OPINION OF ADVOCATE GENERAL LÉGER

delivered on 15 February 2001 [1]

1. In the present action, the Commission of the European Communities (hereinafter 'the Commission') is seeking a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Articles 5, 7 and 9 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, [2] and with Annex II thereto, the Italian Republic has failed to fulfil its obligations under that directive.

2. In support of its action, the Commission maintains that the Italian Republic has infringed the provisions of Articles 5, 7 and 9 of the birds directive and Annex II thereto:

— by laying down rules permitting the capture of birds of the species *Passer italiae*, *Passer montanus* and *Sturnus vulgaris* [3] to be sold for use as decoys and the keeping of those species;

— by providing that those rules are to apply by way of a general and permanent derogation, and

— by failing to transpose the provisions of Article 9(1)(a) and (b) of the directive.

I — Relevant provisions

A — *The birds directive*

3. The immediate aim of the birds directive, as stated in Article 1(1) thereof, is 'the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States'. [4] To that end, it introduces rules for the protection, management and control of those species. It also lays down rules for their exploitation.

1 — Original language: French.

2 — OJ L 1979 103, p. 1 (otherwise referred to as 'the birds directive').

3 — Otherwise referred to as the 'species at issue'.

4 — Hereinafter 'the protected species'.

4. Under Article 5(a) and (e), the birds directive generally prohibits the killing, capture or keeping of the protected species.

5. However, in accordance with Article 7(1) of the birds directive, the species listed in Annex II may be hunted under national legislation. More specifically, the species referred to in Annex II/1 may be hunted throughout the geographical area of the Community where Directive 79/409 applies. Conversely, the species referred to in Annex II/2 may be hunted only in the Member States shown in that annex.

6. Member States may derogate from these rules restricting hunting, and also from the other restrictions and prohibitions that are laid down in particular in Article 5 of the birds directive, if there is no other satisfactory solution and for the reasons listed in Article 9(1), namely:

(a) in the interests of public safety and health, and of air safety, to prevent serious damage to agriculture and for the protection of flora and fauna;

(b) for the purposes of research and teaching, of repopulation, of reintroduction and for the breeding necessary for these purposes, and

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

7. Under Article 9(2) of the birds directive, 'the derogations must specify:

— the species which are subject to the derogations,

— the means, arrangements or methods authorised for capture or killing,

— the conditions of risk and the circumstances of time and place under which such derogations may be granted,

— the authority empowered to declare that the required conditions obtain and

to decide what means, arrangements or methods may be used, within what limits and by whom,

— the controls which will be carried out'.

8. Article 18(1) of the directive states that 'Member states shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive within two years of its notification'.

B — *National provisions*

Italian Law No 157/92 of 11 February 1992 [5]

9. Law No 157/92 is the national measure by which the Italian Republic transposed the provisions of the birds directive.

10. Article 1(3) provides that the ordinary status regions 'shall prescribe provisions to govern the management and protection of all species of wild fauna in accordance with this Law, international agreements and Community directives'. The article provides that the special status regions and autonomous provinces shall be subject to this requirement 'within the bounds of their exclusive powers as set out in their individual constitutions'.

11. Article 2(3) of Law No 157/92 provides that 'control of population levels of birds at airports shall be entrusted to the Minister for Transport'.

12. Article 4(4) of Law No 157/92 provides that 'capture for the purpose of sale as decoys shall be permitted only of the following species: skylark, fieldfare, redwing, songthrush, starling, blackbird, sparrow, tree sparrow, lapwing and wood pigeon. Birds of other species which are captured must be ringed and immediately released'.

13. Article 5(2) of Law No 157/92 states that 'regions shall also make provision for the creation and the management of the

5 — Ordinary supplement No 41 to GURI No 46, of 25 February 1992 (hereinafter 'Law No 157/92').

stock of live decoys of the species laid down in Article 4(4), and to authorise any hunter pursuing any hunting activity, in accordance with Article 12(5)(b), to keep not more than ten specimens of each species up to a maximum of forty. For hunters engaged in hunting using temporary hides and live decoys, such stock may not exceed a maximum total of ten'.

