JUDGMENT OF THE COURT (Fourth Chamber)

20 May 2010 *

In Case C-308/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 10 July 2008,

**European Commission,** represented by S. Pardo Quintillán and D. Recchia, 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 (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris and L. Bay Larsen (Rapporteur), Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 By its application, the European Commission (formerly 'Commission of the European Communities') claims that the Court should declare that, in relation to the project for upgrading the country road between Villamanrique de la Condesa (Seville) and El Rocio (Huelva), the Kingdom of Spain has failed to fulfil its obligations under 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 Habitats Directive'), as interpreted by the judgments in Case C-117/03 *Dragaggi and Others* [2005] ECR I-167 and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, and under Article 12(4) of that directive.

## Legal context

*European Union law ('EU law')*

2 According to the sixth recital in the preamble to the Habitats Directive, 'in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas

of conservation in order to create a coherent European ecological network according to a specified timetable'.

3 'Under Article 3(1) of the Habitats Directive, '[a] coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species 'habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.

4 Article 4 of the Habitats Directive is worded as follows:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. ...

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. …

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance [("SCIs")] drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

…

The list of sites selected as [SCIs], identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

…

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

5 The Lynx pardina ('Iberian lynx') is among the species of Community interest listed in Annex II to the Habitats Directive as a priority species. Article 1(h) of that directive defines 'priority species' as 'species referred to in [Article 1(g)(i)] for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2'.

6 In Article 6 of the Habitats Directive, which lays down protection arrangements for SCIs, paragraph 2 provides:

'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.'

7 Article 12(4) of the Habitats Directive is worded as follows:

'Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.'

8 The Iberian lynx is among the species listed in Annex IV(a) to the Habitats Directive.

**The facts underlying the dispute and the pre-litigation procedure**

9 In December 1997, the Kingdom of Spain proposed the Doñana natural park as a SCI because of the presence there, inter alia, of Iberian lynx.

10 In November 1999 – that is to say, between the time when that site was proposed and when it was actually placed on the list of SCIs by the Commission – a project was adopted for the upgrading of the country road which runs alongside the edge of the Doñana natural park and cuts through a section of it.

11 On the view that the upgrading of the road had been carried out without all necessary measures being taken to prevent a negative impact on the environment and, in particular, on the Iberian lynx, the Commission sent a letter of formal notice to the Kingdom of Spain on 1 April 2004, alleging that it had failed to fulfil, inter alia, its obligations under Articles 6 and 12 of the Habitats Directive.

12 In order to take account of *Dragaggi and Others*, the Commission sent the Kingdom of Spain a supplementary letter of formal notice on 4 July 2006. In that letter, the Commission stated that the Kingdom of Spain had failed to fulfil its obligations under the Habitats Directive, as interpreted in that judgment, and under Article 12(4) of that directive. In that regard, the Commission referred to the importance of the presence of Iberian lynx in the area where the project for upgrading the road had been carried out and stated that the conversion of that byroad into a regional road led the natural habitat of that species to be fragmented and exposed the animals to the risk of fatal accidents, since the protective measures could not be regarded as appropriate.

13 On 19 July 2006, by Decision 2006/613/EC adopting, pursuant to Council Directive 92/43, the list of sites of Community importance for the Mediterranean

biogeographical region (OJ 2006 L 259, p. 1), the Commission placed the Doñana natural park on that list.

14 By letter of 25 September 2006, the Kingdom of Spain replied that, after corrective measures had been taken, there had been no more cases of animals being struck by vehicles and that it appeared that, while not eliminating that risk, the protective measures reduced it enormously.

15 On 18 October 2006, on the view that the infringement of EU law was ongoing, the Commission delivered a reasoned opinion in which it reiterated its complaints and requested the Kingdom of Spain to comply with that opinion within a period of two months from its receipt.

16 On 18 December 2006, the Kingdom of Spain sent in reply a report from the Junta de Andalucía (Region of Andalucía), which restated the fact that, ever since corrective measures had been taken, there had been no more cases of Iberian lynx being struck by vehicles.

