# JUDGMENT OF THE COURT (Second Chamber)

14 April 2005 *

In Case C-441/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 October 2003,

**Commission of the European Communities,** represented by M. van Beek, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Kingdom of the Netherlands,** represented by H.G. Sevenster and N.A.J. Bel, acting as Agents,

defendant,

* Language of the case: Dutch.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), R. Schintgen, P. Kūris and G. Arestis, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 3 February 2005,

gives the following

## Judgment

1 By its application the Commission of the European Communities seeks from the Court a declaration that, by failing to bring into force within the prescribed periods the laws, regulations and administrative provisions necessary to comply with the requirements of 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) and of Article 6(1) 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), in conjunction with Articles 2(2), 1

(a), (e) and (i), 6(2) to (4), 7, 11, 14 and 15 thereof, or, at the very least, by failing to notify those national provisions to it and by maintaining in force Article 13(4) of the Nature Conservancy Law (Natuurbeschermingswet), which is incompatible with Article 6(4) of Directive 92/43, the Kingdom of the Netherlands has failed to fulfil its obligations under those directives.

2 As a result of information communicated by the Netherlands Government in its defence the Commission has however found that Article 14 of Directive 92/43 had been properly transposed into domestic law, so that it withdrew, in its reply, the complaint relating to the incorrect transposition of that article.

## Legal background

### *Community legislation*

3 Directive 79/409 relates, as provided in Article 1(1) thereof, to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States. It covers the protection, management and control of these species and lays down rules for their exploitation.

4 In accordance with Article 4(1) and (2) of Directive 79/409, the species mentioned in Annex I thereto are to be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution, taking account of the particular situation of a certain number of species. As regards the conservation of those species, Member States are to classify

in particular the most suitable territories in number and size as special protection areas. Member States are also obliged to take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection as regards their breeding, moulting and wintering areas and the staging posts along their migration routes. To this end, Member States are to pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

5 Under Article 2(1) thereof, the aim of Directive 92/43 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 EC Treaty applies. According to Article 2(2), measures taken pursuant to the Directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

6 Article 6(2) to (4) of Directive 92/43 provides:

'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.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

7 Article 11 of Directive 92/43 is worded as follows:

'Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.'

8 Article 15 of Directive 92/43 provides:

'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:

...'.

*National legislation*

9 As the Commission stated in its application, the Kingdom of the Netherlands has adopted the following measures in order to transpose Directive 92/43:

— Nature Conservancy Law (Natuurbeschermingswet);

— Decree providing for exceptions to and derogations from the Nature Conservancy Law (Besluit ontheffingen en vrijstellingen Natuurbeschermingswet);

— Action Plan for Nature (Natuurbeleidsplan) including the European Network of protected areas (ecologische hoofdstructuur EHS);

— Structural Plan for Green Spaces (Structuurschema Groene Ruimte);

— Town and Country Planning Law (Wet op de ruimtelijke ordening);

— Decree on protected native animal species (Besluit beschermde inheemse diersoorten);

— Regulation of the Minister for Agriculture, Nature Management and Fisheries (Regeling van de Minister van Landbouw, Natuurbeheer en Visserij) of 12 April 1995;

— list of endangered and vulnerable species within the meaning of Articles 1 and 3 of the Berne Convention on the Conservation of wildlife and natural habitats, drawn up by the Regulation of the Minister for Agriculture, Nature Management and Fisheries (Regeling van de Minister van Landbouw, Natuurbeheer en Visserij) of 27 January 1995;

— Law on endangered exotic animal and plant species (Wet bedreigde uitheemse dier- en plantensoorten);

— Regulation on management contracts and nature development (Regeling beheersovereenkomsten en natuurontwikkeling);

— Regulation to stimulate forest development of farm land (Regeling stimulering bosuitbreiding op landbouwgronden);

— Regulation providing for derogations from the Law on endangered exotic animal and plant species (Regeling ontheffingen Wet bedreigde uitheemse dier- en plantensoorten);

— Regulation designating endangered exotic animal and plant species (Regeling aanwijzing bedreigde uitheemse dier- en plantensoorten);

— Environment Management Law (Wet milieubeheer), and

— Flora and Fauna Law (Flora- en faunawet).

**Pre-litigation procedure**

10 By letter of formal notice of 24 October 2000 the Commission called on the Kingdom of the Netherlands to submit its observations concerning the transposition of Directives 79/409 and 92/43 into its national law. The Kingdom of the Netherlands replied by letter of 8 March 2001.

