JUDGMENT OF THE COURT (Second Chamber)

28 June 2007 *

In Case C-235/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 June 2004,

Commission of the European Communities, represented by M. van Beek and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris (Rapporteur), J. Klučka, R. Silva de Lapuerta and L. Bay Larsen, Judges,

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

Judgment

1 By its action, the Commission of the European Communities requests the Court to declare that, by failing to classify territories of a sufficient number and size as special protection areas for birds ('SPAs') in order to provide protection for all the species of birds listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended, inter alia, by

Commission Directive 97/49/EC of 29 July 1997 (OJ 1997 L 223, p. 9; 'Directive 79/409'), and for the migratory species not mentioned in the said Annex I, the Kingdom of Spain has failed to fulfil its obligations under Article 4(1) and (2) of Directive 79/409.

Legal context

2 Article 1(1) of Directive 79/409 provides:

'This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.'

3 Article 2 of that directive provides:

'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.'

4 Article 4(1) and (2) of that directive states as follows:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.'

Pre-litigation procedure

5 Following a number of complaints, on 26 January 2000 the Commission sent the Kingdom of Spain a letter of formal notice noting the incorrect application by that Member State of Directive 79/409 in that it had failed to classify territories of a sufficient number and size as SPAs.

6 Since the Commission took the view that the replies of the Spanish authorities and the information and proposals for classification of new SPAs, sent between 18 May 2000 and 10 January 2001, were not convincing, on 31 January 2001 the Commission issued a reasoned opinion requesting the Kingdom of Spain to take the measures necessary to comply therewith within a period of two months from notification of that opinion, the period for replying to which was extended to 3 May 2001.

7 By letters of 17 April and 15 May 2001, the Spanish authorities responded to the reasoned opinion and, between 28 May 2001 and 25 October 2002, sent additional information and details of classifications of and extensions to SPAs.

8 After having analysed all of those replies and taking the view that the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla y León, Castilla-La Mancha and Madrid had not yet fulfilled all the obligations arising out of Article 4(1) and (2) of Directive 79/409 and that the Autonomous Communities of the Asturias, Catalonia, Extremadura, Galicia and Valencia had classified SPAs in a wholly inappropriate and inadequate manner, the Commission decided, during January 2003, to bring the matter before the Court of Justice.

9 The Spanish authorities continued to send the Commission, between 13 January 2003 and 5 April 2004, proposals for SPA classifications, files relating to the redefinition and extension of the SPA network, including various data brought up to date and supplemented by cartographic documents, and information on the situation of the bird species.

10 After having analysed all these replies, the Commission, considering that the failure to fulfil obligations arising under Directive 79/409 was continuing, decided to bring, on 4 June 2004, the present action.

The action

11 By its action, the Commission alleges that the Kingdom of Spain has failed to classify sufficient SPAs, in number and in size, having regard to the objectives of protection of the bird species listed in Annex I to Directive 79/409 and of the migratory species not covered in that annex.

12 Since, at the hearing, the Commission withdrew its action with regard to the Autonomous Community of Extremadura, the present case for failure to fulfil obligations concerns only the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia.

Classification of SPAs

Arguments of the parties

13 The Commission takes the view that the Kingdom of Spain has not classified as SPAs territories sufficient in size and in number having regard to the areas of importance for the conservation of birds identified in the ornithological list published in 1998 ('the IBA 98').

14 The Spanish Government objects to the use of the IBA 98. That inventory, it submits, does not have the same value as the *Inventory of Important Bird Areas in the European Community* published in 1989 ('the IBA 89') since, because it was neither commissioned nor supervised by the Commission, the accuracy of its results is not guaranteed.

15 The IBA 98 was drawn up exclusively on the initiative of the Sociedad Española de Ornitología (Spanish Ornithological Society; 'SEO/BirdLife') which decided unilaterally to amend the IBA 89 in order to increase the number and size of the areas to be protected in Spain. No public authority having responsibility for environmental matters supervised the drawing-up of that list to ensure the precision and accuracy of its data. The increase in number and above all in size of new areas

requiring to be protected in the IBA 98 in comparison with the IBA 89 is therefore impossible to justify or check.

