OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 23 October 1997 *

1. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1] (hereinafter 'the Directive') was notified to the Federal Republic of Germany on 5 June 1992. Article 23(1) required Member States to 'bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of its notification [and] forthwith [to] inform the Commission thereof'. For Germany, this deadline therefore expired on 5 June 1994.

2. In the absence of any indication that the Directive had been transposed into German law, the Commission opened the pre-litigation stage of the procedure provided by Article 169 of the Treaty establishing the European Community ('the Treaty') by sending a letter of formal notice on 9 August 1994. Germany did not contest the complaint in its reply of 6 October 1994. The Commission issued a reasoned opinion on 28 November 1995, to the effect that in failing to adopt the necessary provisions, Germany was in breach of its obligations under the Directive, and setting a two-month deadline for compliance. The present proceedings were initiated pursuant to Article 169 of the Treaty by an application registered at the Court on 24 February 1997.

3. In its application, the Commission observes that, as far as it is aware, not all the provisions necessary to comply with the Directive have been adopted or notified, and that the defendant neither answered nor complied with the reasoned opinion. On this ground, it requests the Court to hold that Germany is in breach of its obligations under the Treaty, and in particular the third paragraph of Article 189 and the first paragraph of Article 5 thereof.

4. In its defence, Germany admits that it has not adopted all the necessary measures to comply with its obligations under the Directive. It adds by way of complementary information that the Directive is directly applied by the competent public authorities, and that the existing national provisions are interpreted in conformity therewith. Furthermore, a bill to amend the Bundesnaturschutzgesetz (Federal law on nature protection) has been submitted to the Bundestag (Federal Assembly, lower house of

* Original language: English.

1 — OJ 1992 L 206, p. 7.

parliament); the legislative procedure was scheduled to be completed by Autumn 1997.

5. The Directive is predicated on the statement in the first recital in the preamble that 'the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community'. The fourth recital notes that, as 'the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them'. This Directive is closely linked to Council Directive 79/409/EEC of 2 April on the conservation of wild birds [2] (hereinafter 'the Birds Directive'). [3] The definition of the obligation to transpose the Birds Directive laid down by the Court from its earliest judgments in this area seems to me to be applicable, *mutatis mutandis*, to the obligation to transpose the present Directive. In *Commission* v *Belgium*, for example, the Court held that transposition 'does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision of national law; a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner'. [4] It added a proviso to this general statement which is especially relevant in the present proceedings, to the effect 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'. [5]

6. Germany has expressly admitted its failure to adopt all of the necessary provisions to comply with the Directive; it has not contended that the action of the public authorities, or the interpretation of the relevant national provisions, ensures such compliance, and, indeed, the Court has consistently held that '[mere] administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty'. [6] In these circumstances, I am of the opinion that the Commission should be granted the declarations which it has requested both on the merits and as regards costs.

2 — OJ 1979 L 103, p. 1.

3 — See paragraph 70 of my Opinion in Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, at pp. I-3832 and I-3833.

4 — Case 247/85 [1987] ECR 3029, paragraph 9 of the judgment.

5 — Loc. cit.

6 — Case C-334/94 *Commission* v *France* [1996] ECR I-1307, paragraph 30 of the judgment.

Conclusion

7. In the light of the foregoing, I recommend to the Court that it:

(1) Declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora within the deadline set, the Federal Republic of Germany has failed to comply with its obligations under the EC Treaty;

(2) Order the Federal Republic of Germany to pay the costs.