11 On 26 July 2001 the Commission sent a reasoned opinion to the Kingdom of the Netherlands in which it complained that the latter had incorrectly transposed a certain number of provisions of Directives 79/409 and 92/43, and invited the Kingdom of the Netherlands to comply with the reasoned opinion within two months from the date of its notification.

12 By letter of 11 October 2001, the Kingdom of the Netherlands sent to the Commission a draft law amending the Nature Conservancy Law. On 28 January 2002 a more detailed reply on that matter was sent to the Commission by the Netherlands authorities.

13 Taking the view that the Kingdom of the Netherlands had not fully transposed, within the prescribed periods, Directives 79/409 and 92/43, the Commission decided to bring the present proceedings.

## The action

*Arguments of the parties*

14 The Commission puts forward the following seven complaints against the Kingdom of the Netherlands:

— the national legislation does not fully transpose Article 6(1) of Directive 92/43, in conjunction with Articles 1(a), (e) and (i) and 2(2) thereof;

— the national legislation has only partially transposed the requirements of Article 6(2) of Directive 92/43, in conjunction with Articles 1(a), (e) and (i) and 2(2) thereof;

— neither Articles 12 and 21(3) of the Nature Conservancy Law or the Environment Management Law, nor any other law, regulation or administrative provision in force in the Netherlands are in accordance with the requirements of Article 6(3) of Directive 92/43;

— neither Articles 12 and 21(3) of the Nature Conservancy Law or the Environment Management Law, nor any other law, regulation or administrative provision in force in the Netherlands adequately transpose Article 6(4) of Directive 92/43, in the situations covered by that provision; Article 13(4) of the Nature Conservancy Law is also incompatible with that provision;

— contrary to the requirements of Article 11 of Directive 92/43 a complete system for surveillance of sites has not been set up in the Netherlands;

— the prohibition of indiscriminate means set out in Article 15 of Directive 92/43 is not fully implemented in the provisions of the Decree providing for exceptions to and derogations from the Nature Conservancy Law;

— the measures necessary to fulfil the obligation to protect the habitat of the species of birds referred to in Article 4(1) and (2) of Directive 79/409 have not been adopted in the Netherlands.

15 As regards the third complaint, relating to the failure to transpose Article 6(3) of Directive 92/43 into Netherlands law, the Commission submits that the assessment which must be carried out on the basis of that provision must also cover the elements set out in Article 6(4). For the purposes of such an assessment there should

be an examination not only of whether a plan or project is likely adversely to affect the integrity of the site concerned, but also of whether alternative solutions exist, whether imperative reasons of overriding public interest require the operation to be carried out or whether compensatory measures must be taken. Furthermore, it is necessary to take account of the fact that a particular site may host a priority natural habitat type and/or a priority species.

16 In that connection, the Netherlands Government, while acknowledging that Article 6(3) of Directive 92/43 has not been fully transposed, rejects the Commission's interpretation of the definition of 'appropriate assessment' contained in that provision. It takes the view that, given the characteristics of the assessment process for plans or projects set out in that article, Article 6(4) and the elements in it are applicable only if it is clear from the assessment carried out under Article 6(3) that the plan or project may in fact adversely affect the integrity of the site. The Netherlands Government argues that it is only in such cases that it is necessary to go on to examine the elements mentioned in Article 6(4). If the assessment carried out under Article 6(3) showed that a plan or project does not affect the integrity of the site, there would then be no reason to add to the assessment obligation under that provision a further examination concerning the existence of the elements mentioned in Article 6(4).

17 As to the first, second, fourth and seventh complaints made by the Commission, the Kingdom of the Netherlands acknowledges that the provisions of Directives 79/409 and 92/43 which are the subject of the action have not been fully transposed into Netherlands law. In that connection, it states that on 19 December 2001 a draft law amending the Nature Conservancy Law was submitted to Parliament. That draft law is intended to ensure that those directives are fully transposed, particularly as regards the provisions on the basis of which the first, second, fourth and seventh complaints have been raised.

18 As to the fifth and sixth complaints the Netherlands Government contends that measures are planned in order to eliminate the legal lacunas pointed out by the Commission in its action.

*Findings of the Court*

19 Since the Kingdom of the Netherlands accepts that the first, second, fourth, fifth, sixth and seventh complaints are well founded, the application must be upheld in that regard.

