# OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 29 January 2002 [1]

1. By this action, lodged on 14 February 2001 in accordance with Article 226 EC, the Commission of the European Communities requests the Court of Justice to declare that the Grand Duchy of Luxembourg has failed to transpose fully and correctly certain provisions of 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, hereinafter 'the Directive').

## I — Law

### A — *Relevant Community rules*

2. Article 1 of the Directive provides:

'For the purpose of this directive:

(a) *conservation* means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

(b) *natural habitats* means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural;

(c) *natural habitat types of Community interest* means those which, within the territory referred to in Article 2:

(i) are in danger of disappearance in their natural range;

or

(ii) have a small natural range following their regression or by reason of their intrinsically restricted area;

1 — Original language: Italian.

or

(iii) present outstanding examples of typical characteristics of one or more of the five following biogeographical regions: Alpine, Atlantic, Continental, Macaronesian and Mediterranean. Such habitat types are listed or may be listed in Annex I;

(d) *priority natural habitat types* means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as "favourable" when:

— its natural range and areas it covers within that range are stable or increasing,

and

— the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future,

and

— the conservation status of its typical species is favourable as defined in (i);

(f) *habitat of a species* means an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle;

(g) *species of Community interest* means species which, within the territory referred to in Article 2, are:

(i) endangered, except those species whose natural range is marginal in that territory and which are not endangered or vulnerable in the western palearctic region;

or

(ii) vulnerable, i.e. believed likely to move into the endangered category in the near future if the causal factors continue operating;

or

(iii) rare, i.e. with small populations that are not at present endangered or vulnerable, but are at risk. The species are located within restricted geographical areas or are thinly scattered over a more extensive range;

or

(iv) endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.

Such species are listed or may be listed in Annex II and/or Annex IV or V;

(h) *priority species* means species referred to in (g)(i) for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority species are indicated by an asterisk (*) in Annex II;

(i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as "favourable" when:

— population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats,

and

— the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future,

and

— there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

(j) *site* means a geographically defined area whose extent is clearly delineated;

(k) *site of Community importance* means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

For animal species ranging over wide areas, sites of Community importance shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction;

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;

(m) *specimen* means any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species;

(n) *the committee* means the committee set up pursuant to Article 20.'

3. According to Article 2(1), the aim of the directive is:

'to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.'

Paragraph 2 of that article states:

'Measures taken pursuant to this directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.'

4. Article 4 of the Directive establishes a procedure in several stages for selecting the sites which host the species and habitats protected by the Directive. Firstly, each Member State must propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. The list must be sent to the Commission, together with information on each site, within three years of notification of the Directive (Article 4(1)). On the basis of the lists of the Member States and the criteria set out in Annex III, the Commission must establish, in agreement with each Member State, a draft list of sites of Community importance. It then draws up a definitive list in accordance with the procedure laid down in Article 21 of the Directive (Article 4(2)). The procedure must be completed within six years of the notifi-

cation of the Directive (Article 4(3)). Once a site of Community importance has been identified in accordance with the above procedure, the Member State concerned must designate it as a special area of conservation ('SAC') as soon as possible and within six years at most (Article 4(4)). These SACs make up the 'Natura 2000' network, a coherent European ecological network of such areas (see Article 3(1) of the Directive). Finally, Article 4(5) provides that: '[a]s soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

5. Pursuant to Article 5 of the Directive:

'1. In exceptional cases where the Commission finds that a national list as referred to in Article 4(1) fails to mention a site hosting a priority natural habitat type or priority species which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

2. If, on expiry of a consultation period not exceeding six months, the dispute remains unresolved, the Commission shall forward to the Council a proposal relating to the selection of the site as a site of Community importance.

3. The Council, acting unanimously, shall take a decision within three months of the date of referral.

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6(2).'

6. Article 6 of the Directive provides that:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural

habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

7. Pursuant to Article 7 of the Directive:

'Obligations arising under Article 6(2), (3) and (4) of this directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

8. Pursuant to Article 11 of the Directive:

'Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in

Article 2 with particular regard to priority natural habitat types and priority species.'

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this directive is implemented.

9. Under Article 12(1)(b) and (c), (2) and (4) of the Directive:

...

'1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.'

...

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

10. Article 13(1)(b) and (2) of the Directive provides that:

(c) deliberate destruction or taking of eggs from the wild;

'1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV (b), prohibiting:

...

...

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this directive is implemented.

2. The prohibitions referred to in paragraph 1(a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.'

11. Pursuant to Article 14 of the Directive:

'1. If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status.

2. Where such measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11. Such measures may also include in particular:

— regulations regarding access to certain property,

— temporary or local prohibition of the taking of specimens in the wild and exploitation of certain populations,

— regulation of the periods and/or methods of taking specimens,

— application, when specimens are taken, of hunting and fishing rules which take account of the conservation of such populations,

— establishment of a system of licences for taking specimens or of quotas,

— regulation of the purchase, sale, offering for sale, keeping for sale or transport for sale of specimens,

— breeding in captivity of animal species as well as artificial propagation of plant species, under strictly controlled conditions, with a view to reducing the taking of specimens [in] the wild,

— assessment of the effect of the measures adopted.'

12. Article 15 of the Directive provides that:

'[i]n respect of the capture or killing of species of wild fauna listed in Annex V (a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV (a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI (a);

(b) any form of capture and killing from the modes of transport referred to in Annex VI (b).'

13. Pursuant to Article 16(1) of the Directive:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

14. Pursuant to Article 22(b) and (c) of the Directive:

'In implementing the provisions of this directive, Member States shall:

...

(b) ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction. The results of the assessment undertaken shall be forwarded to the committee for information;

(c) promote education and general information on the need to protect species of wild fauna and flora and to conserve their habitats and natural habitats.'

15. Finally, Article 23 of the Directive provides that:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive within two years of its notification. They shall forthwith inform the Commission thereof.

2. When Member States adopt such measures, they shall contain a reference to this directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

3. Member States shall communicate to the Commission the main provisions of national law which they adopt in the field covered by this directive.'

16. As the Directive was communicated to the Grand Duchy of Luxembourg on 5 June 1992, the time-limit for its implementation in this instance expired on 5 June 1994.

B — *Relevant national laws*

17. The Grand Duchy of Luxembourg has sent to the Commission an extensive series of measures intended to transpose the Directive. According to the Luxembourg Government, the main measures are: la loi concernant l'aménagement du territoire of 21 May 1999 ('Regional Planning Law'), [2] a projet de règlement grand-ducal instituant un ensemble de régimes d'aides pour la sauvegarde de la diversité biologique ('draft Grand-Ducal regulation on biodiversity') and the loi concernant la protection de la nature et des ressources naturelles of 11 August 1982, as amended ('Nature Protection Law'). [3] I shall discuss these and other measures relevant to this case at greater length below.