14. The original version of Article 18 of Law No 157/92 lists a number of species — including the birds concerned in this case — which may be hunted in Italy.

15. Article 19(2) of Law No 157/92 states that it is for the regions to exercise control of the species of wild fauna, including in areas where hunting is prohibited, for the purpose of attaining the following objectives: improvement in management of the zoological heritage, protection of the soil, health reasons, biological selection, protection of the historical and artistic heritage and protection of animal, agricultural and forestry products and of fish reserves. Such control must be carried out on a selective basis and, in general, with the use of ecological methods. If the Istituto Nazionale per la Fauna Selvatica [6] finds that the control methods are ineffective, the regions may give authority for schemes for killing the species concerned, using game wardens or, if appropriate, foresters or local police officers, or even private individuals holding a hunting permit, to implement them.

Ministry of Agriculture Circular 3/93 of 29 January 1993 [7]

16. Circular 3/93 introduces rules derogating from the prohibitions imposed in the birds directive. It provides that birds may be captured for sale as decoys and be kept, as provided in Article 4(4) and Article 5(2) of Law No 157/92, under derogations authorised in accordance with Article 9 of the birds directive.

The Prime Ministerial Decree of 21 March 1997 [8]

17. To comply with the requirements of Annex II to the birds directive, the decree of 21 March 1997 amended Article 18 of Law No 157/92, by excluding the species *Passer italiae*, [9] *Passer montanus*, [10] *Passer*

6 — National Wild Fauna Institute (hereinafter 'the INFS').

7 — GURI No 38, of 16 February 1993 (hereinafter 'Circular 3/93').

8 — GURI No 98, of 29 April 1997 (hereinafter 'the decree of 21 March 1997').

9 — Italian sparrow.

10 — Tree sparrow.

domesticus, *Colinus virginianus*, *Sturnus vulgaris*, [11] *Corvus frugilegus*, *Corvus monedula*, *Bonasa bonasia* and *Limosa limosa* from the list of species that might be hunted.

18. Some further details were given in a circular letter of 13 May 1997 from the INFS. [12] The letter provides that the decree of 21 March 1997:

'... excluded species that might be hunted, among others the starling (*Sturnus vulgaris*), the tree sparrow (*Passer montanus*), the Italian sparrow and also the house sparrow (*Passer domesticus*) which had previously still been captured to supply live decoys used for hunting using hides.

The protection accorded to these four species means that they cannot be used as decoys for hunting; modifications must therefore be made to the current rules for managing the arrangements for capture.

The attention of the administrations to whom this circular is sent must therefore be drawn to the fact that, in drafting the "regional or provincial regulations on operation of the arrangements for capture of birds to be used as decoys" for 1997, they must proceed to make the appropriate changes to the forms supplied by the INFS. In addition to the prohibition on capture of starlings, Italian sparrows, tree sparrows and house sparrows, it must also be made impossible to authorise captures in resting areas (although that is shown in the "general rules on the use and management of arrangements for hunting birds as decoys" that are set out in the sub-section on Types of equipment and specialisation, point 3).

Since the modifications made to these regulations, and the modified list of species that may be captured, fall within the concept of fitness as required in Article 4(3) of Law No 157/92, administrations must send them in good time to applicants from the provinces who, within a short period of time, are to give the INFS proof that they qualify, as specified for the current year'.

Decree of 27 September 1997 [13]

11 — Starling.

12 — Hereinafter 'the INFS circular letter'.

13 — GURI No 254, of 30 October 1997 (hereinafter 'the decree of 27 September 1997').

19. This decree was adopted by the Prime Minister. Under Article 1(1), it defines the detailed rules for granting a derogation as provided in Article 9(1)(c) of the birds directive.

20. Article 2 of the decree provides that 'the regions in agreement with the Ministers for the Environment and for Agricultural Policies shall adopt the derogations provided in Article 1 of the present decree, identifying:

— the grounds for the derogation, having regard to the scale of the population of each species and specifying the technical, statistical and scientific evaluations conducted at the inquiries stage, in accordance with Article 9(1)(c) of Directive 79/409/EEC,

— the species and quantities which are subject to the derogation,

— the examination of the various alternative solutions capable of appropriately satisfying the interests protected by Article 9(1)(c) of Directive 79/409/EEC,

...

