JUDGMENT OF THE COURT (Sixth Chamber)

13 June 2002 *

In Case C-117/00,

Commission of the European Communities, represented by R. Wainwright, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D.J. O'Hagan, acting as Agent, and C. Mac Eochaidh, BL, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to take all the measures necessary to comply with Article 3 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), in respect of the

* Language of the case: English.

Red Grouse, and with the first sentence of Article 4(4) of that directive and Article 6(2) 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 respect of the Owenduff-Nephin Beg Complex special protection area, Ireland has failed to comply with those directives and has failed to fulfil its obligations under the EC Treaty,

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann (Rapporteur) and V. Skouris, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 27 March 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to take all the measures necessary to comply with Article 3 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, hereinafter 'the Birds Directive'), in respect of the Red Grouse, and with the first sentence of Article 4(4) of that directive and Article 6(2) 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, hereinafter 'the Habitats Directive'), in respect of the Owenduff-Nephin Beg Complex special protection area ('SPA'), Ireland has failed to comply with those directives and has failed to fulfil its obligations under the EC Treaty.

Community law

2 According to Article 1(1) thereof, the Birds Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies.

3 Under Article 2 of the Birds Directive, 'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a

level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.'

4 Article 3 of the Birds Directive provides:

'1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

(a) creation of protected areas;

(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;

(c) re-establishment of destroyed biotopes;

(d) creation of biotopes.'

5 Article 4 of the Birds Directive provides:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

...

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

...

4. 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.'

6 Article 6(2) of the Habitats Directive reads as follows:

'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 Under Article 7 of the Habitats Directive, obligations arising under Article 6(2), (3) and (4) of that directive are to replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive 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 the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive, where the latter date is later.

8 Member States were required under Article 23(1) of the Habitats Directive to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification. Since the directive was notified in June 1992, that period expired in June 1994.

The pre-litigation procedure

9 On 9 October 1997, the Commission sent the Irish Government a letter of formal notice for failure to comply with Article 3 and the first sentence of Article 4(4) of the Birds Directive and under Article 6(2) of the Habitats Directive. In its letter the Commission emphasised the adverse effects of overgrazing on Ireland's largest SPA, the Owenduff-Nephin Beg Complex, and on the habitats of the Red Grouse, a resident wild bird covered by Article 3 of the Birds Directive. The Irish authorities failed to answer that letter.

10 On 8 April 1998, the Commission addressed to Ireland a reasoned opinion in which it stated that, by neglecting to take all the measures necessary to comply with Article 3 of the Birds Directive, in respect of the Red Grouse, and with the first sentence of Article 4(4) of that directive and Article 6(2) of the Habitats Directive, in respect of the Owenduff-Nephin Beg Complex SPA, Ireland had failed to comply with those directives and had failed to fulfil its obligations under the Treaty. It called upon Ireland to comply with the reasoned opinion within a period of two months from its notification.

11 The Irish authorities replied to the reasoned opinion by letter of 1 September 1998, providing information on new measures taken to curb overgrazing both in general and with specific reference to the Owenduff-Nephin Beg Complex area.

12 Taking the view that that information did not enable it to reach the conclusion that Ireland had made good its failure to fulfil the obligations in question, the Commission resolved to bring before the Court the present action.

Substance

The plea of infringement of Article 3 of the Birds Directive

13 The Commission states that the habitat of the Red Grouse is hill land and bog and that its diet consists principally in common heather, on which it also relies for building its nests and for protection from predators. The range of the Red Grouse is, therefore, limited in Ireland to areas of bog and moorland where heather is plentiful. However, heather is a species of plant that is particularly vulnerable to overgrazing and in Ireland it is under serious threat from overgrazing. The Commission cites in this connection various studies which show that there has recently been a very marked decline in that Member State in Red Grouse populations and a significant reduction in the areas where the species is found, including its mating grounds. As far as declining populations are concerned, the Commission refers to a 1993 report of the Irish Wildbird Conservancy. As regards the contraction of its range, the Commission refers to two atlases of breeding birds in Great Britain and Ireland. Furthermore, the species' breeding range still lies to a significant extent within areas designated by the Irish authorities as degraded. According to the Commission, Ireland has thus failed to fulfil its duty to safeguard a sufficient diversity and area of habitats for the Red Grouse.

14 The Irish Government maintains that the Commission has failed to establish that the facts of which it complains had the effect, whether jointly or separately, of reducing the habitat of the Red Grouse to such a degree that it is no longer sufficient for its conservation. The Irish Government states that the Red Grouse, as a subspecies of the Willow Grouse, belongs to a species that is widespread and not under threat. As regards the two atlases to which the Commission refers and which relate to the periods 1968 to 1972 and 1988 to 1991 respectively, the difference in methods used to prepare those atlases renders any comparison of the figures and any conclusions drawn therefrom unreliable for the purpose of

establishing a decline in the numbers of Red Grouse or a contraction of its range. The Irish Government also disputes that areas of heathland necessary to the Red Grouse are under serious threat from overgrazing, although it acknowledges that overgrazing has had a negative effect on the numbers of Red Grouse and on the extent of the species' habitat.