2 — *Mémorial* (Official Journal) A No 61 of 3 June 1999, p. 1402.

3 — *Mémorial* A No 69 of 20 August 1982, p. 1486.

## II — Arguments of the parties and legal analysis

A — *Introduction*

18. The Commission submits that the set of national measures communicated to it by Luxembourg is not sufficient for correct and full implementation of the Directive. For that reason, on 29 April 1999, it sent a letter of formal notice to the Luxembourg authorities pursuant to Article 169 of the EC Treaty (now Article 226 EC). In their reply to that letter, the Luxembourg authorities objected that a number of national laws and regulations, including ones subsequent to those initially sent to the Commission, substantially fulfilled the objectives of the Directive. However, in their reply to a reasoned opinion, which the Commission sent on 22 February 2000 in spite of that reply, the Luxembourg authorities acknowledged that, in order to ensure implementation of the Directive, it would be necessary to amend the national legal framework further, and they assured the Commission that the necessary parliamentary work for this purpose had already been started. However, in its defence in these proceedings, Luxembourg merely stated that a draft law implementing the directive was approved by its government on 23 February 2001. On this basis alone, without submitting any further defence, and without even referring to the arguments expounded during the pre-litigation stage, the defendant government formally requested the Court to dismiss the action

or, in the alternative, to suspend proceedings which would later become devoid of purpose and which it believed the Commission would withdraw once the draft law was finally approved.

19. In short, the Commission alone has submitted argument in these proceedings, Luxembourg deciding essentially not to do so, albeit that, in order to ascertain the content of its defence, reference may be made to the Commission's case and to the case-file which, in this instance, includes a copy of the observations and documents sent by Luxembourg during the pre-litigation procedure. I must point out, moreover, that in spite of that, Luxembourg has not simply requested a stay of the proceedings, but has also requested, as principal relief, that the Commission's action be dismissed. So, for this reason, but especially because of the nature of the proceedings brought under Article 226 EC, the absence of a defence of the defendant government, and indeed even its acquiescence, may not lead automatically to judgment being entered against it.[4] In fact, as the Court of Justice has emphasised, since the jurisdictional stage of infringement proceedings 'is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation',[5] it must be taken that the Court is nevertheless obliged to proceed with an assessment of the merits of the submissions which the Commission makes in such proceedings. Therefore, given that the Commission has not decided that it should withdraw this action, it is necessary to verify whether its submissions are well founded, despite the defendant's reaction.

B — *Arguments*

20. On that basis, I shall now analyse the arguments.

1. Article 1 of the Directive

21. The Commission submits that none of the national measures has as its object or effect the correct, complete and precise transposition of the definitions of important terms set out in Article 1 of the Directive. In July 1999 the Luxembourg authorities indicated that the definitions in Article 1 would be included in a 'sectoral plan' provided for by the Regional Planning

4 — See, to this effect, the recent Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 3 July 2001 in Joined Cases C-367/98, C-483/99 and C-503/99 *Commission* v *Portugal, France* and *Belgium*, point 76.

5 — Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 14, where there are further references; see also Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 19, with additional references.

Law. However, after expiry of the period of two months from communication of the reasoned opinion to the Luxembourg authorities and even when the present action was lodged the Commission found no evidence that that plan had been adopted. Nor did the Luxembourg Government provide any indications to that effect. In my opinion, therefore, the first plea must be upheld.

2. Article 4(5) of the Directive

22. According to the Commission, the provisions communicated to it by the Luxembourg authorities have neither as their object nor effect the transposition of Article 4(5) of the Directive. As stated above, the article provides that, '[a]s soon as a site is placed on the list [of sites of Community importance] it shall be subject to Article 6(2), (3) and (4)', which, as we shall see more clearly below (see points 34 to 48), sets out a series of measures intended to avoid deterioration of natural habitats and habitats of particular species and the disturbance of protected species. The Commission submits that, for this reason, upon the expiry of the time-limit for implementation of the Directive the national measures intended to put into effect Article 6(2) to (4) (not yet adopted, see below) would not automatically be applicable to sites of Community importance and would not, therefore, be binding on third parties.

23. In their reply to the letter of formal notice, the Luxembourg authorities argued that their administrative practice, based on the Nature Protection Law, whereby they refuse authorisation for any deterioration of natural habitats and habitats of species, is an appropriate measure for the purpose of transposing Article 4(5). The authorities have, however, admitted that the Nature Protection Law is not sufficient to ensure an assessment of the effect of plans or projects on special areas of conservation as mentioned in Article 6(3) and (4) of the Directive, simply stating that the sectoral plan yet to be adopted would remedy the lacuna.

24. For my part, I shall simply say, as the Commission has done, that a solution based on administrative practice does not ensure correct implementation of a directive, given that such practices, as the Court has stated on a number of occasions, being by their nature alterable at will by the authorities and lacking the appropriate publicity, do not guarantee the legal certainty required for transposition of a directive. [6] In any case, it is clear that, since the

6 — See, to this effect, the leading case, Case C-83/97 *Commission* v *Germany* [1997] ECR I-7191, paragraph 9, where there are further references.

Luxembourg Government admits that the sectoral plan has not been adopted (see point 21), it cannot be held that the provision in question has been fully and correctly transposed.

25. It is my opinion, therefore, that this plea must be upheld.

3. Article 5(4) of the Directive

26. As I stated above (see point 5), Article 5 lays down the procedure to be followed in exceptional cases where the Commission finds that the list communicated to it pursuant to Article 4(1) fails to mention a site which it considers to be essential for the conservation of a particular habitat. That procedure includes a period of bilateral consultation with the Member State concerned of up to six months and, if necessary, referral of the matter to the Council, which must reach a decision within three months. During the consultation period and pending a decision of the Council, Article 5(4), as I mentioned above, provides that the site concerned is to be subject to Article 6(2). According to the information at the disposal of the Commission, there are no laws in the Grand Duchy of Luxembourg which have as their object or effect the transposition of Article 5(4) so that, in the case mentioned in that article, the national measures implementing Article 6(2) will not automatically be applicable to any sites which may be relevant and will therefore not be binding on third parties during the transitional period.

27. Admittedly, in their reply to the letter of formal notice, the Luxembourg authorities maintained that the Nature Protection Law guarantees the result intended by Article 5(4) of the Directive (as in the case of Article 4(5), mentioned above). However, for the same reasons, that argument is, in my view, inadmissible.