— the means, arrangements or methods authorised for capture or... killing,

— the times and places for exercise of the derogation,

— the time at which the derogation ceases to operate,

— the detailed rules, the control bodies and the system for verifying the controls carried out...'. [14]

21. Article 3 of the decree of 27 September 1997 provides that:

'The rules governing the conditions and detailed rules for application of the derogations specified in the articles above shall also apply to capture for sale as decoys as referred to in Article 4(4) of Law No 157 of 11 February 1992.'

14 — Free translation of Article 2 of the decree of 27 September 1997.

22. Article 4 of the decree of 27 September 1997 states that the INFS is the authority empowered under Article 9 of the birds directive to declare that the required conditions obtain.

23. Concerning the derogations provided in Article 9(1)(a) and (b) of the directive, the preamble to the decree of 27 September 1997 states that these are governed by the third paragraph of Article 2 and by Article 19 of Law No 157/92.

24. Following actions brought by certain regions, the Corte Costituzionale (Constitutional Court) annulled the decree of 27 September 1997 in Decision No 169 of 14 May 1999.

II — Procedure

A — *Pre-litigation procedure*

25. After examining the Italian legislation, the Commission took the view that Law No 157/92 permitted the hunting, the capture for sale as decoys and the keeping of species of birds which, under the birds directive, should have been protected, and that the Italian legislation — specifically Circular 3/93 — did not meet the requirements set out in the directive for the system of derogations from the prohibitions on hunting, keeping and capture.

26. On 30 November 1993, in accordance with Article 169 of the EC Treaty (now Article 226 EC), the Commission sent the Italian Government a letter of formal notice setting out its objections and inviting it to submit its observations within two months.

27. On 21 March 1997, the Italian authorities sent the Commission a copy of a letter of 4 March 1997 from the Ministry of Agricultural, Food and Forestry Resources announcing the imminent adoption of regulations to comply with the obligations imposed by the birds directive. On 29 May 1997, the Italian Government transmitted the text of the decree of 21 March 1997, amending Article 18 of Law No 157/92 by removing nine species of birds from the list of species that might be hunted in Italy.

28. On 7 August 1997, considering that the measures adopted by the Italian authorities were inadequate, the Commission sent the Italian Government a reasoned opinion stating its reasons for maintaining its objections concerning the non-fulfilment by Articles 4 and 5 of Law No 157/92 of the obligations laid down in the birds directive. It also stated that the rules in force in Italy on the application of deroga-

tions from the prohibitions imposed by the birds directive likewise failed to meet the requirements of Community law. It therefore invited the Italian Republic to adopt the measures necessary to comply with that opinion within two months from notification.

29. In reply to the reasoned opinion, the Italian Government sent the Commission, by letters of 1 October and 5 and 17 November 1997, the text of the decree of 27 September 1997 as published in the *Gazzetta ufficiale della Repubblica italiana*.

30. Considering that the measures so adopted only partially fulfilled the obligations set out in the birds directive, the Commission sent the Italian Government a further reasoned opinion on 18 June 1998. It also invited the Italian Republic to take the measures necessary to complete transposition of the directive within two months.

31. Confronted with the silence of the Italian Government, the Commission decided to bring the present case.

B — *Forms of order sought*

32. The Commission's application was registered at the Court Registry on 30 April 1999.

33. The Commission claims that the Court should:

'Declare that the Italian Republic has failed to fulfil its obligations under Community Law

— by laying down rules permitting the capture and keeping of three species (*Passer italiae*, *Passer montanus* and *Sturnus vulgaris*), contrary to Articles 5 and 7 of the birds directive and Annex II thereto, and by providing that those rules are to apply by way of a general and permanent derogation, which is contrary to Article 9 of that Directive and engenders an unacceptable degree of legal uncertainty; and

— by laying down rules concerning the conditions and detailed rules for the application of the derogation from the prohibitions laid down by the birds directive which do not fully comply

with the requirements under Article 9 thereof, in particular as regards the reasons for derogation, listed in Article 9(1)(a) and (b);

Order the Italian Republic to pay the costs of the proceedings.'