15 Article 3 of the Birds Directive requires Member States to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds covered by the directive. The case-law of the Court of Justice shows that the obligations on Member States arising under Article 3 therefore exist before any reduction is observed in the number of birds or any risk of a protected species becoming extinct has materialised (see Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 15).

16 The report prepared in 1993 by the Irish Wildbird Conservancy, a non-governmental organisation dedicated to the protection of birds in Ireland, identified the Red Grouse as one of the country's 12 most endangered breeding birds and indicated that the numbers of Red Grouse had diminished by more than 50% over the last 20 years.

17 Moreover, comparison of the two scientific works, *The Atlas of Breeding Birds in Britain and Ireland: 1968-1972* and *The New Atlas of Breeding Birds in Britain and Ireland: 1988-1991*, produced by D.W. Gibbons, J.B. Reid and R.A. Chapman, reveals a significant contraction in the range in which the species is present and in which the species breeds. It is important to emphasise in this connection that, whilst, in the second atlas, the authors discuss and acknowledge

the need for caution in comparing data, they note that 'despite these difficulties, the change maps do reflect the real underlying distributional changes [of the species]'.

18 It is not in dispute that the breeding range of the Red Grouse, which is given a full entry in Annex II/1 to the Birds Directive, coincides, to a large extent, with the areas designated by the Irish Heritage Council as having been degraded by overgrazing.

19 It should also be borne in mind that, in its letter of 1 September 1998, Ireland acknowledged that, in general terms, it was reasonable to conclude that Red Grouse populations had been affected by the consequences of overgrazing on their habitats. In the same letter, Ireland stated that the Red Grouse is dependent on common heather, which is the predominant plant species on many Irish heaths, raised bogs and uplands, and that it would be designating a very large area of those types of habitat, probably in excess of 250 000 hectares, as special areas of conservation within the meaning of the Habitats Directive, and that this would provide mechanisms to control the overgrazing.

20 Moreover, according to the Action Plan for Ireland's 12 most threatened breeding bird species prepared in 1995 by the Irish Wildbird Conservancy, it is essential that pasturelands be properly managed as part of the priority actions which consist, initially, in halting the decline in Red Grouse populations and in their areas of distribution and, subsequently, in repopulating the areas of distribution abandoned since the time of the first atlas, mentioned in paragraph 17 of the present judgment.

21 In light of the foregoing, it must be held that Ireland has not taken all the measures necessary to safeguard a sufficient diversity and area of habitats for the Red Grouse for the purposes of Article 3 of the Birds Directive. Consequently, the Commission's action must, on this point, be upheld.

The plea alleging infringement of the first sentence of Article 4(4) of the Birds Directive and Article 6(2) of the Habitats Directive

22 The Commission maintains that Ireland has failed to take the necessary measures to prevent the blanket bog of the Owenduff-Nephin Beg Complex SPA from being damaged by overgrazing. In particular, the Rural Environmental Protection Scheme ('REPS') adopted by the Irish authorities has been, and still is, inadequate to combat the problem of overgrazing both generally and within the Owenduff-Nephin Beg Complex. The Commission nevertheless recognises the potential of the REPS, following its revision in 1998, effectively to deal with overgrazing of commonages, provided that commonage framework plans are established, implemented and monitored. The Commission argues that the general reduction of 30% in the mountain sheep quota decided upon during the winter of 1998/1999 is inadequate, if consideration is given to all of the areas affected by overgrazing.

23 Whilst it acknowledges that there has been an increasing problem of overgrazing in the Owenduff-Nephin Beg Complex, the Irish Government contends that the Commission has produced insufficient evidence to establish that Ireland has failed to fulfil its obligations under Article 6(2) of the Habitats Directive and the first sentence of Article 4(4) of the Birds Directive. It points out first of all that, since 1996, farmers participating in the REPS have had to comply with grazing strategies for commonages. Next, it refers to the conditions for the conservation of blanket bogs, heaths and upland grasslands designated as National Heritage Areas under the REPS as in force from 1 January 1999. Furthermore, Ireland

purchased 10 000 of the 25 255 hectares of land in the Owenduff-Nephin Beg Complex SPA and has granted licences for only six cattle and 150 sheep on this land. In 2000 Ireland adopted a framework plan for the other commonages in the SPA. The remaining 5 000 hectares in the Complex are not in commonage and are unaffected by the problem of overgrazing. In addition, the Irish Government states that the Commission approved, by decision of 6 August 1998 taken pursuant to Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 L 215, p. 85), amendments to the REPS notified to the Commission in or after June 1997. Lastly, the Irish Government points out that implementation of the Conservation Management Plan for the Owenduff-Nephin Beg Complex has been delayed by the need to engage in detailed public consultations with the persons affected.

24 First of all, it should be recalled that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion (see, *inter alia*, Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 18, and Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraph 14). Thus, in the present case, measures adopted by Ireland after 8 June 1998 cannot be taken into account.