28. The Luxembourg authorities added that they have in any event probably already included in the list sent to the Commission pursuant to Article 4(1) all the sites within its territory which are essential to maintaining certain types of habitat and that, therefore, recourse to the procedure laid down in Article 5(4) of the Directive would be quite unnecessary. However, again I am unable to accept that argument. Leaving aside the fact that the defendant proposes to proceed on the basis of supposition, the fact remains, as the Commission observes, that the outcome of the work presently being undertaken by the Com-

mission to identify sites of Community importance in the continental biogeographic region, of which Luxembourg is part, cannot be taken for granted.

29. It is my view, therefore, that the plea relating to Article 5(4) of the Directive is well founded.

4. Article 6 of the Directive

30. The Commission first states that, in accordance with Article 23(1) of the Directive, Article 6 should have been properly transposed by 5 June 1994. Indeed, under Article 4(4) of the Directive, Member States must designate sites of Community importance within their territory as 'special areas of conservation' ('SACs') as soon as possible after recognition of their being 'of Community importance' and, at the latest, within six years thereof. The Commission adds that the fact that the Directive expressly provides that Member States must be able to proceed as quickly as possible to designating sites as SACs makes it clear that they must before that date have prepared the legal instruments and procedures necessary for that purpose.

31. On the basis of that premiss, which I take to be correct, the Commission goes on to develop arguments relating to individual paragraphs of Article 6.

(a) Article 6(1) of the Directive

32. The Commission complains that Luxembourg failed to adopt the national measures required under Article 6(1) of the Directive within the given time-limit. Leaving aside the fact that Luxembourg law appears not even to include the concept of SAC as such, the Commission believes the Nature Protection Law is not sufficient to guarantee the objective pursued by Article 6(1). In their response to the letter of formal notice, the Luxembourg authorities stated that the deficiencies exposed by the Commission would be remedied by the sectoral plan and the draft Grand-Ducal regulation on biodiversity (see, respectively, points 21 and 17). However, neither of those measures has yet been adopted.

33. On that basis, I must take this part of the Commission's application to be well founded.

(b) Article 6(2) of the Directive

34. The aim of Article 6(2) of the Directive is to avoid the deterioration of natural habitats and the habitats of species as well as the disturbance of species for which the SACs have been designated. Whilst recognising that the Nature Protection Law, which the Luxembourg authorities believe faithfully transposes the provision in issue, does contain some protective provisions, the Commission nevertheless deems these insufficient to meet the objectives which the Directive pursues.

35. In respect of measures preventing the *deterioration* of habitats, the Commission maintains that Article 14 of the Nature Protection Law, whilst prohibiting the reduction, destruction or modification of certain biotopes (such as ponds and marshes), does not make it absolutely clear whether that protection extends to all biotopes, or only to particular ones. In the Nature Protection Law, in fact, there is no express reference either to natural habitats or to habitats of particular species, within the meaning of the Directive (see Article 1), situated in the SACs and in other Luxembourg laws no general measures may be found which are binding on third parties and which clearly and precisely prohibit the deterioration of such habitats. That appears to be contrary to the Court's case-law, according to which, whilst the transposition of a directive into national law does not necessarily require the provisions of a directive to be enacted in precisely the same words in a specific and express legal provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner, 'a faithful transposition becomes 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'. [7]

36. As regards the prevention of *disturbance* of species in the SACs, the Commission submits that the Nature Protection Law envisages only certain types of disturbance (for example, the use of vehicles in forests and sporting activities), without any guarantee, therefore, that all activities which may significantly disturb the protected species are regulated or potentially subject to appropriate regulation.

37. In its reply to the letter of formal notice, the Luxembourg Government disputes the Commission's claims, maintaining that the Nature Protection Law (see

7 — See Case 247/85 *Commission* v *Belgium* [1987] ECR 3029, paragraph 9. See also to this effect Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 9, which contains further references. Both those judgments concern Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), a directive similar in many ways to Directive 92/43. More particularly concerning the directive in issue, the Commission also refers to the Opinion of Advocate General Fennelly in Case C-256/98 *Commission* v *France* [2000] ECR I-2487, point 20.

Articles 1, 14 and 36) meets the objectives of the Directive and covers all the cases mentioned. It adds that Articles 21 and 22 of the Nature Protection Law prohibit any kind of unjustified exploitation, use, mutilation or destruction of unprotected wild plants and animals, while Article 23, of a general nature, prohibits the disturbance of fauna. Furthermore, the Luxembourg authorities say that that law has now been reinforced by a Ministerial Circular of 9 July 1999[8] whose very purpose is to transpose the Directive, in which it is stated that any degradation of habitats and disturbance of protected species must be avoided by means of rigorous application of the Nature Protection Law. On the other hand, the Luxembourg Government adds, to claim, as the Commission does, that, in order to transpose Article 6(2), general regulatory measures binding upon third parties are necessary implies an excessively strict interpretation of the Directive. Article 6(2) lends itself to transposition by means of various types of measure, all of them appropriate, including administrative and contractual instruments as well as regulatory ones.

38. The arguments put forward by the Luxembourg Government do not, in my view, appear convincing for the same reasons as those adduced by the Commission in the application. I would first point out, as does the Commission, that the Nature Protection Law contains no reference to SACs, to the terms 'natural habitats' and 'habitats of species', to specific types of habitat or to protected species listed in the annexes to the Directive. Considering the types of habitat with which the Directive is concerned, that fact alone means that the law in question does not constitute a correct and precise transposition of Article 6(2). Furthermore, as Advocate General Fennelly observed in his Opinion, cited above, in Case C-256/98 *Commission* v *France*, which concerned Directive 92/43, '[t]he Court's observation regarding the Birds Directive [79/409] in *Commission* v *Belgium* [Case 247/85, cited above] that "a faithful transposition becomes 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" is also, in my view, relevant in the present case' (point 20).

39. Even a more detailed examination of the provisions of the Nature Protection Law to which the Luxembourg Government refers leads to the same conclusion. First, no provision of Luxembourg law defines the terms 'natural habitats' or 'habitats of species'. Next, the term biotope mentioned in Article 14 of the Nature Protection Law is not sufficiently precise. As regards Articles 21 and 22, the Commission stresses that the notion of 'unjustified' mutilation or destruction mentioned in the Nature Protection Law is so general as to make a precise transposition of the

8 — Instruction ministérielle du 9 juillet 1999 à appliquer par les administrations relevant du Ministère de l'Environnement: mesures administratives nécessaires pour garantir la mise en œuvre de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages (Ministerial Circular of 9 July 1999 to be applied by the departments of the Ministry of the Environment: administrative measures to ensure implementation of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora).