16 Next, still in the view of the Spanish Government, the use of incomplete information in the IBA 98 does not permit areas of interest for the conservation of birds to be correctly defined. The criteria used to define the SPAs are also incorrect, are of low ornithological value and do not comply with Directive 79/409.

17 The Spanish Government also takes the view that the surveys and the numerous population estimates carried out for all the areas of importance for the conservation of birds are not supported by any bibliographical reference, which prevents any checking or comparison of data. Furthermore, SEO/BirdLife explicitly accepted that the sources of the ornithological data were not cited for each of these areas.

18 Thus, there are serious lacunae in SEO/BirdLife's definition of the areas to be protected because of the lack of bibliographical references and the poor quality of the information used. The IBA 98 does not therefore have the minimum quality required of a scientific work with regard to accuracy of data and precision of the criteria used.

19 Finally the Spanish Government submits that SEO/BirdLife prohibited, without its express authorisation, the release to the autonomous communities, which have administrative jurisdiction in environmental matters, of the information which it used to identify and define the areas of importance for the conservation of birds.

20 According to the Commission, the IBA 98 relies on the best documented and most accurate references available to define the areas most appropriate to the survival and reproduction of bird species in accordance with Article 4(1) and (2) of Directive 79/409. The IBA 98 is based on balanced ornithological criteria such as population size, bird diversity and the risks to which the species are exposed on an international scale, allowing identification of the places most likely to ensure conservation of the species listed in Annex I to Directive 79/409 and of the migratory species not listed in that annex.

21 The Commission states that the assessment of the network of SPAs classified by the Kingdom of Spain was not carried out on the basis of the IBA 98 alone, but also on the basis of two other criteria relying, first, on an analysis of the presence in each area of the bird species mentioned in Annex I to Directive 79/409 and, second, on the taking into account of wetlands.

22 Finally, also in the view of the Commission, the fact that it is impossible to access the database used by SEO/BirdLife does not invalidate the scientific nature of the study and does not preclude the various Spanish authorities from drawing up or arranging for their own studies to comply with their obligations under Directive 79/409.

Findings of the Court

23 As a preliminary point, it must be borne in mind that Article 4 of Directive 79/409 lays down a regime which is specifically targeted and reinforced both for the species listed in Annex I and for the migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the European Community (Case C-191/05 *Commission* v *Portugal* [2006] ECR I-6853, paragraph 9, and case-law cited). Furthermore, it is

clear from the ninth recital in the preamble to that directive that the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. The Member States are therefore required to adopt the measures necessary for the conservation of those species.

24 For that purpose, the updating of scientific data is necessary to determine the situation of the most endangered species and the species constituting the common heritage of the Community in order to classify the most suitable areas as SPAs. It is therefore necessary to use the most up-to-date scientific data available at the end of the period laid down in the reasoned opinion.

25 In that regard, it should be recalled that the national lists, including the IBA 98 drawn up by SEO/BirdLife, revised the first pan-European study carried out in the IBA 89 and provide more exact and up-to-date scientific data.

26 In view of the scientific nature of the IBA 89 and of the absence of any scientific evidence adduced by a Member State tending particularly to show that the obligations flowing from Article 4(1) and (2) of Directive 79/409 could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area, the Court has held that that inventory, although not legally binding, could be used by the Court as a basis of reference for assessing whether a Member State has classified a sufficient number and size of areas as SPAs for the purposes of the abovementioned provisions of Directive 79/409 (see, to that effect, Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraphs 68 to 70, and Case C-378/01 *Commission* v *Italy* [2003] ECR I-2857, paragraph 18).

27 It must be held that the IBA 98 provides an up-to-date list of the areas of importance for the conservation of birds in Spain which, in the absence of scientific proof to the

contrary, constitutes a basis of reference permitting an assessment to be made as to whether that Member State has classified areas of a sufficient number and size as SPAs to protect all the bird species listed in Annex I to Directive 79/409 and the migratory species not listed in that annex.

