JUDGMENT OF THE COURT (Second Chamber)

18 May 2006 *

In Case C-221/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 27 May 2004,

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

applicant,

v

Kingdom of Spain, represented by F. Díez Moreno, 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, J. Makarczyk, R. Schintgen, P. Kūris (Rapporteur) and G. Arestis, Judges,

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

having regard to the written procedure and further to the hearing on 1 December 2005,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court for a declaration that, owing to the authorisation by the authorities in Castilla y Léon of the setting of stopped snares in several private hunting areas, the Kingdom of Spain has failed to fulfil its obligations under Article 12(1) of and Annex VI to 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) ('the directive').

Legal context

2 The aim of the directive, according to Article 2(1) thereof, 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'.

3 Article 12(1) of the directive provides that:

'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:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

...'

4 Annex IV to the directive, entitled 'Animal and plant species of Community interest in need of strict protection', cites *Lutra lutra* ('the otter') under (a), 'Animals'.

5 Annex VI to the directive, entitled 'Prohibited methods and means of capture and killing and modes of transport', mentions, as regards mammals, '[t]raps which are non-selective according to their principle or their conditions of use' under (a), 'Non-selective means'.

6 Article 15 of the directive provides that:

'In 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);

...'

7 Article 16 of the directive provides that:

'1. 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):

...

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

...'

Facts and pre-litigation procedure

8 On 19 April 2001, following a complaint registered in 2000, the Commission sent the Kingdom of Spain a letter of formal notice in which it maintained that that Member State had failed to fulfil its obligations under Article 12(1) of and Annex VI to the directive by authorising the setting of stopped snares in a hunting area in which some of the animal species referred to in Annexes II and IV to that directive are to be found. The Spanish authorities replied by means of a detailed letter of 29 June 2001.

9 Having received two new complaints concerning permits for setting stopped snares in the course of 2001, the Commission, on 21 December 2001, sent a supplementary letter of formal notice to the Spanish authorities, who replied by letter of 25 February 2002.

10 As it considered that the infringements of the directive were persisting, the Commission sent the Kingdom of Spain a reasoned opinion on 3 April 2003 concerning the grant by the Spanish authorities of permits to set stopped snares, which do not constitute a selective hunting method, on various hunting grounds. It requested that that Member State take the measures necessary to comply with that opinion within two months of its notification.

11 In its letter of reply of 15 July 2003, the Spanish Government stated that the Commission had contravened the provisions of Article 226 EC by mentioning in the reasoned opinion a permit of 13 December 2002 which had not been cited either in the initial letter of formal notice or in the supplementary letter of formal notice. Moreover, that government again contested the grounds of complaint put forward by the Commission.

12 As it took the view that the Kingdom of Spain was still failing to fulfil some of the obligations stemming from the directive, the Commission brought this action.

13 The action relates to three permits for the use of stopped snares for fox hunting issued by the authorities of Castilla y Léon on 10 January 2000, 24 May 2001 and 13 December 2002 ('the contested permits'). The contested permits relate to two hunting areas ('the areas concerned'), namely the AV-10.198 area situated in the territory of the municipality of Mediana de la Voltoya in the province of Ávila which is referred to in the permit of 24 May 2001 and the SA-10.328 area situated in the territory of the municipality of Aldeanueva de la Sierra in the province of Salamanca which is referred to in the permits of 10 January 2000 and 13 December 2002.

Admissibility of the action

14 The Spanish Government raises two pleas of inadmissibility. The first concerns alteration of the subject-matter of the application and in the alternative its lack of precision and the second relates to the insufficient statement of grounds in the application.

The plea of inadmissibility concerning alteration of the subject-matter of the application

15 The Spanish Government submits principally that the Commission altered the subject-matter of the application following its submission by alleging that the directive was incorrectly transposed although in earlier correspondence it had restricted itself to alleging that the Kingdom of Spain had infringed the directive by issuing the contested permits.