Directive all the more necessary, so as to enable the competent authorities, where those provisions are invoked at national level in the context of application of the Directive, to interpret them in accordance with the Directive. Article 23 in turn contains a general prohibition on disturbance without referring either to the objectives (for example, conservation) of the Directive (mentioned in Article 6(2)), or to SACs or even to the species listed in the annexes to the Directive. Finally, Article 36, which lists the cases where the competent authority must refuse applications for authorisation under the Nature Protection Law (for example, work which may modify the water system (Article 5) or a change of intended use for forestry land (Article 10)), does not constitute a clear and precise transposition of the Directive given, once more, the absence of any reference to the relevant provisions of the Directive such as would ensure that the law is applied in accordance with the Directive.

40. Turning to Luxembourg's more general argument concerning the excessive strictness of the Commission's interpretation and the issue of the Ministerial Circular of 9 July 1999, I would first point out that the Luxembourg Government itself, both in adopting the circular and in announcing new laws, acknowledged the need for clarity and precision emphasised by the Commission. Secondly, I must reiterate that an administrative practice cannot ensure the legal certainty required for transposition of a directive (see point 24).

41. Consequently, given that the general legal context fails to guarantee effectively full application of Article 6(2) of the Directive with sufficient clarity and precision and with the necessary degree of legal certainty, I take the view that the Commission's submissions on this point are well founded. [9]

(c) Article 6(3) and (4) of the Directive

42. Under Article 6(3) of the Directive, an assessment must be carried out of the effect which any plan or project not directly connected with or necessary to the management of a site may have on that site. Article 6(4) provides for cases where, in spite of a negative assessment, a plan or project must nevertheless be carried out for imperative reasons.

43. The Commission states that Member States need not transpose Article 6(3) pro-

9 — Similar observations in respect of the same provision of the directive were made by Advocate General Fennelly in Case C-256/98 *Commission* v *France*, cited above, at point 20 et seq. of his Opinion (see footnote 7).

vided that they waive in advance their right to avail themselves of the option mentioned therein and, at the same time, prohibit, in general and unconditional terms, the implementation of any plan or project of the kind mentioned in the Directive. If, however, Member States do not communicate to the Commission any such measures of general and unconditional prohibition, they are obliged to implement the provision fully. Given that Article 6(4) introduces a derogation in respect of Article 6(3), Member States would, in this case, be relieved of their obligation to transpose that provision too, waiving in advance their right to rely on it. The Commission stresses that, naturally, given the importance of the provision, such waiver cannot be presumed unless the Member State concerned adopts a specific provision to the contrary, the Commission must therefore proceed on the assumption that the obligation to transpose Article 6(4) remains.

44. As regards the substance, the Commission argues that the measures communicated by the Luxembourg authorities do not meet the requirements of Article 6(3) as they do not contain provision for an assessment to be carried out of the effect of plans or projects in all the cases mentioned in the Directive.

45. In particular, the Commission finds certain provisions of the Nature Protection Law, such as the third paragraph of Article 7 and the second, third and fourth paragraphs of Article 8, which make certain projects subject to ministerial authorisation, inadequate because such authorisation is required only for certain projects and there is in any event no requirement that the assessment of their effect on the environment be carried out in an appropriate fashion as the Directive requires. The Commission also observes that Article 9 of the Nature Protection Law, which provides for impact studies to be carried out at the initiative of the minister in the cases listed therein, concerns the 'green belt', as defined in Article 2 of the law, but not the protected areas designated under Article 27 to which the Luxembourg authorities may also have recourse in identifying SACs. Moreover, in the cases mentioned, Article 9 does not place an obligation upon the minister, as the Directive intends, but simply gives him the option of carrying out an assessment.

46. The Commission adds that not even the legislation transposing Directive 85/337/EEC [10] may be regarded as implementing Article 6(3) of the Directive as there is no overlap in the scope of these directives. The same may be said of Directive 97/11/EC, [11] which amended Directive 85/337, extending its scope of application

10 — 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).

11 — Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73, p. 5).

to special protection areas (SPAs) and to SACs, since not all the projects mentioned in Directive 92/43 are covered by these two directives, nor do they deal with planning. Furthermore, the Commission emphasises, incomplete transposition of Article 6(3) frustrates implementation of Article 6(4) because the obligations laid down by the latter presuppose the completion of an assessment of the effect of plans and projects on protected sites.

47. Luxembourg immediately acknowledged in its reply to the letter of formal notice that the provisions in force were insufficient, but claimed that the lacuna would be remedied when the sectoral plan was adopted. It also stated that, in the mean time, the matter was regulated by the Ministerial Circular of 9 July 1999. On the matter of the compensatory measures mentioned in Article 6(4) of the Directive, Luxembourg claimed that provision was already made for them by Article 37 of the Nature Protection Law, under which the minister may grant authorisation subject to conditions preventing the work to be carried out from damaging the environment.

48. However, it is clear, and the Luxembourg Government itself admits, that the transposition of Article 6(3) and (4) is inadequate and that, for the reasons I gave when considering Article 6(2) (see points 38 and 40), the Ministerial Circular cannot satisfy the obligations incumbent upon Luxembourg. Moreover, as I said earlier, there is no indication that the sectoral plan has yet been adopted. Finally, as regards Article 37 of the Nature Protection Law, the Commission has quite rightly pointed out that it is not sufficient since it does not require the ministerial authorisation to be made subject to the conditions described above when the circumstances mentioned in the Directive require it. I therefore consider this claim of the Commission's is also well founded.

49. In conclusion, it is my view that the fourth plea relating to Article 6 of the Directive should be upheld.

5. Article 7 of the Directive

50. Under Article 7, the obligations arising under Article 6(2) to (4) of the Directive replace those arising under the first sentence of Article 4(4) of Directive 79/409 regarding SPAs for wild birds, which are similar to the SACs. The Commission observes that failure to transpose Article 6(2) to (4) leaves the Luxembourg SPAs without an appropriate legal framework conforming to Community law. In its

reply to the letter of formal notice, the Luxembourg Government simply observed that the adoption of the sectoral plan would provide a precise legal framework for the 'Natura 2000' network, including both the SACs and the SPAs.

51. I have already dwelt upon Luxembourg's failure to transpose correctly Article 6(2) to (4). I have also pointed out that there is no evidence that the sectoral plan has been adopted. It is my view, therefore, that the plea relating to Article 7 of the Directive is well founded.