28 In that regard, it should be pointed out that the IBA 98 was used by the Autonomous Communities of Castilla-La Mancha, Catalonia, Galicia and Valencia to define SPAs and that, with regard to the Autonomous Communities of Aragon, Cantabria, Extremadura, Madrid, Murcia, the Basque Country and the Autonomous City of Ceuta, the Commission accepted up-to-date scientific information supplied to it in the place of that relating to the important bird areas listed in the IBA 98.

29 It is then appropriate to consider the arguments of the Spanish Government with regard to criteria C.1 and C.6 used in that inventory.

30 Under the IBA 98, criterion C.1 designates an area regularly visited by a significant number of birds of a globally threatened species or of a species whose preservation is of interest on a worldwide level. Criterion C.6 designates an area constituting one of the five most important areas in each European region for a species or a subspecies listed in Annex I to Directive 79/409.

31 With regard to criterion C.1, the Spanish Government considers that the identification threshold for SPAs cannot be less than 1% of the national reproducing population of a species listed in that annex.

32 That argument disregards the definition of that criterion and thus cannot be accepted. Since criterion C.1 relates to globally threatened species, it is sufficient that the area concerned be the habitat of a significant number of individual members of such a species. No threshold of 1% is laid down by criterion C.1 or imposed by virtue of Directive 79/409.

33 With regard to criterion C.6, the Spanish Government submits that the biogeographical regions defined in 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) are to be regarded as being equivalent to areas defined for the purposes of Directive 79/409. The use of a different method to define habitats and areas of importance for the conservation of birds would create considerable and unjustifiable disparities, taking into account the existence of numerous different administrative territorial divisions within the Member States.

34 As the Advocate General noted in point 90 of her Opinion, the Kingdom of Spain did not attempt to divide Spanish territory on an ornithological basis which would permit identification of SPAs, but merely referred to the existence of biogeographical regions, which do not constitute a basis comparable to the autonomous communities for the putting into place of a network covering the Community in a more or less uniform manner, which is necessary in order to obtain a comparable breadth of reference in all the Member States for application of criterion C.6.

35 In the light of all the foregoing, it must be found that, in the absence of the submission of scientific studies capable of contradicting the results of the IBA 98, that inventory constitutes the most up-to-date and exact reference for the identification of the sites most suitable in number and size for the conservation of birds.

36 That conclusion cannot be undermined by the argument that it was impossible to consult the database set up by SEO/BirdLife.

37 In that regard, it must be noted that, as the Spanish Government has confirmed, such access was not refused to the Spanish Government, but there was a prohibition on the passing of the information to the autonomous communities.

38 Furthermore, it is not in dispute that the Commission concluded a contract in 1991 with SEO/BirdLife for the carrying-out of a precise scientific study allowing maps of areas of importance for bird conservation to be produced, in which each site was to be described from the point of view of its ornithological value using the most complete information available.

39 To that must be added the fact that the IBA 98 was produced with the participation of a number of non-governmental organisations, local SEO/BirdLife groups, three national parks, six universities, the environmental departments of 12 autonomous communities, the Directorate-General for the Protection of Nature of the Ministry of the Environment and the autonomous body Parques Nacionales of the same ministry, which constitutes sufficient indication, in the absence of scientific proof to the contrary, as to the standing of the IBA 98 as a work of reference.

40 In those circumstances, the arguments of the Spanish Government alleging, first, a lack of control over the preparation of the IBA 98 by a competent public authority and, second, that it was impossible to access the database used by SEO/BirdLife must be rejected.