20 As regards the third complaint, although the Kingdom of the Netherlands admits that it has not completely transposed Article 6(3) of Directive 92/43 into its domestic law, nevertheless it contests the Commission's complaint in so far as, according to the Commission, the appropriate assessment referred to in Article 6(3) must also cover the elements referred to in Article 6(4).

21 In that connection, in order to determine the scope of the obligation to carry out an appropriate assessment of a plan or project likely to affect a site which falls within the scope of Article 6(3) of Directive 92/43, it must be stated, as a preliminary point, that the protection scheme established by that article consists of several aspects designed to permit examination of the effects of such a plan or project, and various stages of assessment where the plan or project is likely to have serious repercussions on a protected site.

22 As the Advocate General stated in points 12 and 13 of her Opinion, this 'appropriate assessment' is not a merely formal process of examination, but must allow a detailed analysis which satisfies the conservation objectives of the site in question, as set out in Article 6, particularly as regards the protection of natural habitats and priority species.

23 As the Court stated in paragraphs 33 and 34 of its judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, it is clear from Article 6(3) of Directive 92/43 that in every case of a 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 and projects, the competent authorities are required to carry out an appropriate assessment in that respect. That assessment must relate to the implications of the plan or project for the site in view of the site's conservation objectives.

24 In accordance with Article 6(3), it is only in the second stage, that is on completion of the appropriate assessment and in the light of the conclusions on the implications for the site in question of the plan or project, that the competent authorities adopt a decision on it.

25 It should be added that, in accordance with that provision, the competent authorities, when taking their decision, agree to the plan or project only after having ascertained that the planned operation does not adversely affect the integrity of the site concerned. Furthermore, those authorities must, if appropriate, obtain the opinion of the general public on that subject.

26 Within the procedural context thus outlined, it is only where the assessment required under Article 6(3) of Directive 92/43 is negative and in the absence of alternative solutions that, where the plan or project must nevertheless be carried out for imperative reasons of overriding public interest, the examination laid down in Article 6(4) must be undertaken. It is stated in Article 6(3) that the decision is to be adopted by the competent authorities 'subject to the provisions of paragraph 4'.

27 As to the examination which must be carried out within the framework of Article 6 (4), it should be noted that the complex factors to which it relates, such as the absence of alternative solutions and the existence of imperative reasons of overriding public interest, are intended to enable a Member State to take all compensatory measures to ensure that the overall coherence of Natura 2000 is preserved. Furthermore, where the site concerned hosts a priority natural habitat type and/or a priority species, only a limited number of such imperative reasons may be relied on in order to justify a plan or project nevertheless being carried out.

28 In those circumstances, having regard to the particular characteristics of each of the stages referred to in Article 6 of Directive 92/43, it must be held that the various requirements set out in Article 6(4) cannot constitute elements that the competent national authorities are obliged to take account of where they carry out an appropriate assessment provided for in Article 6(3).

29 Therefore, the complaint alleging that the Netherlands national legislation does not provide that the assessment referred to in Article 6(3) of Directive 92/43 must also be carried out with regard to the elements mentioned in Article 6(4) must be dismissed.

30 In the light of the foregoing, it must be held that, by failing to bring into force within the prescribed periods all the laws, regulations and administrative provisions necessary to comply with the requirements of Article 4(1) and (2) of Directive 79/409 and of Article 6(1) of Directive 92/43, in conjunction with Articles 2(2), 1(a), (e) and (i), 6(2) to (4), 7, 11 and 15 thereof and by maintaining in force Article 13(4) of the Nature Conservancy Law, which is incompatible with Article 6(4) of Directive 92/43, the Kingdom of the Netherlands has failed to fulfil its obligations under those directives.

## Costs

31 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 has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds the Court (Second Chamber) hereby:

1. **Declares that, by failing to bring into force within the prescribed periods all the laws, regulations and administrative provisions necessary to comply with the requirements of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and of Article 6(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in conjunction with Articles 2 (2), 1(a), (e) and (i), 6(2) to (4), 7, 11 and 15 thereof and by maintaining in force Article 13(4) of the Nature Conservancy Law (Natuurbeschermingswet), which is incompatible with Article 6(4) of Directive 92/43, the Kingdom of the Netherlands has failed to fulfil its obligations under those directives;**

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

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

[Signatures]