17 On the view that the situation remained unsatisfactory, the Commission brought the present action on 10 July 2008.

## The action

*The first plea in law, alleging failure to fulfil the obligation, binding on the defendant Member State under the Habitats Directive, not to authorise intervention of a kind which would seriously endanger the ecological characteristics of the site concerned*

Arguments of the parties

18 The Commission claims that, in upgrading the country road at issue without at the same time taking appropriate protective measures, the Kingdom of Spain had intervened in a way which seriously altered the ecological characteristics of the SCI as proposed, a site considered to be essential for the Iberian lynx.

19 Despite the corrective measures adopted by the Spanish authorities, intervention of such a kind – in an area of particular sensitivity in relation to the survival of the Iberian lynx – leads to the fragmentation of the habitat of that species, making it difficult for the young lynx to disperse and for the connection between the various 'territorial nuclei' to be maintained and, above all, exposing young animals to the risk of being struck by a vehicle and killed. The result is that, contrary to the obligations imposed by the Habitats Directive as interpreted by the case-law of the Court, that priority species is in danger of becoming extinct.

20 The Kingdom of Spain contends that the regional transport link between Villamanrique de la Condesa and El Rocío was – and still is – an asphalt road which the Andalusian authorities have merely maintained in an appropriate manner. It cannot be said, therefore, that the ecological characteristics of the site have been seriously compromised because of intervention. Even if that were to be the case, the Kingdom of Spain has, in any event, adopted measures to prevent harm to the environment.

Findings of the Court

21 Under the Habitats Directive, Member States must take appropriate protective measures to preserve the characteristics of sites which host priority natural habitat types and/or priority species and which have been identified by Member States with a view to their inclusion on the Community list. Member States cannot therefore authorise intervention where there is a risk that the ecological characteristics of those sites will be seriously compromised as a result. That is particularly so where there is a risk that intervention of a particular kind will bring about the extinction of priority species present on the sites concerned (see, to that effect, *Bund Naturschutz in Bayern and Others*, paragraphs 44 and 46).

22 However, the Commission criticises the Kingdom of Spain for authorising intervention of just such a kind, which has seriously altered the ecological characteristics of the SCI proposed and which risks bringing about the extinction of the Iberian lynx, a priority species the presence of which on the site at issue was one of the justifications for the Doñana natural park being proposed as a SCI by the defendant Member State.

23 According to established case-law, it is for the Commission to prove the alleged failure to fulfil obligations. It is the responsibility of the Commission to place before the Court the information needed to enable the Court to establish that the obligation has

not been fulfilled, and in so doing the Commission may not rely on any presumption (see Case C-179/06 *Commission* v *Italy* [2007] ECR I-8131, paragraph 37, and Case C-416/07 *Commission* v *Greece* [2009] ECR I-7883, paragraph 32).

24 It is not contested that the track between Villamanrique de la Condesa and El Rocío was first asphalted in 1989. As regards the upgrading project at issue, its implementation was authorised in February 2000, subject to the taking of measures such as the construction of wildlife crossings, the provision of appropriate road signs and the erection of animal fencing along the length of the section crossing the forest area, which is the area most favourable for the conservation of the Iberian lynx. Upgrading of the road was completed in July 2001. However, a number of additional corrective measures were gradually carried out, and finalised in November 2004. It is apparent from the case-file that, although the asphalting works have not altered either the route or the dimensions of the transport link at issue, they have brought about a change in use by converting a byroad into a regional road. That upgrading has led to an increase in traffic, particularly private cars, travelling at higher speeds.

25 It is common ground that, in general, linear transport infrastructures may constitute a real barrier for certain species referred to in the Habitats Directive and, by thus fragmenting their natural range, promote endogamy and genetic drift within those species. It does not appear, however, that the upgrading at issue has actually had a real impact on the habitat fragmentation of the Iberian lynx.

