2000, that the project did not have to be made subject to an assessment of its effects on the environment as it did not exceed the limits, laid down by the Italian law, above which such a procedure automatically applied. The Region arrived at that decision after the Regional Coordinating Committee on the Assessment of Effects on the Environment ('the Regional Coordinating Committee') had, after appraising the project's characteristics, given a favourable opinion — Opinion No 2/92 of 21 January 2000 — stating that such an assessment was not necessary.

11 Unconvinced by the Italian Republic's explanations, on 29 October 2001 the Commission issued a formal letter inviting the Italian Republic to submit its observations on the decision not to make that project subject to such an assessment.

12 The Commission received no reply from the Italian authorities and so on 27 June 2002 it sent them a reasoned opinion requesting that they comply therewith within two months.

13 The Commission still received no reply from those authorities and so decided to bring the present action before the Court.

The action

Arguments of the parties

14 The Commission submits that the relevant authorities did not properly determine, in accordance with the national legislation implementing Directive 85/337, whether the construction of the Fossacesia marina should be made subject to an assessment of its effects on the environment. The failure to give any, or any adequate, statement of reasons for their finding that it was not necessary, and the fact that it was made after the building consent had been issued, led the Commission to conclude that Article 4(2) of Directive 85/337 was not properly applied.

15 The Italian Government confirms that an inadequate statement of reasons was given for the favourable opinion of the Regional Coordinating Committee of 21 January 2000 and for the regional decree of 27 January 2000 rejecting the need for an assessment of the effects of the project on the environment. It also confirms that those measures were adopted after the building consent had been issued.

16 The Italian Government refers, however, to a subsequent detailed favourable report of the Regional Coordinating Committee which made various proposals, in particular to compensate for certain effects of the works already carried out. It also states that it warned the Region that if the procedure for the assessment of the effects of the project on the environment ultimately concluded that it did have adverse effects thereon, it would be necessary to consider returning the site to its original state. The Italian Government adds that, regardless of the outcome of the assessment procedure, it will be necessary to adopt measures in respect of the pSCI affected in order to preserve or replace elsewhere what had been lost at the site of the marina.

17 The Italian Government nevertheless submits that an assessment of the effects of the marina project on the environment was necessary only in order to assess the effects of that project on the 'Lecceta di Torino di Sangro e foce fiume Sangro' pSCI. That assessment was carried out a posteriori for the purposes of the second opinion of the Regional Coordinating Committee.

Findings of the Court

18 The fifth recital in the preamble to Directive 85/337 states that the purpose of that directive is to introduce, with a view to supplementing and coordinating development consent procedures, general principles for the assessment of the environmental effects of public and private projects likely to have a major effect on the environment.

19 For certain types of project, Article 4(2) of Directive 85/337 gives the Member States a discretion to decide whether the characteristics of a project require that it be made

subject to an assessment of its effects on the environment. However, the limits of that discretion are to be found in the obligation on those States, set out in Article 2 (1) of that directive, that projects likely to have significant effects on the environment are to be subject to such an assessment (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50).

20 Where, in the exercise of the power laid down in the second paragraph of Article 4 (2) of Directive 85/337, a Member State defines general rules for determining whether projects falling within Article 4(2) must be made subject to prior assessment of their effects on the environment before consent is given, the infringement of those rules necessarily constitutes an infringement of the combined provisions of Articles 2(1) and 4(2) of Directive 85/337.

21 In the present case, it is not in dispute that the Region gave consent for the construction of the Fossacesia marina before carrying out the ad hoc prior determination required by Italian law as to whether the project should be made subject to an assessment of its effects on the environment. Accordingly, without having to make a finding on the duty to state reasons for a decision as to whether or not the project should have been made the subject of such an assessment, the Court finds that the Region infringed Article 4(2) of Directive 85/337 when read together with Article 2(1) of that directive.

22 Whilst the breach of Community law in the present case also constitutes a breach, by the Member State on whose territory that breach occurred, of the national law adopted to apply Community law and national legal procedures would most probably have been capable of establishing it, that breach by a public authority of the Member State nevertheless constitutes a failure on the part of that Member State to fulfil its obligations, contrary to Article 226 EC.

23 It follows from the foregoing that, since the Region did not properly determine whether the project for the construction of a marina at Fossacesia — a project covered by the list in Annex II to Directive 85/337 — had characteristics requiring it to be made subject to a procedure to assess its effects on the environment, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.

Costs

24 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. As the Commission has asked that costs be awarded against the Italian Republic and the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs.

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

1. **Declares that, since the Abruzzo Region did not properly determine whether the project for the construction of a marina at Fossacesia (Chieti) — a project covered by the list in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment — had characteristics requiring it to be made subject to a procedure to assess its effects on the environment, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive;**

2. **Orders the Italian Republic to pay the costs.**

[Signatures]