The lack of classification and the partial or inappropriate classification of territories as SPAs

Arguments of the parties

41 According to the Commission, the IBA 98 identifies 391 areas of importance for the conservation of birds in Spain, covering an area of 15 862 567 hectares, which represents approximately 31.5% of the surface area of the country. An examination of the 427 SPAs classified by the Kingdom of Spain, representing a total surface area of approximately 7 977 789 hectares, that is to say 15.8% of the national territory, shows that 148 areas of importance for the conservation of birds are classified as SPAs over more than 75% of their surface area (2 730 612 hectares of a total of 2 967 119 hectares), 194 areas of importance for the conservation of birds are classified as SPAs over less than 75% of their surface area (4 388 748 hectares of a total of 10 739 054 hectares) and 99 areas of importance for the conservation of birds have not been classified as SPAs (2 684 713 hectares). The SPA network is therefore insufficient.

42 The Spanish Government submits that the surface area of the network of SPAs in Spain represents a proportion of the national territory two and a half times greater than the Community average (15.51% as against 6.89%), and up to 10 times greater than the proportion of the territory of certain neighbouring Member States. Furthermore, that government points out that, for the period between April 2000 and May 2004, the Spanish network grew from 179 to 416 SPAs, that is to say 237 new areas, which represents an increase of 132.4% and 35% of the number of new SPAs declared by all Member States. With regard to the increase in surface area of the areas classified as SPAs, the Spanish share of new declarations corresponds to 43% of the total surface area declared in all the Community. The Spanish contribution alone corresponds to 35% of the total surface area of the SPAs in the Community, while the surface area of the Kingdom of Spain represents only 16% of that of the Community. These data show that the Kingdom of Spain has made an effort greater, firstly, than the Community average and, secondly, than the individual effort of each Member State to comply with the obligations arising under Directive 79/409.

43 With regard to the areas partially or inappropriately classified as SPAs, the Commission takes the view that, in the light of the IBA 98, the current degree of cover of areas of importance for the conservation of birds by the Spanish SPAs is very low, which represents an additional danger for the survival of the species whose habitat they are, since the measures necessary for the protection of their habitat have not been adopted.

Findings of the Court

44 By its action for failure to fulfil obligations, the Commission seeks a declaration that territories sufficient in size and number to offer protection to all the bird species listed in Annex I to Directive 79/409 and the migratory species not covered by that annex have not been classified as SPAs in the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia.

45 As a preliminary point, it should be pointed out that a Member State may not rely on the situation in other Member States to exonerate itself from its obligation to classify SPAs. Only ornithological criteria such as those laid down in Article 4(1) and (2) of Directive 79/409 permit the definition of the most suitable sites with a view to their classification as SPAs.

46 Next, it should be noted, on the one hand, that the Commission claims that all the autonomous communities have defined SPAs of an insufficient size compared with that given in the IBA 98 whereas, on the other, it accepts the updated scientific arguments which have shown that the current limits of the SPAs classified in the Autonomous Communities of Castilla-La Mancha, Catalonia, Galicia and Valencia are sufficient to ensure compliance with Directive 79/409.

47 Such a contradiction in the heads of claim put forward by the Commission in support of its action for failure to fulfil obligations does not satisfy the requirements of Article 21 of the Statute of the Court of Justice and Article 38(1)(c) of the Rules of Procedure.

48 The Court has held that the Commission must, in the heads of claim in an application made under Article 226 EC, indicate the specific complaints on which the Court is asked to rule. Those heads of claim must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (see Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 24 and case-law cited).

49 It follows that the complaint that the classification of areas of importance for the conservation of birds as SPAs by the Autonomous Communities of Castilla-La Mancha, Catalonia, Galicia and Valencia is insufficient in size is inadmissible.

50 Accordingly, it is appropriate to consider that complaint in turn as regards the Autonomous Communities of Andalusia, the Balearics and the Canaries only.

51 First of all, with regard to the Autonomous Community of Andalusia, the Spanish Government gave notification, after expiry of the period laid down in the reasoned opinion, of the classification of 39 new SPAs and the enlargement of other areas, which represents an increase in the area protected of 560 000 hectares. Furthermore, it indicated that a declaration procedure is under way for new SPAs whose main value lies in the protection of steppe-land birds.

52 According to consistent case-law, in the context of an action under Article 226 EC, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, inter alia, Case C-168/03 *Commission* v *Spain* [2004] ECR I-8227, paragraph 24). The Commission's claim with regard to the Autonomous Community of Andalusia must therefore be accepted.