16 According to the Commission that claim is incorrect as the action for failure to fulfil obligations has the sole aim of challenging the permits.

17 It is clear from the documents in the file that the debate regarding the incorrect transposition of the directive has its origin in the position taken by the Spanish Government in its defence which consisted of justifying the contested permits with regard to the derogations provided for in the directive.

18 The subject-matter of this action is clearly not the possible incorrect transposition into Spanish law of that directive, but the alleged infringement thereof by the grant of the contested permits. Accordingly, that plea of inadmissibility, as set out in the principal argument, must be rejected.

19 In the alternative, the Spanish Government submits that the Commission did not define the subject-matter of the action sufficiently. In that regard, the Spanish Government puts forward five arguments.

20 By its first argument, the Spanish Government objects to the expansion of the subject-matter of the application to include the permits of 24 May 2001 and 13 December 2002. On the one hand, the permit of 24 May 2001 was revoked by the competent authorities on 29 May 2001 and consequently has no legal force or status. On the other hand, the permit of 13 December 2002 was mentioned for the first time in the reasoned opinion so that that government did not have an opportunity to make observations.

21 The Commission contends first of all that the Spanish Government has not proved that the permit of 24 May 2001 was revoked. According to the Commission that permit shows the continuing existence of the administrative practice of issuing permits for hunting using stopped snares in hunting areas in which otters are to be found and should, on that basis, be taken into account in spite of the fact that it was granted only for a very brief period. As regards the permit of 13 December 2002, it was applied for and granted as an extension to the permit of 10 January 2000.

22 It must be borne in mind that it follows from the express terms of the second paragraph of Article 226 EC that the Commission may bring an action for failure to fulfil obligations before the Court only if the Member State concerned has failed to comply with the reasoned opinion within the period laid down by the Commission for that purpose (see, inter alia, Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 9, and Case C-525/03 *Commission* v *Italy* [2005] ECR I-9405, paragraph 13).

23 It is, furthermore, settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned

opinion (see, inter alia, Case C-362/90 *Commission* v *Italy*, paragraph 10; Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7; Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9; and Case C-525/03 *Commission* v *Italy*, paragraph 14).

24 In the present case, it appears that the permit of 24 May 2001 was granted for a limited period ending on 15 June 2001, that is to say well before the reasoned opinion was sent.

25 It has not been shown that that permit continued to produce legal effects after the expiry of the period laid down in the reasoned opinion.

26 It follows that the action is inadmissible in so far as it relates to the permit issued on 24 May 2001.

27 As regards the permit of 13 December 2002, it must be noted that it was granted as an extension to the permit of 10 January 2000.

28 In that regard, it must be borne in mind that, according to the settled case-law of the Court, the subject-matter of a dispute may be extended to events which took place after the reasoned opinion was delivered in so far as they are of the same kind and constitute the same conduct as the events to which the opinion referred (see to that effect Case 42/82 *Commission* v *France* [1983] ECR 1013, paragraph 20, and Case 113/86 *Commission* v *Italy* [1988] ECR 607, paragraph 11).

29 In the present case, it must be noted that the permit of 13 December 2002 is of the same kind as the permit of 10 January 2000, as it states the conditions applicable under the latter for using and setting stopped snares without altering the meaning and scope thereof, and that the grant of those two permits constitutes the same conduct. Consequently, the fact that the permit of 13 December 2002 was cited as an example by the Commission in the reasoned opinion and is referred to again in this application did not deprive the Kingdom of Spain of the rights conferred by Article 226 EC. Therefore, that permit can be incorporated lawfully into the subject-matter of the action.

30 By its second argument, the Spanish Government submits that the Commission did not specify the obligations which the Kingdom of Spain failed to fulfil.

31 However, it is absolutely clear from the Commission's application that it alleges that the Kingdom of Spain failed to fulfil specific obligations stemming from Article 12(1)(a) of and Annex VI to the directive, namely the obligation to establish a system of strict protection for the animal species listed in Annex IV(a) to the directive (among which is to be found the otter) prohibiting all forms of deliberate capture or killing and the obligation to prohibit means of capture and killing which are non-selective according to their principle or their conditions of use. Accordingly, the Kingdom of Spain was aware of the obligations which it is alleged that it failed to fulfil.