26 In that regard, it is necessary to state the following.

27 It follows from the study on the census of Iberian lynx populations in Spain and in Portugal (El Lince ibérico (Lynx pardinas) en España y Portugal – Censo – diagnóstico

de sus poblaciones, J.N. Guzmán and Others, Ministerio de Medio Ambiente, 2004) that approximately half the population of Iberian lynx living in the Doñana natural park remain concentrated in 20 % of the surface area of that park – precisely where the most abundant populations of rabbits, their main food source, are to be found.

28 Moreover, because of the lack of rabbits on 75 % of the area on which Iberian lynx is present, the number of mating territories has dropped from approximately 12 to a maximum of 8.

29 In addition, it emerges from the summary of the final activity report drawn up by the Spanish authorities concerning the period from 1 July 2002 to 30 June 2006 (Recuperación de poblaciones de Lince ibérico en Andalucía, Proyecto Life No 02NAT/E/8609, Consejería de Medio Ambiente, Septiembre 2006) that it is important to promote the interconnection of the various territories which host the Iberian lynx population of the Doñana region, given that that population is composed of small 'territorial nuclei' between which the animals move when they are dispersing.

30 In particular, it emerges from the case-file that the most important original nucleus of small Iberian lynx is to be found in the forested areas of de Coto del Rey and Matasgordas, both of which are in the Doñana national park. From that nucleus, young Iberian lynx have two basic lines of dispersal, one towards the north, which leads across the asphalt road between Villamanrique de la Condesa and El Rocío, and the other towards the west.

31 In November 2006, however, eight wildlife crossings and two bridges were built in order to make sure that it was possible to cross the road at issue and thus to avoid the barrier effect resulting from its upgrading to a regional road.

32 Admittedly, according to a report of WWF/Adena of September 2007 (Informe sobre el camino agricola asfaltado Villamanrique de la Condesa (Seville) – El Rocío (Huelva)), the wildlife crossings built have proved to be unusable and useless because of design faults and lack of maintenance or failure to implement additional corrective measures.

33 However, the technical report drawn up in November 2006 by Inerco, a consultancy, at the request of the municipality of Villamanrique de la Condesa (Informe Técnico sobre las medidas correctoras adoptadas en las obras de adecuación del firme de la via Villamanrique – El Rocío (Sevilla – Huelva)), indicates that the number of wildlife crossings across the road at issue, as well as their design, were considered to be well adapted to the characteristics of the transport link which they are intended to make safe to cross. Their usefulness was limited only in the event of exceptionally heavy rainfall.

34 As the Commission observed when quoting the follow-up report on the effectiveness of the corrective measures implemented on the asphalt road between Villamanrique de la Condesa and El Rocío (Informe de seguimiento de la eficacia de las medidas correctoras establecidas en el camino agrícola asfaltado Villamanrique de la Condesa – El Rocío, Junta de Andalucía Consejería de Medio Ambiente, 16 March 2008), although proof that Iberian lynx had used the crossings between March 2006 and February 2007 was confined to only four occasions over a period of a year, it is also true that, at that time, the total estimated population of Iberian lynx in the Doñana parks did not even amount to 50 individual animals. Moreover, according to the final activity report referred to in paragraph 29 above, it has been established that individual specimens of Iberian lynx wander between the various territories of the Doñana region. In that regard, according to the follow-up report, the wildlife crossings have a sufficient covering of vegetation to encourage the animals to use them and the access slopes make the crossings perfectly accessible for lynx.

35 Moreover, as the final activity report states, thanks to the capture of 13 specimens and to the breeding in captivity programme, two cubs were born to broodstock originating respectively from the populations of the Andujar-Cardeña and the Doñana regions. That represents a step forward in the preservation of current genetic variability.

36 In the light of the foregoing, it cannot be regarded as established to the requisite legal standard that the upgrading of the road, as such, has had a real impact on the habitat fragmentation of the Iberian lynx in the Doñana region.