53 Next, with regard to the Autonomous Community of the Balearics, although it is established that 40 SPAs, of a total size of 121 015 hectares and covering in whole or in part 20 areas of importance for the conservation of birds and almost 54% of the total surface area of the network of areas to be protected, had been classified before expiry of the period laid down in the reasoned opinion, the fact remains that those areas do not cover the areas of habitat of the red kite (*Milvus milvus*), a species referred to in Annex I to Directive 79/49, which was protected after expiry of that period. The Commission's claim with regard to the Autonomous Community of the Balearics must therefore be accepted.

54 Finally, with regard to the Autonomous Community of the Canaries, the IBA 98 identifies 65 sites covering a surface area of 133 443 hectares as areas of importance for the conservation of birds. Before expiry of the period laid down in the reasoned opinion, 28 SPAs of a total surface area of 211 598 hectares covered in part 41 areas of importance for the conservation of birds and approximately 59.5% of the surface area of the network of areas to be protected. The Commission therefore takes the view that coverage remains insufficient, in particular, for the Houbara (*Chlamydotis undulata*), the Egyptian vulture (*Neophron percnopterus*), the Fuerteventura chat (*Saxicola dacotiae*), the cream-coloured courser (*Cursorius cursor*) and the Bulwer's petrel (*Bulweria bulwerii*).

55 Although the Spanish Government submits that there were internal difficulties in the classification of certain SPAs, it must be recalled that, according to the Court's settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations and time-limits laid down by a directive (see, inter alia, Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraph 13).

56 Nevertheless, the Spanish Government accepts that certain SPAs must be extended. Accordingly, the Commission's claim in respect of the Autonomous Community of the Canaries must be accepted.

57 In those circumstances, it must be held that the complaint that the classification of areas of importance for the conservation of birds as SPAs by the Autonomous Communities of Andalusia, the Balearics and the Canaries is insufficient in size must be upheld.

58 Finally, the Commission claims that the Kingdom of Spain classified an insufficient number of areas of importance for the conservation of birds as SPAs in the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia.

59 With regard to the Autonomous Communities of Andalusia and Galicia, the authorities of those communities, after expiry of the period laid down in the reasoned opinion, classified new SPAs and enlarged part of the existing SPAs. However, it is clear from the case-law cited in paragraph 52 of the present judgment that the existence of a failure to fulfil obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes. The Commission's claim in that regard must be accepted.

60 With regard to the Autonomous Community of the Balearics, although the authorities of that community, after expiry of the period laid down in the reasoned opinion, did indeed declare new SPAs specifically in order to protect the red kite and new SPAs were proposed in Majorca and Minorca to protect the nesting sites of that species, since the existence of a failure to fulfil obligations must be determined only by reference to the situation obtaining in a Member State at the end of the period laid down in the reasoned opinion, it must be found that there was a failure to fulfil obligations in that regard.

61 Furthermore, with regard to the Autonomous Community of the Canaries, 23 areas of importance for the conservation of birds were not covered at all by an SPA following expiry of the period laid down in the reasoned opinion. The Spanish Government, whilst recognising that it is necessary to classify new SPAs, has produced in support of its defence a detailed study of the areas of importance for the conservation of birds which have not yet been covered. As the Advocate General observed in point 106 of her Opinion, since the Commission did not challenge that study, its content must be regarded as having been accepted and it constitutes, in respect of the ongoing failures to classify, more up-to-date and precise evidence than the IBA 98.

62 That complaint stands in respect only of those SPAs which ought to have been classified before expiry of the period laid down in the reasoned opinion.

63 With regard to the Autonomous Community of Valencia, although, before expiry of the period laid down in the reasoned opinion, new SPAs had been classified, there are still, nevertheless, areas not classified, which, as the Spanish authorities have recognised, are part of a process of extension of the current network of SPAs.