6. Article 12 of the Directive

(a) Article 12(1)(b)

52. The Commission argues that Article 12(1)(b) of the Directive has not been correctly transposed in that none of the measures communicated to it by the Luxembourg authorities [12] contains a prohibition on the deliberate disturbance of the species concerned *during the period of migration.*

53. In its reply to the letter of formal notice, the Luxembourg Government first stated, as a general observation, that Article 12 of the Directive closely follows the wording of Article 6 of the Bern Convention of 19 September 1979 on the Conservation of European Wildlife and Natural Habitats (hereinafter 'the Bern Convention'), approved by Luxembourg by the Law of 26 November 1981 [13] and implemented in Luxembourg from 11 July 1982 in accordance with Article 19(3) of the convention. [14] As regards in particular Article 12(1)(b), the Luxembourg Government also claimed that the protection sought by the Directive is guaranteed by Article 23 of the Nature Protection Law, which prohibits the disturbance of all fauna throughout the year. Article 23 provides, as does Article 6(c) of the Bern Convention, that [15] '[t]he disturbance of fauna, particularly during the period of breeding, rearing and hibernation is prohibited....' [16]

54. I must, however, express agreement with the Commission that the measures cited above do not expressly and clearly provide for a prohibition on the disturbance of protected species during the period of migration. In particular, it appears to me that the expression 'particularly' on which the defence of the Luxembourg Government seems to rest where it stresses that the

12 — See in particular Articles 17 and 23 of the Nature Protection Law and the 'règlement grand-ducal du 8 avril 1986 concernant la protection intégrale et partielle de certaines espèces animales de la faune sauvage' (Grand-Ducal Regulation of 8 April 1986 on the Complete and Partial Protection of Certain Species of Wild Animal, *Mémorial* A No 31 of 23 April 1986, p. 1175).

13 — *Mémorial* A, 1981, p. 2130.

14 — *Mémorial* A, 1982, p. 1099.

15 — Article 6 provides: '... The following will in particular be prohibited for [the wild fauna species specified in Appendix II]:... (c) the deliberate disturbance of wild fauna, particularly during the period of breeding, rearing and hibernation...'.

16 — Unofficial translation, as in the case of all the Luxembourg laws cited in this Opinion.

cases listed in those measures are examples is not sufficient to meet the precise requirements in this regard of the Directive. I need hardly point out again what I said earlier regarding the requirements of precision and of legal certainty especially in the case of a directive such as the one under consideration in which 'the management of the common heritage is entrusted to the Member States in their respective territories'. [17]

(b) Article 12(1)(c)

55. The Commission claims that Luxembourg has failed to transpose fully and correctly Article 12(1)(c) of the Directive, which lays down a prohibition on the 'deliberate destruction or taking of eggs from the wild'. In its reply to the letter of formal notice, the Luxembourg Government submits that the prohibition appears both in Article 17 of the Nature Protection Law, which provides that 'animals which are the subject of complete protection may not be disturbed, killed, hunted, captured, held or tamed *at any stage of their development...*', [18] and in Article 6(d) of the Bern Convention, which prohibits 'the deliberate destruction or taking of eggs from the wild or keeping these eggs'.

56. Here too, I feel I must agree with the Commission.

57. The Commission complains first and foremost that Article 17 of the Nature Protection Law does not even implicitly allude to the taking of eggs from the wild, given that 'taking' has a different meaning from the simple 'possession' (or 'keeping') of eggs, because the eggs may later be abandoned without therefore necessarily implying that they are 'kept' within the meaning of Article 17. Next, given that the prohibition laid down in Article 17 is punishable as a criminal offence (see Article 44 et seq. of the Nature Protection Law) and therefore may not be interpreted broadly, it is unlikely, the Commission says, that a court could interpret the prohibition on keeping eggs as also covering the act of simply taking them.

58. Next, as regards Article 6(d) of the Bern Convention, the Commission argues, first, that, under Article 20 of the Nature Protection Law, [19] animals protected by international conventions approved and

17 — See case-law cited in footnote 7.

18 — Emphasis in the original.

19 — Article 20 provides that 'plants and animals protected by approved and published international conventions may be purchased, imported, sold, exported or kept only in accordance with the provisions of those conventions'.

published in the Grand Duchy of Luxembourg may not be 'held' (or 'kept') except in accordance with the provisions of those conventions and, secondly, that Article 6 of the Bern Convention applies only to the species listed in Annex II to the convention. That annex, however, does not include certain species listed in Annex IV (a) of the Directive, to which Article 12 refers.

59. It must be said, in the end, that Article 20 of the Nature Protection Law nevertheless remains ambiguous. As I mentioned with reference to Article 17 of the law, the concept of 'taking' does not appear, there being reference only to 'keeping' or 'possession' and Article 20 refers exclusively to the keeping of 'animals', without mentioning eggs and without even using the expression 'at any stage of their development'.

(c) Article 12(2)

60. The Commission goes on to complain that Article 12(2) of the Directive is incorrectly transposed, in so far as there is no prohibition in Luxembourg law on the exchange and offering for exchange of specimens taken from the wild. The Commission also objects that the expression 'specimen', which appears in Article 12(2) and is defined in Article 1(m) of the Directive, has a broader meaning than 'animal' in Luxembourg law.

61. In the pre-litigation stage of this case, the Luxembourg Government maintained that the terms 'exchange' and 'offering for exchange' of specimens fall within the scope of Article 17 of the Nature Protection Law in that the law prohibits 'keeping', and clearly a person cannot exchange something which he does not keep. In response to the Commission's second complaint, the Luxembourg authorities observed that Article 15 of the law provides for the cataloguing, under a Grand-Ducal regulation, of 'rare wild plants and animals which are threatened with extinction or which are an important part of the natural environment', with no limitation to indigenous species (see the Grand-Ducal regulation of 8 April 1986 cited in footnote 12). The authorities go on to say that Article 20 of the Nature Protection Law (which I considered at point 58) extends the concept of 'animal' beyond the meaning conferred on it by national law, providing that 'plants and animals protected by approved and published international conventions may be purchased, imported, sold, exported or kept only in accordance with the provisions of those conventions'.

62. The defence of the Luxembourg Government may not be accepted for the following reasons, which the Commission outlined in its application. In particular,

given that the Nature Protection Law is a criminal law, I must reiterate that a court will not interpret broadly the prohibition under Article 17 so as to include exchange or offering for exchange within the expression 'keeping'. It appears, furthermore, that current Luxembourg law does not prohibit a person from exchanging or offering for exchange a particular protected specimen as an intermediary acting on behalf of a person in possession of that specimen.