37 As regards the allegedly high risk of being struck by a vehicle to which Iberian lynx in that region are exposed following completion of the project for upgrading the road, it is necessary to state the following.

38 The Commission referred to the pilot study for the document entitled 'Sustainable mobility, road safety and conservation of wildlife in the Doñana region (Borrador, Movilidad sostenible, seguridad vial y conservación de la faune silvestre en la comarca de Doñana), forwarded by the Spanish authorities on 18 December 2006, which indicates that, for the Iberian lynx of the Doñana region, being struck by a vehicle has become one of the main causes of death and, accordingly, a determining factor for the future viability of the Iberian lynx population. According to that pilot study, the situation has been made worse by two main factors, namely, the increase in the number of asphalt roads, particularly in the final decade of the 20th century, and the growth of road traffic throughout the region, owing to the increase in tourist and commercial use of the main roads and the more frequent use of the asphalt country roads.

39 According to the study referred to in paragraph 27 above, during the period between 2000 and 2003, 10 Iberian lynx died because of being struck by a vehicle in the Doñana region. It is not contested that, during that period, only one Iberian lynx was killed on the country road between Villamanrique de la Condesa and El Rocío.

40 In 2004, another Iberian lynx was killed on that road.

41 However, it is common ground that, since implementation of the additional corrective measures was completed in November 2004, no Iberian lynx has been run over on that road, at least not before the end of the written procedure before the Court, which closed on 23 February 2009.

42 In that regard, it should be pointed out that the corrective measures consist in the adoption of measures to deter speeding; the provision of road signs; the erection of animal fencing; and in the improvement of wildlife crossings, bridges and drainage.

43 Thus, as regards the measures to deter speeding and the provision of road signs, it emerges from the Inerco report, referred to in paragraph 33 above, that the measures adopted by the Spanish authorities to discourage speeding have brought about a significant reduction in traffic speed on the road at issue as compared with that recorded a number of years earlier.

44 Nevertheless, it is apparent from the study of the Doñana natural park carried out in 2006 (Estudio de 2006 del Parque Natural de Doñana) that the average speeds recorded on that road exceed the authorised speed limits.

45 Against that background, the report referred to in paragraph 34 above concludes that, although the measures taken appear at the moment to yield good results, all the measures adopted could be improved by speed checks and more intensive maintenance of infrastructure, or even the adoption of new measures.

46 As regards the animal fencing, the WWF/Adena report referred to in paragraph 32 above indicates that this has not been erected along the entire length of the road

between Villamanrique de la Condesa and El Rocío, one side of that road remaining unfenced for a section of approximately three kilometres. Thus, along that section, the Iberian lynx had unrestricted access to the road. According to the Inerco report, referred to in paragraphs 33 and 43 above, the road has been fully fenced off and the measures adopted in that connection must be considered appropriate in relation to the objectives pursued, even though it is necessary to check the fencing to ensure that it remains secure. Moreover, accidental gaps in certain fences have exceptionally allowed wildlife to pass through.

47 The follow-up report, referred to in paragraphs 34 and 45 above, indicates that, with regard to the 11 000 metre section of the country road which crosses the Doñana natural park, the first 9 300 metres – which correspond to the forested area constituting a favourable habitat for the Iberian lynx – are entirely bordered by animal fencing on both sides of the road. The remaining 1 700 metres are unfenced, since the road crosses a floodplain and serves as a ford during heavy floods. Moreover, there are no trees or bushes, the land being intended for grazing.

48 Furthermore, it emerges from the document drawn up on the initiative of the National Commission for nature protection of the Kingdom of Spain and entitled 'Technical specifications for the design of wildlife crossings and perimeter fencing' ('Prescripciones técnicas para el diseño de pasos de fauna y vallados perimetrales') – to which the Commission referred – that, for the Iberian lynx, twisted wire or soldered fences are recommended, which should reach two metres above the ground. However, it is undisputed that the animal fencing at issue in the present case complies with the recommended specifications, which – contrary to the Commission's assertions in its reply – are not prohibited for roads with the same characteristics as the road at issue.