64 In those circumstances, it must be held that the complaint alleging insufficient classification of areas of importance for the conservation of birds as SPAs by the Autonomous Communities of Andalusia, the Balearics, the Canaries, Galicia and Valencia should be upheld.

65 With regard to the Autonomous Community of Castilla-La Mancha, the Commission takes the view that 10 areas of importance for the conservation of birds have not been classified as SPAs. The Spanish Government has recognised the need to classify as an SPA area No 183 (Hoces del Río Mundo y del Río Segura). With regard to area No 189 (Parameras de Embid-Molina), the Spanish Government admits the need for classification of part of that area, recognising the presence of a colony of Dupont's lark (*Chersophilus duponti*) estimated at 1 250 birds over an area of 1 800 hectares.

66 However, the Spanish Government disputes the need to classify areas No 70 (El Escorial — San Martín de Valdeiglesias), No 72 (Carrizales y Sotos de Aranjuez), No 157 (Hoces del Turia y Los Serranos), No 210 (Sierras de Cazorla y Segura) and No 305 (Bajo Tietar y Rampa de la Vera), since they cover areas which are also located in other autonomous communities and the part within the autonomous community concerned is very small.

67 That argument must be rejected. Because of the importance and homogeneity of a site considered the most suitable for the conservation of certain species such as the Spanish imperial eagle (*Aquila adalberti*), threatened on a global scale, the black stork (*Ciconia nigra*), Bonelli's eagle (*Hieraaetus fasciatus*), the golden eagle (*Aquila chrysaetos*), the Griffon vulture (*Gyps fulvus*) the Egyptian vulture and the peregrine falcon (*Falco peregrinus*), the fact that a site covers a number of regions cannot constitute a ground on which Member States may exonerate themselves from their obligations under Article 4(1) and (2) of Directive 79/409.

68 The Spanish Government also disputes the classification as an SPA of area No 185 (San Clemente-Villarrobledo) in which the populations of lesser kestrel (*Falco naumanni*), little bustard (*Tetrax tetrax*) and pin-tailed sandgrouse (*Pterocles alchata*) mentioned in the IBA 98 are of little interest and represent only 6%, 4% and 4% respectively of the population in the entire Autonomous Community of Castilla-

La Mancha. What is more, that area is of no interest in ornithological terms since it includes urban areas, industrial zones and stretches of vineyards as well as large expanses of irrigable land under intensive cultivation.

69 Such an argument must also be rejected. That area has significant populations of species threatened on a global and European scale and constitutes one of the main feeding areas of those species.

70 With regard to area No 78 (Puebla de Beleña), the Spanish authorities dispute the need for its classification because of the seasonal nature of the lagoons and the very irregular presence of cranes (*Grus grus*), without providing scientific data capable of contradicting the results of the IBA 98. Accordingly, the claim of the Commission must be accepted on that point.

71 It is also necessary to reject the arguments of the Spanish Government that the population of certain species is not significant and does not need protection by way of classification of new SPAs in area No 199 (Torrijos). It must be pointed out that, firstly, the population of 150 to 200 great bustards (*Otis tarda*) exceeds the existing worldwide threshold of 50 individuals. Secondly, it should be noted that the population of little bustards amounts to 1 200 birds, whilst the threshold value is 200 birds. All those elements therefore make it necessary to classify new SPAs to meet the requirements of protection of those species.

72 According to the Commission, other species, such as the lesser kestrel, are still insufficiently protected and it points out that since the expiry of the period laid down in the reasoned opinion the Autonomous Community of Castilla-La Mancha has not classified any new SPAs. The Spanish Government raises the objection that that species is found within urban areas which cannot be classified as SPAs.

73 Such an argument must be rejected. In order to protect species, classification as an SPA is necessary where an area constitutes a specific nesting area, as is the case of the lesser kestrel. In addition, as the Advocate General noted in point 118 of her Opinion, if measures of urban development were to override the interest in protecting that species, they would have to be implemented under Article 6(4) of Directive 92/43, that is to say in the absence of alternatives and with the adoption of compensatory measures. That is not the case here.