34. The Italian Government claims that the Court should:

'Declare the second objection set out in the application inadmissible;

— dismiss the remainder of the application;

— order the Commission to pay the costs of the proceedings.'

III — The Commission's pleas and assessment thereof

35. The Commission submits two pleas against the Italian Government. First, it objects that it has infringed Articles 5, 7 and 9 of the birds directive and Annex II thereto. Second, it claims that it has not fully transposed the provisions of Article 9 of the birds directive.

A — *The first plea*

36. This plea divides into two heads. Under the first head, the Commission considers that, by allowing three protected species to be captured as decoys and to be kept, the Italian Government has infringed Articles 5 and 7 of the birds directive. Furthermore, under the second head of this plea, the Commission claims that the Italian Government has introduced rules on derogating from the hunting prohibitions set out in the birds directive which are contrary to Article 9 of that directive.

First plea (first head)

(a) Observations of the parties

37. According to the Commission, Articles 5 and 7 of the birds directive clearly

prohibit hunting, capturing and keeping specimens of species not shown in Annex II to the directive. The three species, *Passer italiae*, *Passer montanus* and *Sturnus vulgaris*, are not shown in Annex II as species that may be hunted, captured or kept in Italy.

38. The Commission finds it equally clear from Article 4(4) and Article 5(2) of Law No 157/92 that those species may be captured for sale as decoys. Similarly, those same national provisions show that the keeping of those three protected species is authorised.

39. It is therefore clear that the provisions of the Italian legislation are incompatible with Articles 5 and 7 of the birds directive.

40. The Italian Government acknowledges that the birds directive prohibits the hunting, capturing for sale and keeping of the three species in dispute within Italy. However, it claims in essence that the Italian legislation does meet the requirements of the birds directive.

41. According to the Italian Government, in prohibiting the hunting of those species, the decree of 21 March 1997 also implicitly prohibits capturing them for sale as decoys. The Italian Government indicates that there is a close link between the provisions of Article 4(4) and Article 18(1) of Law No 157/92, which lists the species that may be hunted, in that capture for sale as decoys is permitted only for species in respect of which hunting is authorised.

(b) Assessment

42. Articles 5 and 7 of the birds directive expressly state that the hunting, capture and keeping of specimens of species not shown in Annex II to the directive are prohibited. The species *Passer italiae*, *Passer montanus* and *Sturnus vulgaris* are not shown among those that may be killed, captured or kept in Italy.

43. The very wording of Article 4(4) of Law No 157/92 shows that the capture for sale as decoys of specimens of those three species is authorised in Italy. Similarly, Article 5(2) of Law No 157/92 permits the regions to make rules on the detailed arrangements for keeping specimens of

those three species intended for use as decoys.

44. Since the species at issue are not included among the species that may be hunted, captured or kept, because — at any rate, as regards Italy — they are not shown in either Part 1 or Part 2 of Annex II to the birds directive, the requirements established by Article 4(4) and Article 5(2) of Law No 157/92 conflict with Articles 5 and 7 of the birds directive, in conjunction with Annex II thereto.

45. As regards the Italian Government's argument that prohibition is implicit and must be deduced from reading Article 18 of Law No 157/92 (as amended by the decree of 21 March 1997) together with Article 4(4) of the Law, I regard that as unsatisfactory in the light of the Court's requirements of accuracy, precision and clarity in transposing the provisions of the birds directive.

46. Thus, the Court has consistently held as regards the birds directive that, 'while transposition into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision, 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, 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'. [15]

47. The wording of Article 18 of Law No 157/92 (as amended) shows that only hunting activities have been prohibited in respect of the species at issue, and there is no mention of the activities of capturing these three protected species for sale as decoys or of keeping them, either expressly or by reference. Thus, Article 18 does not indicate that the activities referred to in Article 4(4) and Article 5(2) of Law No 157/92 are also covered by that prohibition.

