OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 8 November 1990 *

Mr President,
Members of the Court,

Background

1. In this case the Commission is seeking a declaration from the Court that the Italian Republic has failed to fulfil its obligations under the EEC Treaty by failing to bring into force before 31 July 1986 measures implementing Commission Directive 85/411/EEC of 25 July 1985 amending Council Directive 75/409/EEC on the conservation of wild birds, [1] or at least by failing to notify those measures to the Commission.

2. The first subparagraph of Article 4(1) of Council Directive 79/409 of 2 April 1979 [2] requires the Member States to adopt in respect of the species mentioned in Annex I special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. According to the final subparagraph of Article 4(1) of that directive, the Member States must classify in particular the most suitable territories in number and size as special protection areas for the conservation of those species. According to Article 4(4) of the directive, Member States must take appropriate steps to avoid pollution or deterioration of habitats in the special protection areas and any disturbances affecting the birds, in so far as such pollution, deterioration and disturbances would be significant having regard to the objectives of that article.

Commission Directive 85/411 replaces Annex I with an annex listing 144 bird species, as opposed to 74 in the previous version, in order 'to take account of the latest information on the situation as regards avifauna' (first recital in the preamble to Directive 85/411). That extension therefore entails the obligation for the Member States, as regards the bird species added to the annex which occur in their territory, to adopt special conservation measures, in particular those referred to in the final subparagraph of Article 4(1) and Article 4(4) of Directive 79/409.

3. According to Article 2 of Directive 85/411 the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive on 31 July 1986 and are to inform the Commission thereof forthwith.

4. The Italian authorities did not provide the Commission with any information before 31 July 1986 concerning the manner in which Directive 85/411 was implemented

* Original language: Dutch.
1 — OJ 1985, L 233, p. 33.
2 — OJ 1979, L 103, p. 1.

in Italy. By letter of 26 March 1987, that is to say eight months after the expiry of the period prescribed for implementation, the Commission initiated the procedure under Article 169 of the EEC Treaty. That letter evoked no response from the Italian Government. By letter of 12 September 1988, that is to say after a further 18 months had elapsed, the Commission issued a reasoned opinion. The Italian Government did not take any action to comply with the reasoned opinion either. By application of 19 October 1989 the Commission instituted proceedings before the Court. At that stage the time-limit for implementation had expired more than three years earlier and Italy had still not provided the Commission with any information.

Admissibility

5. The Italian Government maintains that the action is inadmissible, on the ground that the allegations are too general.

In order to assess that defence, it is necessary to ascertain whether the Commission has defined sufficiently clearly the subject-matter of the dispute, as referred to in Article 19 of the Protocol on the Statute of the Court of Justice and in Article 38 of the Rules of Procedure. [3]

In its application to the Court, which is based on the same grounds and arguments as the reasoned opinion, the Commission states the obligations which Italy has allegedly failed to fulfil. Its main claim is for a declaration that Italy has failed to adopt the measures needed to implement the directive. In the alternative, it seeks a declaration that in any event Italy has failed to discharge the duty of notification imposed by the directive.

The subject-matter of the dispute therefore appears to me to be clearly defined, and I see no reason to consider the objection of inadmissibility.

Substance

6. I shall begin by considering the Commission's *alternative* claim first. The Italian Government does not deny that it failed to notify any measures implementing Directive 85/411 to the Commission. However, it considers that Italy was under no obligation to adopt, and consequently to notify, any implementing measures so long as the Commission did not first indicate the bird species added to Annex I of Directive 79/409 which occur in Italian territory and whose habitats must therefore be the subject of special conservation measures.

That contention cannot be upheld. Like many other directives, Article 2 of Directive 85/411 imposes on the Member States a duty of notification. The Court has already had occasion to point out that the information which the Member States are required to supply to the Commission on the basis of a duty of notification of that kind, having regard also to Article 5 of the EEC Treaty, must be clear and precise. In the absence of such information the Commission is not in a position to ascertain whether a Member State has effectively and completely implemented the directive. In a judgment of 25 May 1982 in Case 96/81 the Court stated as follows:

3 — See also the judgment of 5 October 1989 in Case 290/87 *Commission* v *Netherlands* [1989] ECR 3083, at paragraph 6.

'The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 169 of the EEC Treaty in order to establish the failure to fulfil the obligation'. [4]

That duty of notification also implies, in my view, that the Member State is under an obligation to inform the Commission that it does not consider itself obliged to adopt any specific measures for the implementation of the directive, and the reasons why. Without such information, the Commission is unable to ascertain whether the directive has in fact been implemented precisely.

In this case, it means that the Member State concerned is required to identify the bird species added to the annex by Directive 85/411 which occur in its territory, and then inform the Commission of the measures it has taken with regard to the bird species newly covered by Directive 85/411, in accordance with the obligation to protect habitats under Article 4 of Directive 79/409, either by amending existing measures or by adopting new measures.

Since, as stated earlier, Italy has not provided any information whatsoever three years after the expiry of the period for implementation, it is quite clear that it has failed to discharge its duty of notification.

7. The Commission's *primary* claim is for a declaration that Italy has failed to adopt measures for the implementation of Directive 85/411. The question arises whether the Commission can simply rely on the presumption, based on the absence of any notification, that Italy has failed to adopt all or any measures prescribed by the directive.

Although as a general rule a presumption cannot constitute sufficient evidence of a failure to fulfil an obligation under Community law, [5] the situation is different where, as in this case, Italy is clearly in default with regard to its duty of notification. As stated earlier, the Commission was unable, as a result of the total absence of any information, to establish whether the directive had been implemented correctly or to furnish evidence of Italy's possible default. In those circumstances, and in the absence of evidence to the contrary, the Commission may, in my view, infer from the silence of the Italian Government that Italy has failed to fulfil its obligation to implement the directive in national law. The Italian Government has not furnished any evidence to the contrary either in the proceedings before the Court or earlier. As stated above, it has failed to indicate in respect of any of the bird species concerned what new conservation measures it has adopted or what existing measures it has amended.

4 — Judgment of 25 May 1982 in Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, at paragraph 8. See also the judgment of the same date and between the same parties in Case 97/81 [1982] ECR 1819, at paragraph 8.

5 — See the abovementioned judgment in Case 290/87 *Commission* v *Netherlands*, at paragraph 11.

Conclusion

8. To summarize, I propose that the Court:

(1) Declare the action admissible;

(2) Declare that the Italian Republic has failed to fulfil its obligations under Commission Directive 85/411/EEC of 25 July 1985;

(3) Order the Italian Republic to pay the costs.