JUDGMENT OF THE COURT (Second Chamber)

26 October 2006 *

In Case C-239/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 June 2004,

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

applicant,

v

Portuguese Republic, represented by L. Fernandes, acting as Agent, and J.F. Ganderez and R. Gomes da Silva, advogados, with an address for service in Luxembourg,

defendant,

* Language of the case: Portuguese.

THE COURT (Second Chamber),

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

Advocate General: J. Kokott,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 April 2006,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by implementing a project for a motorway, whose route crosses the Castro Verde special protection area (SPA), notwithstanding the negative environmental impact assessment and the existence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the

conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Directive 97/62/EC of 27 October 1997 (OJ 1997 L 305, p. 42) ('the Habitats Directive').

Legal context

Directive 79/409/EEC

2 Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) require member States to classify as SPAs areas fulfilling the criteria laid down by those provisions.

3 Article 4(4) of that directive provides:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

The Habitats Directive

4 Article 6(2) to (4) of the Habitats Directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

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

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

...'

5 Pursuant to Article 7 of the Habitats Directive:

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

Facts of the dispute and the pre-litigation procedure

6 The construction project for the A 2 motorway, linking the city of Lisbon with the Algarve region, was awarded in 1997 to the company BRISA Auto-Estradas de Portugal.

7 For the part of that motorway running between the settlements of Aljustrel and Castro Verde, the company drew up a planned route bypassing to the east the settlements of Messejana, Alcarias, Conceiçao, Aivados and Estação de Ourique and crossing the western side of the Castro Verde SPA.

8 In September 1999, an environmental impact assessment relating to the planned route ('the environmental impact study') was submitted to the Portuguese Ministry of the Environment.

9 In the same month, the Castro Verde area was classified as a SPA by the Portuguese authorities pursuant to Article 4 of Directive 79/409.

10 In January 2000, the Secretary of State for the Environment approved the environmental impact study and authorised the implementation of the project.

11 The section of the A 2 motorway between Aljustrel and Castro Verde was opened to traffic in July 2001.

12 On the basis of a complaint which informed it that, despite the negative assessment of impact of that section of motorway on the Castro Verde SPA, the Portuguese authorities had implemented a motorway construction project whose route crossed that area, the Commission, by letter of 20 October 2000, gave the Portuguese Republic formal notice to submit its observations within two months.

13 The Portuguese authorities submitted their observations to the Commission by letters of 4 December 2000 and 12 January 2001.

14 Having found that the Portuguese authorities had not explained why alternative routes situated outside both the Castro Verde SPA and the residential zones of Alcarias, Conceição, Aivados and Estação de Ourique had not been considered and taking the view that the Portuguese Republic had failed to fulfil its obligations under Article 6(4) of the Habitats Directive, on 11 April 2001 the Commission issued a reasoned opinion calling on that Member State to take the measures necessary in order to comply with the opinion within two months of the date of its notification.

15 Since the Commission was not satisfied by the reply given by the Portuguese authorities, it decided to bring the present action.

The action

16 The Commission asserts that the environmental impact study clearly shows that the route chosen by the Portuguese authorities for the construction of the section of the A 2 motorway between Aljustrel and Castro Verde has a very significant negative impact on 17 species of wild birds listed in Annex I to Directive 79/409 and on the habitat of those birds.

17 The Portuguese Republic submits that the Commission merely makes general observations drawn from the environmental impact study, without demonstrating how the implementation of the route has had a very significant negative impact. In its view, it is necessary to weigh the potential adverse effect on the Castro Verde SPA against that which has actually been caused.

18 Pursuant to Article 6(3) of the Habitats Directive, the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the area but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of the plan or project for the site, that it will not adversely affect the integrity of the site and, if appropriate, after having obtained the opinion of the general public.

19 That provision thus establishes a procedure intended to ensure, by means of a prior examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is

authorised only to the extent that it will not adversely affect the integrity of that site (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 34).

20 In that regard, the Court has already held that a plan or project such as the one in question may be granted authorisation only on the condition that the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such effects (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 56 and 59).

21 In the present case, the environmental impact study mentions the presence, in the Castro Verde SPA, of 17 species of bird listed in Annex I to Directive 79/409 and the high sensitivity of certain of them to the disturbance and/or the fragmentation of their habitat resulting from the planned route of the section of the A 2 motorway between the settlements of Aljustrel and Castro Verde.

22 It is also apparent from that study that the project in question has a 'significantly high' overall impact and a 'high negative impact' on the avifauna present in the Castro Verde SPA.