48. Having regard to the arguments above, I consider that Article 4(4) and Article 5(2) of Law No 157/92 do not comply with Articles 5 and 7 of the birds directive, in conjunction with Annex II thereto.

15 — See, in particular, the judgments in Case 247/85 *Commission* v *Belgium* [1987] ECR 3029, paragraph 9; in Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 9; in Case 252/85 *Commission* v *France* [1988] ECR 2243, paragraph 5; and in Case C-118/94 *Associazione Italiana per il WWF and Others* [1996] ECR I-1223, paragraph 20.

First plea (second head)

(a) Observations of the parties

49. The Commission maintains that the Italian legislation, in particular Article 3 of the decree of 27 September 1997, in conjunction with Article 4(4) of Law No 157/92, permits general and permanent derogation from the prohibitions laid down by the birds directive, particularly in Article 5(a), whereas the arrangements for derogating from the prohibitions on hunting, established by Article 9 of the directive, do not authorise that.

50. The Italian Government disputes that analysis. It claims that the Italian legislation organises the activity of capture in a precise manner, under the direct control of public bodies and authorities.

51. Thus a hunter with an interest in using birds as decoys could never capture them himself, but would have to acquire them from bodies specifically set up and with exclusive authority to capture.

52. Control of the activity of these bodies is entrusted to the INFS, which also certifies the activity pursued and determines how long it is to last. After adoption of the decree of 21 March 1997, the institution took timely action, in the INFS circular letter, to give the administrations concerned the instructions needed for the species *Passer italiae*, *Passer montanus* and *Sturnus vulgaris*, already excluded from the list of species that might be hunted, to be excluded from capture for use as decoys.

(b) Assessment

53. I accept the Commission's analysis. I believe the Italian legislation does not comply with the requirements of clarity, precision and accuracy imposed by the case-law of the Court.

54. The Court has invariably held that 'with regard to the conservation of wild birds, the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the directive must be reproduced in specific national provisions'. [16]

55. Similarly, the Court has repeatedly held that 'national legislation which authorises the hunting of certain species of birds not

16 — See, in particular, the judgments in *Associazione Italiana per il WWF and Others*, paragraph 22, and in Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraph 28.

included in the list in Annex II to the directive without, however, listing the criteria for derogation or clearly and specifically obliging the regions to take account of those criteria and to apply them, does not satisfy the conditions to which the derogations provided for by Article 9 of the directive are subject'. [17]

56. It should be noted that the Italian legislation does not lay down the principle of prohibiting capture of the three species at issue for sale as decoys. Indeed, Article 4(4) of Law No 157/92 lays down the principle of authorising that activity.

57. By wording Article 3 of the decree of 27 September 1997 in the way it has, the Italian legislature has not clarified the legal position which existed up to then, [18] for the article provides that the detailed rules for applying the derogation arrangements laid down in Article 9(1)(c) of the birds directive also relate to Article 4(4) of Law No 157/92.

58. As has been seen, however, Article 4(4) of Law No 157/92 does not lay down a derogation in accordance with Article 9 of the birds directive. In other words, Article 4(4) of the Law does not provide that the capture of these protected species has to be regarded as a derogation justified under the provisions of Article 9 of the directive. Article 3 of the decree of 27 September 1997 is therefore not capable of validly defining the detailed rules for making a derogation which has not yet been laid down. It must therefore be concluded that Article 3 of the decree does not accord with the provision for which it seeks to set out the conditions for application.

59. This inconsistency also produces marked consequences as regards legal certainty: how is one to interpret and reconcile Article 4(4) of the Law and Article 3 of the decree? Does one have to believe that capturing protected species for sale as decoys is what the ordinary law provides, as seems to be suggested by Article 4(4) of the Law, or, on the other hand, does one have to regard Article 3 of the decree as a provision which lays down rules on derogation applying only where there is a need to allow — selectively and in strictly controlled conditions — the capture, keeping and any other judicious exploitation of certain birds in small quantities? If it is the second interpretation that must prevail, as the Italian Government indicates, it must be noted that the Italian rules do not meet the requirements of Article 9 of the directive, particularly as regards identification of the authority empowered to establish the terms for applying the derogation and to ensure that the means, arrangements and methods used are appropriate to the purpose intended and that the use of such

17 — See, in particular, the judgment in *Associazione Italiana per il WWF and Others*, paragraph 25.