32 By its third and fourth arguments, the Spanish Government alleges that the Commission restricted the subject-matter of the application for failure to fulfil obligations. During the pre-litigation procedure the Commission referred, on the one hand, to the protection of five other animal species apart from the otter and, on the other hand, to a variety of hunting methods and not only the use of stopped snares.

33 It must be borne in mind that, as the Commission rightly observes, the Court has already found that it is possible to limit the subject-matter of the proceedings at the stage of the proceedings before the Court (see to that effect Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraphs 24 and 25; Case C-52/00 *Commission* v *France* [2002] ECR I-3827, paragraph 44; Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraphs 18 and 19; and Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 28). Accordingly, the Commission could limit the subject-matter of the failure to fulfil obligations alleged in its application to one of the species and one of the hunting methods mentioned during the pre-litigation procedure.

34 By its fifth argument, the Spanish Government submits that the Commission used the pre-litigation procedure as a means of progressively establishing the grounds for the failure to fulfil obligations. The consequence of such conduct is a breach of the principles of legal certainty and of respect for the fundamental rights of the defence.

35 The Commission considers that that argument alleges, on the one hand, the limitation of the subject-matter of the action, and, on the other hand, the absence, in the letter of formal notice, of sufficient evidence to warrant the initiation of infringement proceedings.

36 In this connection, such factors do not however appear capable of affecting the admissibility of the action. First, the Commission was permitted to limit the subject-matter of the proceedings at the stage of the proceedings before the Court, as observed in paragraph 33 of this judgment. Secondly, according to the case-law of the Court the purpose of the pre-litigation procedure is to give the State concerned the opportunity, on the one hand, to comply with its obligations under Community law and, on the other hand, to avail itself of its right to defend itself against the complaints formulated by the Commission (Case C-117/02 *Commission* v *Portugal*

[2004] ECR I-5517, paragraph 53). Furthermore, the formal notice cannot be subject to such strict requirements of precision as is the reasoned opinion, since the formal notice cannot, of necessity, contain anything more than an initial brief summary of the complaints (see to that effect Case C-279/94 *Commission* v *Italy*, paragraph 15).

37 As the Advocate General observed at point 24 of her Opinion, whilst it is true that the aim of the letter of formal notice is to delimit the subject-matter of the dispute, the Commission is obliged to specify precisely in the reasoned opinion the grounds of complaint which it has already raised more generally in the letter of formal notice. However, that does not prevent it from restricting the subject-matter of the dispute or expanding it to cover subsequent measures that are essentially the same as the measures challenged in the formal notice.

The plea of inadmissibility alleging an insufficient statement of grounds in the application

38 The second plea of inadmissibility raised by the Spanish Government alleges infringement of Article 38(1)(c) of the Rules of Procedure of the Court of Justice on the one hand and on the other hand an insufficient statement of grounds in the application and failure to prove the alleged failures to fulfil obligations.

39 As regards the first point, it must be stated that the application meets the requirements set out in Article 38(1)(c) of the Rules of Procedure of the Court of Justice as regards the subject-matter of the proceedings and a summary of the pleas in law.

40 With regard to the second point, it must be noted that, as the Commission states, the ground of complaint set out therein falls to be examined in the context of the substance of the case. Therefore, that plea of inadmissibility cannot be upheld.

41 In the light of the foregoing, it must be held that the action is inadmissible to the extent that it is founded on the permit of 24 May 2001 concerning the AV-10.198 hunting area situated in the territory of the municipality of Mediana de la Voltoya in the province of Ávila and is admissible as to the remainder.

The merits of the action

42 It must therefore be considered whether the permit of 13 December 2002 ('the contested permit') which relates to the SA-10.328 hunting area situated in the territory of the municipality of Aldeanueva de la Sierra in the province of Salamanca ('the area concerned') was issued by the Spanish authorities in breach of the directive.

43 The Commission puts forward two complaints in support of its action. First, the permit to use stopped snares in the area concerned entails the deliberate capture or killing of otters, in breach of Article 12(1)(a) of the directive. Secondly, the Commission submits that the Kingdom of Spain also infringed the provisions in Annex VI(a) to the directive as that permit relates to a means of hunting which is non-selective according to its principle and its conditions of use.

The complaint concerning infringement of Annex VI(a) to the directive

44 By its second complaint, which it is appropriate to examine first, the Commission submits that the permit to use stopped snares infringes Annex VI(a) to the directive since it involves a means of hunting which is non-selective according to its principle and its conditions of use.

45 Under the directive the methods and means of capture and killing listed in Annex VI(a) are prohibited only as regards the cases referred to in Article 15 of the directive, which is the only article referring to that annex.

46 It is clear from that provision that it is prohibited to use non-selective means, in particular those listed in Annex VI(a) to the directive, to capture or kill species of wild fauna listed in Annex V(a) to the directive and, where in accordance with Article 16, derogations are applied, to take, capture or kill species listed in Annex IV(a) to the directive.

47 It must be borne in mind that the contested permit was issued for fox hunting and that the fox is an animal species which is not referred to in either Annex IV(a) or Annex V(a) to the directive. It follows that the prohibition with regard to non-selective means of hunting is not binding on the Spanish authorities in the present case. Therefore, the complaint concerning infringement of Annex VI(a) to the directive must be rejected.

The complaint concerning infringement of Article 12(1)(a) of the directive

48 It must be borne in mind that under Article 12(1)(a) of the directive Member States are required to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to the directive in their natural range. That system must, according to that provision, prohibit all forms of deliberate capture or killing of the species referred to.

49 In order to assess the validity of the complaint put forward by the Commission, the presence of the otter in the area concerned must be ascertained, and the circumstances under which the capture or killing of that species is deliberate must be established.

The presence of the otter in the area concerned

— Arguments of the parties

50 First, the Commission submits that, in its reply to the reasoned opinion, the Spanish Government acknowledged the presence of the otter in the area concerned as in that response it stated that the otter may be found throughout virtually the whole of the territory of Castilla y Léon.

51 Secondly, the presence of the otter is borne out by the scientific information sheets 'Natura 2000' which the Kingdom of Spain submitted to the Commission concerning the sites of Quilamas (Salamanca) and Encinares de los ríos Adaja y Voltoya (Ávila), the site of Quilamas being adjacent to the area concerned.

52 Thirdly, waterways, which are a necessary component of the habitat of otters, cross that area.

53 Lastly, monographs on the position of otters in Spain also confirm that that species is to be found in the area concerned.

54 In view of all those factors, the Commission submits that if the Spanish Government considers that the otter is not to be found in that area, it must prove it by submitting a technical study carried out on site.

55 The Spanish Government submits that there are no otters in the area concerned. In reply to the first argument put forward by the Commission, it observes that acknowledging that a particular animal species is present in a territory does not imply that that species occupies all the habitats in that territory.

56 The Spanish Government also states that waterways are a necessary component of the habitat of otters whereas the area concerned is neither a coastal area nor an area adjoining a river. It adds that the rivers and streams which cross that area are of a seasonal nature as they dry up during the summer months.

57 Furthermore, monographs produced by the Commission prove that there are no otters in the area concerned.

58 Lastly, the Spanish Government considers that there is in that area merely a likelihood that otters are to be found and that the Commission has not established their presence in so far as it does not have either direct evidence, such as the capture of specimens of that species, or indirect evidence, such as the existence of otter tracks.

— Findings of the Court

59 It must be borne in mind that, according to the settled case-law of the Court, in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove that the obligation has not been fulfilled without being able to rely on any presumption (see to that effect, inter alia, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-194/01 *Commission* v *Austria* [2004] ECR I-4579, paragraph 34; and Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 75).