63. On the matter of how the terms 'specimen' and 'animal' differ in meaning, it must first be pointed out that, in their reference to Article 20 of the Nature Protection Law, the Luxembourg authorities do not specify which international convention is relevant to the case in point. If the law refers to the Bern Convention (and there is every indication that it does), I would note that Article 6(e), the provision which seems closest to Article 12(2) of the Directive, prohibits the possession of and trade in the animals listed in Annex II 'where this would contribute to the effectiveness of the provisions of this article'. That suggests the need for further intervention by the national authorities in implementing the provision. However, the Commission has received no indication that Luxembourg has adopted a measure implementing that provision (apart from Article 20 which, however, makes no provision in respect of the circumstances of the present case). Aside from that point, I must observe that the Commission states that Annex II to the convention contains a list of protected species which does not include some of those which appear in Annex IV (a) to the Directive, to which Article 12 refers.

64. The Commission has also rightly pointed out that the Luxembourg authorities have been unable to show that the term 'animal' in their national law includes 'any part or derivative [of an animal], as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals... of those species', as described in Article 1(m) of the Directive, which defines the term 'specimen'.

65. Finally, regarding the Luxembourg authorities' reference to Article 15 of the Nature Protection Law and the related Grand-Ducal regulation of 8 April 1986, I would simply point out that those laws do not appear to include 'any part or derivative' as mentioned in Article 1(m) of the Directive, and the list of animals covered by the Grand-Ducal regulation omits a number of the species listed in Annex IV (a) to the Directive.

(d) Article 12(4)

66. Regarding the Commission's submissions relating to Article 12(4), the Lux-

embourg authorities have acknowledged that they have failed to transpose Article 12(4), which provides for the establishment of a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a).

67. In conclusion, it is my view that all the Commission's arguments regarding the incorrect and/or incomplete transposition of Article 12 are well founded.

7. Article 13 of the Directive

(a) Article 13(1)(b)

68. The Commission submits that Article 13(1)(b) has not been correctly transposed because Luxembourg law does not prohibit the keeping, exchange and offering for sale or exchange of specimens of the plant species listed in Annex IV (b) and Annex II (b) to the Directive; nor does it ensure the application of the prohibitions laid down by that provision to the non-indigenous species listed in those annexes.

69. In their reply to the letter of formal notice, the Luxembourg authorities argued that Article 13(1)(b) is transposed by Article 16 of the Nature Protection Law, which prohibits the sale of the specimens mentioned, and by Article 5 of the Bern Convention, which prohibits their possession. The Luxembourg authorities then submitted that application of the prohibition of the activities listed in Article 13(1)(b) to all the plant species listed in Annex IV (b) and Annex II (b) to the Directive is ensured by the Nature Protection Law, and in particular by Article 15 thereof, which does not exclude non-indigenous species from the list of the protected plants classified under the Grand-Ducal regulation of 19 August 1989, [20] and which, therefore, simply needs to be supplemented, and by Article 20, which, by referring to international conventions, extends the definition of 'plants' beyond the meaning conferred by national law.

70. Once again, the Luxembourg Government's arguments appear unconvincing, as the Commission has observed.

71. Firstly, whilst Article 16 of the Nature Protection Law prohibits sales, it does not cover cases of keeping, exchange and offering for exchange or sale. Furthermore, with regard to 'keeping', Article 5 of the

20 — Règlement grand-ducal du 19 août 1989 concernant la protection intégrale et partielle de certaines espèces végétales de la flore sauvage (Grand-Ducal Regulation of 19 August 1989 on the Complete and Partial Protection of Certain Species of Wild Flower, *Mémorial* A No 61 of 20 September 1989, p. 1103).

Bern Convention does not appear to coincide fully with the Directive as it prohibits possession 'as appropriate' and therefore appears to require further intervention by the relevant contracting party for its application.[21] As far as the Commission can ascertain, there has been no such intervention in this instance (see Article 20 of the Nature Protection Law, which makes no provision in this regard). The Commission has also observed that Article 5 of the Bern Convention is not sufficient even to transpose Article 13(1)(b) in so far as it refers to Annex I to the convention, which omits some of the plant species listed in Annex IV (b) to the Directive.

72. Turning now to the matter of the protection of the non-indigenous plants listed in Annexes IV (b) and II (b) to the Directive, the Commission reiterates its observation concerning Article 12 of the Directive, that the reference made to Article 20 of the Nature Protection Law was not accompanied by any indication as to which international convention was relevant in this instance. However, the provision which appears to correspond most closely to Article 13(1)(b) is, once again, Article 5 of the Bern Convention. Nevertheless, the Commission emphasises, the considerations set out in the previous paragraph apply here too and Article 13(1)(b) is incapable of correctly transposing the prohibition of keeping protected plant species.

21 — As in the case of Article 6(e) of the Bern Convention. See my observations in point 63.

73. I would add, lastly, that the argument that Article 15 of the Nature Protection Law extends the protection intended by the Directive to the non-indigenous species listed in the annexes to the Directive is clearly unfounded in that the Luxembourg Government has acknowledged that the Grand-Ducal regulation of 19 August 1989, adopted in execution of Article 13(1)(b), remains to be implemented. The information provided by the Luxembourg authorities in their reply to the reasoned opinion and in their defence in this case does not suggest that the Grand-Ducal regulation in question has been implemented.

(b) Article 13(2)

74. The Commission complains that Article 13(2) has not been fully transposed in that 'plant' in national law appears to have a more restricted meaning than 'specimen' as defined in Article 1(m) of the Directive. In their reply to the letter of formal notice, the Luxembourg authorities nevertheless maintained that Article 13(2) was transposed by Article 16 of the Nature Protection Law, which also expressly mentions 'parts of plants'.

75. The doubts expressed by the Commission as to whether the expression 'parts of

plants' also includes 'any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of [...] plants of those species' (Article 1(m)) appear to be well founded.

76. In my view, therefore, the Commission's complaint concerning Article 13 of the Directive is well founded.

8. Article 14 of the Directive

77. Under Article 14 of the Directive, Member States must, if they deem it necessary in light of the surveillance provided for in Article 11, take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V and their exploitation are compatible with their being maintained at favourable conservation status. Where necessary, these measures may also include continuation of the surveillance provided for under Article 11.