74 The Commission's claim with regard to insufficient classification of areas of importance for the conservation of birds as SPAs by the Autonomous Community of Castilla-La Mancha must therefore be accepted.

75 With regard to the Autonomous Community of Catalonia, the Commission takes the view that 10 areas of importance for the conservation of birds have not been designated as SPAs. Thus, of 62 breeding species listed in Annex I to Directive 79/409, the lesser grey shrike (*Lanius minor*), the capercaillie (*Tetrao urogallus*), the shag (*Phalacrocorax aristotelis*), the little bustard, the Calandra lark (*Melanocorypha calandra*), Dupont's lark, the European roller (*Coracias garrulus*), the short-toed lark (*Calandrella brachydactyla*) and the collared pratincole (*Glareola pratincola*) are inadequately protected.

76 However, as the Advocate General observed in point 121 of her Opinion, the IBA 98 does not list the lesser grey shrike, the capercaillie, Dupont's lark, or the collared pratincole. No complaint can therefore be levelled against the Kingdom of Spain for failing to classify SPAs because of the presence of those four species.

77 The argument of the Spanish Government that the action is inadmissible because of the lack of precision with regard to the species, among the 62 listed in Annex I to Directive 79/409, for which new SPAs should have been classified, must be rejected. As is apparent from the foregoing, the Commission stated precisely which species are inadequately protected and for which additional SPAs must be classified.

78 Finally, the Spanish Government submits that most of the habitats which are not yet classified as SPAs are protected by virtue of Directive 92/43 in the context of the Natura 2000 network.

79 Such an argument must be rejected. It should be recalled that the Court has held that the legal regimes of Directives 79/409 and 92/43 are separate (see, to that effect, Case C-374/98 *Commission* v *France*, paragraphs 50 to 57). It follows that a Member State cannot exonerate itself from its obligations under Article 4(1) and (2) of Directive 79/409 by relying on measures other than those laid down by that directive.

80 The Commission's claim with regard to insufficient classification of areas of importance for the conservation of birds as SPAs by the Autonomous Community of Catalonia must therefore be accepted.

81 With regard to wetland areas, it is clear from Article 4(2) of Directive 79/409 that the Member States are to pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

82 According to the Commission, the wetlands of international importance, identified as areas of importance for the conservation of birds, of Albufera de Adra and Embalses de Cordobilla y Malpasillo in Andalusia and Complejo húmedo de Corrubedo in Galicia were not classified as SPAs on expiry of the period laid down in the reasoned opinion.

83 In that regard, it is clear from the proceedings that it is common ground that the classification as SPAs of wetlands of international importance in Andalusia and in Galicia took place after expiry of the period laid down in the reasoned opinion. Accordingly, the Commission's claim in this regard must therefore be accepted.

84 It follows that the Kingdom of Spain failed to classify as SPAs all the areas which, by application of ornithological criteria, appear the most suitable for the conservation of the species in question.

85 In the light of all foregoing, it must be held that, by failing to classify as SPAs territories of adequate size in the Autonomous Communities of Andalusia, the Balearics and the Canaries, and territories of sufficient number in the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia to provide protection for all the species of birds listed in Annex I to Directive 79/409 and the migratory species not covered by that annex, the Kingdom of Spain has failed to fulfil its obligations under Article 4(1) and (2) of Directive 79/409.

Costs

86 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs to be awarded against the Kingdom of Spain and the latter has been unsuccessful in its main pleas, the Kingdom of Spain must be ordered to pay the costs.

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

1. **Declares that, by failing to classify as special protection areas for birds territories of adequate size in the Autonomous Communities of Andalusia, the Balearics and the Canaries, and territories of sufficient number in the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia to provide protection for all the species of birds listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as amended, inter alia, by Commission Directive 97/49/EC of 29 July 1997, and the migratory species not covered by that annex, the Kingdom of Spain has failed to fulfil its obligations under Article 4(1) and (2) of Directive 79/409, as amended;**

2. **Dismisses the remainder of the action;**

3. **Orders the Kingdom of Spain to pay the costs.**

[Signatures]