23 The inevitable conclusion is that, when authorising the planned route of the A 2 motorway, the Portuguese authorities were not entitled to take the view that it would have no adverse effects on the SPA's integrity.

24 The fact that, after its completion, the project may not have produced such effects is immaterial to that assessment. It is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable

scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see, to that effect, Case C-209/02 *Commission* v *Austria* [2004] ECR I-1211, paragraphs 26 and 27, and *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 56 and 59).

25 In those circumstances, the Portuguese authorities had the choice of either refusing authorisation for the project or of authorising it under Article 6(4) of the Habitats Directive, provided that the conditions laid down therein were satisfied (see, to that effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 60).

26 In the present case, therefore, it must be considered whether it was possible to authorise the planned route of the A 2 motorway between the settlements of Aljustrel and Castro Verde on the basis of Article 6(4) of the Habitats Directive.

27 The Commission submits that the Portuguese Republic did not comply with that provision since, in the present case, the Portuguese authorities failed to study certain alternative routes which would not have adverse effects on the Castro Verde SPA or on the population of that area.

28 In particular, it takes the view that those authorities did not take into consideration the alternative routes falling outside the Castro Verde SPA and the residential zone comprising the settlements of Alcarias, Conceição, Aivados and Estação de Ourique.

29 The Commission is of the opinion that such alternative routes should have been examined, in particular those which took the A 2 motorway along a corridor to the west of the Castro Verde SPA, between its boundary and the road IC 1, in an area of

plains with a very low demographic density, so that the Portuguese authorities could have chosen, without significant technical difficulties or unreasonable additional financial costs, an alternative route which did not have adverse effects on the SPA and affected neither the abovementioned nor other settlements.

30 According to the Portuguese Republic, it is for the Commission not only to propose such a route, but also to define it and give details of it, demonstrating the existence and viability of an alternative solution less harmful to the environment which the Portuguese authorities had not envisaged. The Commission has not supplied any evidence in that regard.

31 In any event, the Portuguese Republic submits that the solution proposed by the Commission cannot be considered to be an 'alternative solution' within the meaning of Article 6(4) of the Habitats Directive. In its view, that notion does not simply refer to an alternative solution whose theoretical feasibility is defensible, but also implies that the adverse effects of such a solution are taken into account.

32 In the submission of the Portuguese Republic, the implementation of the route proposed by the Commission would cause serious social, economic and environmental harm since it would affect the populations of Conceição, Aivados and Estação de Ourique as well as the reservoir at the Monte da Rocha dam.

33 Accordingly, that Member State takes the view that the marginal and incidental harm to the integrity of the Castro Verde SPA resulting from the route chosen by the Portuguese authorities is less significant than that which would be caused by implementation of the solution proposed by the Commission.

34 Article 6(4) of the Habitats Directive provides that, if, in spite of a negative assessment carried out pursuant to the first sentence of Article 6(3) and in the absence of alternative solutions, a plan or project must nevertheless be carried out

for imperative reasons of overriding public interest, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

35 That provision, which permits a plan or project which has given rise to a negative assessment under the first sentence of Article 6(3) of the Habitats Directive to be implemented on certain conditions, must, as a derogation from the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly.

36 Thus, the implementation of a plan or project under Article 6(4) of the Habitats Directive is, inter alia, subject to the condition that the absence of alternative solutions be demonstrated.

37 In the present case, it is common ground that the Portuguese authorities examined and rejected a number of solutions whose routes bypassed the settlements of Alcarias, Conceição, Aivados and Estação de Ourique but crossed the western side of the Castro Verde SPA.

38 On the other hand, it is not apparent from the file that those authorities examined solutions falling outside that SPA and to the west of the settlements referred to above, although, on the basis of information supplied by the Commission, it cannot be ruled out immediately that such solutions were capable of amounting to alternative solutions within the meaning of Article 6(4) of the Habitats Directive, even if they were, as asserted by the Portuguese Republic, liable to present certain difficulties.

39 Accordingly, by failing to examine that type of solution, the Portuguese authorities did not demonstrate the absence of alternative solutions within the meaning of that provision.

40 In those circumstances, it must be held that, by implementing a project for a motorway whose route crosses the Castro Verde SPA, notwithstanding the negative environmental impact assessment and without having demonstrated the absence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of the Habitats Directive.

Costs

41 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 the Portuguese Republic to be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

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

1. **Declares that, by implementing a project for a motorway whose route crosses the Castro Verde special protection area, notwithstanding the negative environmental impact assessment and without having demonstrated the absence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 97/62/EC of 27 October 1997;**

2. **Orders the Portuguese Republic to pay the costs.**

[Signatures]