78. The Commission emphasises that Article 14 is not optional but imposes an unconditional obligation of surveillance of protected species together with an obligation to adopt all the measures needed to ensure that such species are maintained at a favourable conservation status where the competent authorities deem it necessary. In Luxembourg law, however, as the Luxembourg authorities themselves have recognised, there is no sign of measures intended to ensure observance of that requirement.

79. The Commission, in my view, has done little to justify its submission that the provision in question is not optional. Nor, in fact, is the argument strengthened by the wording of Article 14, given that the obligation to adopt the measures in question presupposes that the Member State concerned has formed an autonomous judgment on the need to do so. Admittedly, that judgment is subject to review, because it must further the ends listed in Articles 11 and 14 of the Directive, but in any event the Member State retains a margin of discretion. How it exercises that discretion is open to question, but the discretion itself may not be denied. I am therefore unable to agree with the arguments which the Commission puts to the Luxembourg Government on this point. I note from their reply to the letter of formal notice that the Luxembourg authorities have not responded to those arguments and, in particular, that they acknowledge that they have failed to transpose Article 14 of the Directive and Annex V to which it refers. However, for the reasons outlined in connection with the objective nature of pro-

ceedings under Article 226 EC, I continue to believe that the present complaint is not well founded.

9. Article 15 of the Directive

80. As I said earlier, Article 15 provides that, in the cases listed, Member States must prohibit the use of all indiscriminate means of capture or killing capable of causing local disappearance of, or serious disturbance to, populations of protected species. The Commission points out that the Luxembourg authorities have informed it of their intention to avail themselves of the derogations provided for by Article 16 of the Directive and have acknowledged the need to transpose Article 15 (see point 12). However, the Grand Duchy of Luxembourg has not fully and correctly implemented Article 15 or Annex VI in that none of the measures communicated to it by the Luxembourg authorities achieves that result.

81. In their reply to the letter of formal notice, the Luxembourg authorities for their part stated that Article 15 should be regarded as having been transposed by the following pieces of legislation: the Act approving the Bern Convention, the Law on Hunting of 19 May 1885 [22] as amended [23] (hereinafter 'the Law on Hunting') and Decision M(96)8 of 2 October 1996 of the Committee of Ministers of the Benelux Economic Union on hunting and the protection of birds (décision du Comité des Ministres de l'Union Économique Benelux en matière de chasse et de protection des oiseaux; hereinafter 'the Benelux Committee Decision'). The Luxembourg authorities also announced the imminent abrogation of the 'arrêté grand-ducal ayant pour objet la destruction des animaux malfaisants et nuisibles' of 10 March 1959 (Grand-Ducal Decree on the elimination of harmful animals and vermin, hereinafter 'the Grand-Ducal Decree') and the simultaneous adoption of a regulation (intended to implement the Directive) on mordacious animals and rodents which may cause damage to private property and to fauna threatened with extinction.

82. The Commission, however, has argued that none of those measures is apt to ensure the correct transposition of Article 15 of the Directive.

83. As regards the Bern Convention, the Commission has submitted, first, that Annexes II and III, to which Article 8 of the convention refers (that being the provision which most closely mirrors Article 15 of the Directive), are not identical to Annexes V and VI (to which Article 15 refers). Secondly, Annex IV to the Bern Convention does not include all forms and

22 — *Mémorial* 1885, p. 509.

23 — See the consolidated text of the law in *Code de l'environnement*, 1997, Vol. 1, p. 3.

methods of capture and killing and means of transport listed in Annex VI to the Directive (for example, the Bern Convention does not prohibit the use of crossbows and aircraft other than aeroplanes, such as helicopters).

84. As regards the Benelux Committee Decision, although it appears to prohibit the use of crossbows and, perhaps, aircraft in general, it is in reality confined to regulating the practice of hunting and not acts of killing in a more general sense, as the Directive provides. Under Article 4(b) of the Benelux Committee Decision, the governments concerned were required to adopt the necessary measures for its application within a year of signing. The Commission has seen no evidence, however, that the Grand Duchy of Luxembourg has done so.

85. Next, as regards the Law on Hunting, which is particularly relevant in the case of two species of wild animal which are listed in Annex V (a) to the Directive [24] and to which Article 15 (which refers to that annex) and Annex VI therefore apply, the Commission acknowledges that Article 13 thereof authorises hunting with arms and chase hunting and prohibits the use of all other methods of hunting, including hunting with mechanical motor vehicles. It observes, however, that the provision does not expressly prohibit the use of aircraft. Admittedly, aircraft might be included in the expression 'mechanical motor vehicles', but the legal certainty which must characterise the rules arising from transposition of a directive such as the one in question (see point 35), in the Commission's view, requires aircraft to be mentioned expressly and unequivocally.

86. Turning, finally, to the Grand-Ducal Decree, that authorises the elimination of martens and polecats by smoking them out of their lairs or by means of traps, but it does not state that these methods are authorised only if they are selective within the meaning of Article 15 of and Annex VI to the Directive. The Commission also points out that the decree is not justified even in light of Article 16 of the Directive in that it is per se contrary to Article 15. Moreover, in their reply to the letter of formal notice, the Luxembourg authorities recognised that it was necessary to repeal the decree or to amend it so as to conform to the Directive but the Commission is not aware that that has happened.

87. I must therefore conclude that the plea concerning Article 15 of the Directive is well founded, even though it may appear in some ways excessively formalistic, not to say, punctilious.

24 — The marten (*Martes martes*) and the polecat (*Mustela putorius*).

10. Article 16(1) of the Directive

88. The Commission argues that Article 16(1) of the Directive has not been correctly transposed into Luxembourg law.

89. In their reply to the letter of formal notice, the Luxembourg authorities argued that Article 16(1) was transposed, at least partially, by Article 26 of the Nature Protection Law, which provides that 'the Minister may grant derogations from Articles 13 to 18 for scientific purposes or in the public interest', and by the Act approving the Bern Convention, Article 9 of the act corresponding to Article 16(1) of the Directive.

90. Nevertheless, I feel I must share the Commission's view on this point and reiterate that the transposition is incomplete and incorrect. In particular, it seems that the derogations which may be granted by the authorities under Article 26 of the Nature Protection Law are not made subject to the condition that there be no valid alternative solution, as the Directive requires.

91. Next, as regards the Bern Convention, the Commission acknowledges that Article 9 thereof sets out the conditions under which the contracting parties may derogate from Articles 4 to 7 of the convention and from the prohibition of the use of the means of capture and killing mentioned in Article 8 thereof. The Commission, however, objects, amongst other things, that the provisions of the Bern Convention do not guarantee protection equivalent to that under the Directive, and that the fifth indent of Article 9(1) of the convention (roughly equivalent to Article 16(1)(e) of the Directive) does not require specimens subject to the derogation to be taken or kept in limited numbers 'specified by the competent national authorities'.