18 — I should recall that, prior to adoption of this decree, the Italian Government had introduced a similar measure *contra legem* by way of circulars (see points 16 and 18 of this Opinion).

measures is justified because there is no other satisfactory solution. In fact, the authority empowered in this matter in Italy is the INFS, but that institution seems to hold only consultative powers. [19]

60. I have to conclude, therefore, that the Italian legislation does not comply with Article 9 of the birds directive, because it fails to lay down in a precise manner the criteria on which it is possible to derogate from the prohibitions imposed by the directive on the capture of protected species for sale to be used as decoys, and the detailed rules for applying that derogation and, in particular, because it fails to set them out in clearly defined national provisions.

61. Having regard to the arguments above, I invite the Court to find that Article 4(4) and Article 5(2) of Law No 157/92 do not comply with the requirements of Article 9 of the birds directive.

B — *The second plea*

(a) Observations of the parties

62. Essentially, the Commission maintains that the Italian Republic has failed to transpose fully, clearly and unambiguously into its national law the whole substantive content of Article 9 of the birds directive, that is, first, those cases where derogations may be made as formally enumerated in paragraph 1 and, secondly, the conditions and detailed rules for application laid down in paragraph 2.

63. The Italian Government maintains that, under the principles stated consistently in the case-law of the Court, the second plea must be held inadmissible. It argues that plea was not put forward in the act which initiated the procedure, namely the formal letter of notice of 30 November 1993.

(b) Assessment

The objection of inadmissibility

64. Like the Commission, I believe that the objection of inadmissibility raised by the Italian Republic is unfounded and must be rejected.

65. The Court has consistently held that the purpose of the pre-litigation stage of the

19 — On this, see the Italian Government's written response to the questions of the Court.

procedure is to afford the Member State concerned an opportunity, first, to fulfil its obligations under Community law and, second, to make a proper statement of its defence to the complaints stated by the Commission. The Court has also consistently held that the purpose of the formal letter of notice is to lay down the limits of the subject-matter of the dispute and to indicate to the Member State invited to submit its observations which details are needed in preparing its defence. [20]

66. However, a formal letter of notice cannot be made subject to the same requirements of exhaustiveness as a reasoned opinion, because it might comprise only an initial brief summary of the complaints, expressed in comprehensive fashion, on the understanding that the reasoned opinion which follows is to set out those complaints as a coherent and detailed statement of the reasons for which the Commission is convinced that the State concerned has failed to fulfil its obligations under Community law. [21]

67. It should be noted that the objection based on improper transposition of Article 9 of the birds directive, made by the Commission in its application, was not only contained in the additional reasoned opinion but had already been expressed briefly and generally in the formal letter of notice of 30 November 1993. In that letter, the Commission expressly referred to some of the conditions required for applying the derogations laid down in Article 9 of the birds directive, for the purpose of receiving the Italian authorities' observations in particular as regards the general inadequacy of their regulations on the subject.

The fourth and fifth paragraphs of that letter read as follows:

'To that it should be added that Article 9(2) of the birds directive of the Council provides that, for those cases falling within the scope of Article 9(1), an authority shall be empowered to declare that the conditions set out in that paragraph obtain and to decide where and for which birds hunting may exceptionally be authorised.

The authorities empowered under Article 9(2) of the abovementioned directive must also see whether there is any other satisfactory solution that makes it possible to resolve the particular problem without the need to authorise a derogation.'

68. I consider that the beginning of that passage ('To that it should be added') shows that the Commission intended to state an objection differing from that set

20 — On these various points, see in particular the judgment in Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraphs 22 and 23.

21 — See, in particular, the judgment in Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraphs 14 and 15.

out earlier in the same document. Likewise, the wording of this passage shows explicitly that the Commission intended to refer to a more general matter than the possibility of hunting and capturing certain species notwithstanding the provisions of the directive, meaning the wider matter of the detailed rules for applying the derogations provided in Article 9 and of seeing whether there were any solutions other than a derogation.