60 As regards the scientific information sheets 'Natura 2000', it must be stated that, as the Advocate General observed in point 71 of her Opinion, they cover the Quilamas site, which has a surface area of over 10 000 hectares. Admittedly, the area concerned is situated in the immediate vicinity of that site, to the north-west. However, it is common ground that the largest waterways on that site, including the Arroyo de las Quilamas, flow to the south-east and are separated from the area concerned by a range of hills with a height of several hundred metres. Therefore, it is unlikely that otters from the populations living in the network of waterways on the Quilamas site would move into the area concerned.

61 Furthermore, as the Spanish Government, which has not been contradicted on that point by the Commission, has stated, although waterways are a necessary component of the habitat of otters those which cross the area concerned or flow near it are of a seasonal nature.

62 Lastly, as regards the monographs produced by the Commission, it must be stated that they contain contradictory information so that no certainty regarding the presence of the otter in the area concerned is apparent from them.

63 It is clear from the foregoing that the Commission has not furnished evidence to the requisite legal standard as to the presence of otters in the area concerned as the evidence produced proves at the very most that there is a possibility that they are to be found in that area.

Whether the capture of otters is deliberate

— Arguments of the parties

64 The Commission submits that the capture of otters cannot be regarded as accidental and therefore that the condition as to intention which is provided for in Article 12(1)(a) of the directive is met if the Spanish authorities, although they know that otters are present in an area, nevertheless authorise for the purposes of fox hunting the use of a non-selective method of capture there which may adversely affect otters.

65 Thus, by issuing the contested permit, the Kingdom of Spain failed to fulfil the obligation arising out of Article 12(1)(a) of the directive to forestall adverse consequences for otters and created a risk of specimens of that species being deliberately captured.

66 The Spanish Government contends that the contested permit was issued for fox hunting, not otter hunting. It acknowledges the possibility of an indirect effect on otters provided that that animal species is to be found in the area concerned — a circumstance which has not, however, been established.

67 Furthermore, the Spanish Government considers that the stopped snare is a selective means of hunting both according to its principle, as the stop serves to prevent the captured animal's death, and as regards the conditions of use imposed by the contested permit such as the daily inspection of snares, the requirement that any animal which is not covered by that permit be immediately freed or the specific manner in which those snares are set.

— Findings of the Court

68 Under Article 12(1)(a) of the directive, Member States are to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range, prohibiting all forms of deliberate capture or killing.

69 With respect to the condition as to 'deliberate' action provided for in that provision, it is clear from a reading of the different language versions thereof that 'deliberate' refers to both the capture and the killing of protected animal species.

70 It must also be borne in mind that the Court has categorised as deliberate disturbance within the meaning of Article 12(1)(b) of the directive matters such as the use of mopeds on a beach notwithstanding warnings as to the presence of protected sea turtles' nests and the presence of pedalos and small boats in the sea area of the beaches concerned, and has held that a Member State fails to fulfil its obligations under Article 12(1)(b) and (d) of the directive where it does not take all the requisite specific measures to prevent the deliberate disturbance of the animal species concerned during its breeding period or the deterioration or destruction of

its breeding sites (see Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraphs 36 and 39, and the Opinion of Advocate General Léger in that case, at point 57).

71 For the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.

72 It is common ground, however, that the contested permit related to fox hunting. Accordingly, the permit in itself is not intended to allow the capture of otters.

73 Furthermore, it must be borne in mind that the presence of otters in the area concerned has not been formally proven, so that it has also not been established that by issuing the contested permit for fox hunting the Spanish authorities knew that they risked endangering otters.

74 It must therefore be held that the requisite criteria, as set out in paragraph 71 of this judgment, for fulfilling the condition relating that the capture or killing of a specimen belonging to a protected animal species is deliberate have not been met in the present case.

75 The Commission's action must therefore be dismissed.

Costs

76 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 Kingdom of Spain has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]