92. Those observations appear to be well founded. In particular, I consider decisive the fact that Article 9 of the Bern Convention does not ensure a level of protection equivalent to that of the Directive,[25] with the risk that the competent national authorities may avoid recourse to Article 9 if a particular operation is prohibited by the Directive but not by the convention.

93. In my opinion, therefore, since Luxembourg has failed to communicate further

25 — As I noted in my analysis of the Commission's pleas concerning Articles 12, 13 and 15 of the Directive, corresponding respectively (for present purposes) to Articles 6, 5 and 8 of the Bern Convention, to which Article 9 of the convention refers.

implementing measures in addition to those mentioned within the period set in the reasoned opinion (or, indeed, subsequently), the plea concerning Article 16(1) of the Directive must be upheld.

11. Article 22(b) and (c) of the Directive

94. The Luxembourg authorities replied to the Commission's complaint in the letter of formal notice concerning incorrect transposition of Article 22(b) of the Directive that the provision is transposed by Article 25 of the Nature Protection Law, which prohibits the introduction of non-indigenous species into the wild except by authorisation of the competent minister, which may be accompanied by appropriate conditions. In this respect, however, I must observe, along with the Commission, that Article 25 of the Nature Protection Law does not make the issue of ministerial authorisation subject to the conditions listed in the Directive (such as, for example, the condition that the introduction of species into the wild must be regulated so as to avoid damage to natural habitats) and, therefore, does not constitute a precise transposition of the Directive.

95. The Luxembourg authorities went on to submit that Article 22(c) of the Directive, the aim of which is to promote education and general information, is transposed by Article 3(3) of the Bern Convention (similar to Article 22(c) of the Directive), by the Rio de Janeiro Convention on Biological Diversity of 5 June 1992 [26] (see Article 13, which is concerned with public education and awareness) and the Law of 10 August 1992, which guarantees freedom of access to information on the environment.

96. Given that Article 20 of the Nature Protection Law does not deal with education and information and that the Law of 10 August 1992 contains no provision for raising public awareness, the Commission recognises that Article 3(3) of the Bern Convention and Article 13 of the Rio de Janeiro Convention on Biological Diversity do, in principle, satisfactorily transpose the Directive. [27] The Commission argues, however, that Luxembourg should have

26 — The convention was ratified by Luxembourg by the Law of 4 March 1994 (*Mémorial* A, 1994, p. 429) and entered into force in Luxembourg on 7 August 1994, in accordance with Article 36(3) of the convention (*Mémorial* A, 1994, p. 1475).

27 — Article 3(3) of the Bern Convention provides: 'Each Contracting Party shall promote education and disseminate general information on the need to conserve species of wild flora and fauna and their habitats.' Article 13 of the Rio de Janeiro Convention provides: 'The Contracting Parties shall: (a) Promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and (b) Cooperate, as appropriate, with other States and international organisations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.'

shown — but has not — that the principle of direct effect of self-executing provisions of legally approved and published international conventions is included in its legal system.

97. I must admit I find it difficult to understand what the Commission is referring to with this latter argument. Without discussing at length the different principles and practices in this area in the various Member States, there is no doubt that, in Luxembourg, once an international convention has been ratified and published it has full legal effect in that State. Questions may arise as to whether the content of a particular convention provision is detailed enough to allow it immediately to have effect or whether further implementing measures are necessary. However, in this instance no such problem appears to arise, given that in particular the wording of Article 3(3) of the Bern Convention is almost identical to Article 22(c) of the Directive. The matter would thus arise in the same way for both provisions. For present purposes, therefore, it appears to me that the fact that the measure implementing the Bern Convention has force in Luxembourg is sufficient to satisfy the requirement laid down by the Directive and that, consequently, the plea raised by the Commission in this respect must be dismissed.

12. Article 23(2) of the Directive

98. Finally, the Commission argues that Article 23(2) of the Directive has been infringed in that none of the implementing measures adopted by the Grand Duchy of Luxembourg following the Directive's entry into force and communicated to it contains a reference to the Directive or was published together with such a reference. In their reply to the letter of formal notice, the Luxembourg authorities stated that the draft sectoral plan provided for by the Regional Planning Law (see, respectively, points 21 and 17) mainly concerned Directives 92/43 and 79/409 and that a list of all the national measures which together transpose the Directive would be published in the *Mémorial*, the Official Journal of the Grand Duchy of Luxembourg.

99. The Commission, agreed in the reasoned opinion that publication in the *Mémorial* of such a list together with a reference to the Directive would make good the failure to transpose Article 23(2). How-

ever, it had had no information about such publication.

100. It appears then that there is no doubt that the Grand Duchy of Luxembourg continues to be in breach of its obligations under Article 23(2) of the Directive.

13. Application to suspend proceedings

101. As I stated earlier (see point 18), the Luxembourg Government, in addition to requesting that the Commission's action be dismissed, called upon the Court to suspend the proceedings in anticipation of a possible withdrawal of the action by the Commission. The reason for the application was that once the Luxembourg Parliament adopted the draft law transposing the Directive mentioned at point 18, the proceedings would become devoid of purpose. The Commission having decided not to lodge a reply (and there having been no hearing), there are no observations from the applicant concerning this request.

102. It is my view, however, that the application may not be granted, because the Rules of Procedure make no provision for proceedings for failure by a Member State to fulfil its obligations under Community law to be suspended in anticipation of a possible withdrawal of the proceedings by the Commission. In any event, even if the draft law were ultimately approved by the Luxembourg Parliament, the present proceedings are not devoid of purpose because, as is well known, in proceedings under Article 226 EC, any breach must be established with reference to the situation in existence at the end of the time-limit laid down in the reasoned opinion. [28]

## III — Costs

103. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if there has been an application to that effect. As the Commission has made such an application and given what I have said about the overall outcome of the action, it is my view that the Commission should be granted costs.

28 — See, to this effect, the leading case, Joined Cases C-396/99 and C-397/99 *Commission* v *Greece* [2001] ECR I-7577, paragraph 33.

## IV — Conclusion

104. In the light of the foregoing, I therefore propose that the Court should declare that:

(1) By failing to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b) and 13(2), 15, 16(1), 22(b), and 23(2) in conjunction with Annexes I, II, IV, V and VI of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive and under the third paragraph of Article 249 EC;

(2) The remainder of the action should be dismissed;

(3) The Grand Duchy of Luxembourg should be ordered to pay the costs.