49 Furthermore, it is indicated in the follow-up report that, by way of corrective measure in relation to the animal fencing and in order to facilitate escape if an Iberian lynx were to break through on to the road at issue, a sufficient number of escape points have been set up along the entire length of the fence, concentrated in the vicinity of possible points of access, such as crossroads or the places where the fencing ends.

However, it has not yet been possible to test the effectiveness of those escape points, since the fences have fulfilled their function well and no Iberian lynx has been able to pass through them.

50 As for the wildlife crossings, bridges and drainage, reference should be made to paragraphs 32 to 34 above.

51 In the light of all of the foregoing, considered as a whole, it is clear that the Commission has failed to prove that the implementation of the project for upgrading the country road placed the Iberian lynx in great danger of being struck by vehicles.

52 Thus, although certain elements in the case-file appear to indicate that the overall situation of the Doñana site might not be satisfactory in the light of the requirements relating to conservation of the Iberian lynx – in particular, because of the relatively high number of cases in which animals of that priority species have died because of being struck by a vehicle – the evidence before the Court is not sufficient for it to find that the project for upgrading the country road, accompanied by the corrective measures, constitutes in itself intervention of a kind which places the Iberian lynx on the site concerned in danger of extinction and which, accordingly, risks seriously compromising the ecological characteristics of that site.

53 The first plea in law must therefore be rejected.

*The second plea, alleging failure to fulfil the obligations incumbent on the defendant Member State under Article 12(4) of the Habitats Directive*

Arguments of the parties

54 The Commission claims that, although the Spanish authorities have acknowledged the accidental deaths of three Iberian lynx, in 1996, 2002 and 2004 respectively, on the country road between Villamanrique de la Condesa and El Rocío, they have not established a system for monitoring closely the incidental killing of Iberian lynx on the asphalt road at issue and have failed to take the conservation measures necessary to ensure that those accidental deaths do not have a significant negative impact on that protected species.

55 The Kingdom of Spain contends that it has adopted measures which are suitable and which drastically reduce the risk of incidental killing. In addition, the Spanish authorities are making sure that the measures adopted are satisfactorily monitored and continue to study new measures which may be even more appropriate with respect to the conservation and improvement of the species.

Findings of the Court

56 Under Article 12(4) of the Habitats Directive, read together with Annex IV(a) thereto, Member States are to establish a system to monitor, inter alia, the incidental killing of Iberian lynx. In the light of the information gathered, Member States are to

undertake further research, or take the conservation measures required, to ensure inter alia that incidental killing does not have a significant negative impact on the species concerned.

57 As regards the establishment of a system for monitoring the incidental killing of Iberian lynx, it should be pointed out that, according to the summary of the final activity report, referred to in paragraph 29 above, a database has been created, according to geographical criteria, on deaths of Iberian lynx attributable to non-natural causes, such as being struck by a vehicle. This means that it has been possible to determine the areas within the natural range of the Iberian lynx where it is most at risk.

58 As regards the conservation measures needed to ensure that the incidental killing of Iberian lynx does not have a significant negative impact on the species, the findings made in relation to the first plea and on the basis of which it fell to be rejected may, in essence, be applied again in this connection.

59 In the present case, as the Kingdom of Spain has contended, the fact that the Spanish authorities continue to study new measures capable of further improving the conditions for conservation and improvement of the species cannot in itself lead to a finding that the measures adopted are inappropriate in relation to the aim underlying Article 12(4) of the Habitats Directive, specified in paragraph 58 above.

60 The second plea in law must therefore be rejected.

61 In the light of all the foregoing and there being no need now to rule on the plea of inadmissibility raised by the Kingdom of Spain in its rejoinder, on the ground that

the first plea is vague and imprecise, the action brought by the Commission must be dismissed.

## Costs

62 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 to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

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

**1. Dismisses the action;**

**2. Orders the European Commission to pay the costs.**

[Signatures]