69. There is no ambiguity of meaning or scope in the objections raised by the Commission. In the way in which they have been stated, both in the formal letter of notice and in the reasoned opinion and in the Commission's application, they have moreover allowed the Italian authorities to make a full submission of their observations regarding both objections.

70. Thus, by letter of 21 March 1997, in reply to the formal letter of notice, the Italian authorities communicated the final version of a regulatory instrument intended to resolve the specific matter of the possibility of hunting the protected species and also announced the forthcoming adoption of a general instrument to transpose Article 9 of the birds directive. The Italian authorities then acknowledged that the matter of transposing Article 9 was an objection which had been voiced long since when, in the third paragraph of that letter, they state that 'this instrument of guidance puts an end to the objection voiced against us long ago by the European Commission for improperly transposing Article 9 of Directive 79/409 regarding derogations'. And, lastly, in its letter replying to the reasoned opinion of 7 August 1997, the Italian Government presented the adoption of the decree of 27 September 1997 as a measure intended to adapt the national law in order to take account of the objection relating to the general problem of the inadequate transposition of Article 9 of the birds directive.

71. This shows that the Commission gave the Italian Republic the possibility of complying with the obligations stemming from Articles 5, 7 and 9 of, and from Annex II to, the birds directive and of effectively presenting its observations on those objections during the pre-litigation phase. The objection of inadmissibility must therefore be rejected.

Substance

72. The Court has consistently held that 'the possibility provided for in Article 9 of derogating from the restrictions on hunting, as well as from the other restrictions and prohibitions contained in Articles 5, 6 and 8 of the directive, is subject to three conditions. First, the Member State must restrict the derogation to cases in which there is no other satisfactory solution. Secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c).

Thirdly, the derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. Although Article 9 therefore authorises wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations'. [22]

73. The Court has also held that the essential features of Article 9 of the birds directive must be transposed clearly, completely and unequivocally. [23] Those essential features include confirmation that there is no satisfactory alternative to the derogation envisaged and compliance with the provisions of Article 9(2) of the birds directive.

74. It should be observed that the essential features of Article 9 of the birds directive have not been transposed by the Italian legislature as regards the derogations laid down in Article 9(a) and (b).

75. The decree of 27 September 1997 provides expressly that the derogation arrangements introduced relate only to the situation envisaged by Article 9(c).

76. According to the preamble to that decree, the derogations laid down in Article 9(a) and (b) of the birds directive are governed by the third paragraph of Article 2 and by Article 19 of Law No 157/92.

77. It is not in dispute that those national provisions do not define either the conditions or the detailed rules for exercise of the derogations, as envisaged by Article 9(2) of the birds directive.

78. Similarly, those national provisions do not state that use of the derogations laid down is to be made subject to verification that there are no other satisfactory solutions.

79. The above arguments show that the Italian legislation does not transpose the substantive content of Article 9 of the birds directive.

80. I therefore propose that the Court should declare the Italian legislation in breach of Article 9 of the birds directive.

22 — See, in particular, the judgments in *Associazione Italiana per il WWF and Others*, paragraph 21; Case 247/85 *Commission v Belgium* [1987] ECR 3029, paragraph 7, and Case 262/85 *Commission v Italy* [1987] ECR 3073, paragraph 7.

23 — See, in particular, the judgment in *Associazione Italiana per il WWF and Others*, paragraph 23.

Conclusion

81. I therefore propose that the Court should:

(1) Declare that:

— by laying down rules permitting the capture and keeping of three species (*Passer italiae*, *Passer montanus* and *Sturnus vulgaris*), contrary to Articles 5 and 7 of, and of Annex II to, Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, and by providing that those rules are to apply by way of a general and permanent derogation, which is contrary to Article 9 of that directive, and

— by laying down rules concerning the conditions and detailed rules for the application of the derogation from the prohibitions laid down by that directive which do not fully comply with the requirements under Article 9 thereof, in particular as regards the reasons for derogation listed in Article 9(1)(a) and (b), the Italian Republic has failed to fulfil its obligations under that directive;

(2) Order the Italian Republic to pay the costs of the proceedings.