25 Secondly, it is important to note that it is undisputed that the Owenduff-Nephin Beg Complex has been classified as an SPA since October 1996. In so far as concerns land classified as an SPA, Article 7 of the Habitats Directive provides that the obligations arising under the first sentence of Article 4(4) of the Birds Directive are replaced, *inter alia*, by the obligations arising under Article 6(2) of the Habitats Directive as from the date of implementation of the Habitats

Directive or the date of classification under the Birds Directive, where the latter date is later. It follows that, in the present case, Article 6(2) of the Habitats Directive, rather than the first sentence of Article 4(4) of the Birds Directive, has applied to the Owenduff-Nephin Beg Complex SPA since October 1996. That being so, the Commission's plea must be dismissed in so far as it is based on infringement of the first sentence of Article 4(4) of the Birds Directive and the Court must confine itself to considering whether there has been an infringement of Article 6(2) of the Habitats Directive.

26 Article 6(2) of the Habitats Directive, like the first sentence of Article 4(4) of the Birds Directive, requires Member States to take appropriate steps to avoid, *inter alia*, deterioration of habitats in the SPAs classified pursuant to Article 4(1) (see Case C-96/98 *Commission* v *France* [1999] ECR I-8531, paragraph 35).

27 Whilst the Commission pursues no claim of infringement against Ireland in relation to the 10 000 hectares in State ownership and upon which grazing will now be very light, it is clear from the documents before the Court that other parts of the Owenduff-Nephin Beg Complex SPA have been seriously damaged.

28 The Conservation Plan for this SPA, completed on 22 August 2000 by Dúchas, the heritage service of the Department of Arts, Heritage, Gaeltacht and the Islands, states that '[s]ome blanket bog and heath areas within the site are heavily eroded caused by the excessive numbers of sheep. In places there is mobile peat with associated haggs and gullies that have eroded to the underlying bedrock. On the higher ground, the heath is severely degraded due to the grazing pressure on ericaceous (heath) species. In the recent past large tracts of the peatland system adjacent to the site have been planted with conifers, resulting in the destruction of vast tracts of both lowland and upland blanket bog.'

29 In their correspondence with the Commission preceding the issue of the Commission's reasoned opinion the Irish authorities had already recognised that the Owenduff-Nephin Beg Complex was heavily stocked with sheep which were penetrating into the uninhabited valleys and mountain slopes. They had also acknowledged that damage caused by overgrazing was particularly severe on the slopes west of Lough Feeagh and that this had contributed to the recent decline in the numbers of Greenland White-fronted Geese which feed there.

30 According to the Conservation Plan mentioned in paragraph 28 of the present judgment, it will be necessary to keep grazing at a sustainable level in order to achieve objectives such as the maintenance and, where possible, the enhancement of the ecological value of both the priority habitat of the Owenduff-Nephin Beg Complex, that is to say blanket bog, and other habitats characteristic of the site and the maintenance and, where possible, increase of populations of birds mentioned in Annex I to the Birds Directive which frequent the site, including in particular the Greenland White-fronted Goose and the Golden Plover, species which provided justification for the classification of the site as an SPA. Overgrazing by sheep is in fact causing severe damage in places and is the greatest single threat to the site.

31 Furthermore, the Irish Government itself recognises in its rejoinder that it is necessary for the Irish authorities not only to take measures to stabilise the problem of overgrazing, but also to ensure that damaged habitats are allowed to recover. The Irish Government indicates that implementation of the Conservation Management Plan for the Owenduff-Nephin Beg Complex SPA, of the framework plans for the commonages situated in the SPA and of individual farm management plans will achieve this end.

32 It follows from the foregoing that Ireland has not adopted the measures needed to prevent deterioration, in the Owenduff-Nephin Beg Complex SPA, of the habitats of the species for which the SPA was designated.

33 Consequently, Ireland has failed to fulfil its obligations under Article 6(2) of the Habitats Directive and it follows that the Commission's action must be upheld on this point also, subject to the limitation mentioned in paragraph 25 of the present judgment.

34 It must, therefore, be held that, by failing to take the measures necessary to safeguard a sufficient diversity and area of habitats for the Red Grouse and by failing to take appropriate steps to avoid, in the Owenduff-Nephin Beg Complex SPA, the deterioration of the habitats of the species for which the SPA was designated, Ireland has failed to fulfil its obligations under Article 3 of the Birds Directive and Article 6(2) of the Habitats Directive.

Costs

35 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 Ireland has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by failing to take the measures necessary to safeguard a sufficient diversity and area of habitats for the Red Grouse and by failing to take appropriate steps to avoid, in the Owenduff-Nephin Beg Complex special protection area, the deterioration of the habitats of the species for which the special protection area was designated, Ireland has failed to fulfil its obligations under Article 3 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;

2. Orders Ireland to pay the costs.

Macken Gulmann Skouris

Delivered in open court in Luxembourg on 13 June 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber