JUDGMENT OF THE COURT (Second Chamber)

14 October 2010 *

In Case C-535/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 30 November 2007,

European Commission, represented by R. Sauer and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by E. Riedl, E. Pürgy and K. Drechsel, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by:

Federal Republic of Germany, represented by M. Lumma and J. Möller, acting as Agents,

intervener,

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting for the President of the Second Chamber, L. Bay Larsen (Rapporteur) and C. Toader, Judges,

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 July 2009,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that:

— by failing to designate (in the case of the Hanság site in the Province of Burgenland) and delimit (in the case of the Niedere Tauern site in the Province of Styria) correctly in accordance with ornithological criteria the most suitable territories in Austria, in number and size, as special protection areas ('SPAs') for the conservation of bird species, under Article 4(1) or (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1; 'the Birds Directive'), and

— by failing to provide legal protection in accordance with the requirements of Article 4(1) or (2) of the Birds Directive and Article 6(2), read in conjunction with Article 7, 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; 'the Habitats Directive') for some of the special protection areas already classified,

the Republic of Austria has failed to fulfil its obligations under those provisions of the directives.

2 By order of the President of the Court of 26 May 2008, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the Republic of Austria.

Legal context

Birds Directive

3 Article 2 of the Birds Directive provides that '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(1) of the Birds Directive provides that, in the light of the requirements referred to in Article 2, Member States are to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all species of birds naturally occurring in the wild in the European territory of the Member States to which the EC Treaty applies. Under Article 3(2)(a), the measures to preserve, maintain and re-establish biotopes and habitats are to include, in particular, the creation of protected areas.

5 Article 4(1) and (2) and the first sentence of Article 4(4) of the Birds Directive state:

'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.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as [SPAs] 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.'

Habitats Directive

6 Article 3(1) of the Habitats Directive provides for the setting up of a coherent European ecological network of special areas of conservation under the title Natura 2000, which also includes the SPAs classified by the Member States pursuant to the Birds Directive.

7 Article 6(2) of the Habitats Directive is worded 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.'

8 Article 7 of the Habitats Directive provides that '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 [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 this Directive or the date of classification or recognition by a Member State under [the Birds Directive], where the latter date is later'.

Pre-litigation procedure

9 On 23 October 2001 the Commission sent a letter of formal notice to the Republic of Austria in which it stated that the latter had not classified the most suitable territories in number and size as SPAs, in particular as regards the designation of the Hanság site and the delimitation of the Niedere Tauern site. The Commission also asserted that the Republic of Austria had not yet fully met the requirements of the Birds Directive designed to ensure legal protection of SPAs in Austria.

10 The Republic of Austria responded to the letter of formal notice by sending to the Commission inter alia a list of the various bird conservation areas with their legal protection regime. In so doing, it drew attention to the fact that certain SPAs were designated in whole or in part as a national park, a nature reserve, a landscape protection area, natural heritage or a tranquillity area and, at the same time, to the existence of laws or regulations enacted in the various provinces in relation to nature conservation.

11 Subsequently, on 18 October 2004, the Commission sent the Republic of Austria a supplementary letter of formal notice, replacing the first letter of formal notice, which stated that the classification and delimitation of the SPAs remained incorrect and that specific legal protection measures for them were missing. The Commission observed in particular that the Hanság site still had not been classified as an SPA and that the Niedere Tauern site had not yet been extended. It also stated that the Austrian bird conservation areas were either protected essentially by relatively old regulations or, in certain cases, denied legal protection. In the majority of the instruments for the provision of protection, the objective of conservation of, and specific protection for, the bird species to be conserved and protected was not discernable. The Commission stated in this regard that it was essential for the regulatory framework to provide at least clarification as to the objectives of specific protection of the birds, even where the level of protection proved in principle sufficient by means of prohibitions of interference and conservation obligations.

12 By letter of 21 December 2004, the Republic of Austria submitted its observations in which it in particular set out its views on the question of the legal protection of the sites concerned by giving explanations of a general nature and explanations specific to the various provinces. With regard to the latter, it asserted that the fact that conservation or protection objectives are explicitly set out in the legal measure serving as instrument of protection cannot be decisive.

13 Since the Commission was not satisfied by the observations submitted by the Republic of Austria, on 15 December 2006 it sent a reasoned opinion to that Member State calling upon it to comply with its obligations within a period of two months from receipt of the opinion. It was stated in the reasoned opinion with regard to the Hanság and Niedere Tauern sites that the Republic of Austria had not complied with its obligations. As to the legal status of the protected areas concerned, it was stated that generally, that is to say also where an SPA was superimposed upon a nature reserve which already existed and received stricter national or regional legal protection, the conservation objectives, namely those concerning not only the bird species and the specific requirements relating to the birds' protection but also the re-establishment of their habitats, had to be included, together with the corresponding measures and obligations, as an essential element of the regulations relating to those protected areas. However, a large number of SPAs still lacked any specific regulation designed to ensure the special protection of the birdlife concerned.

14 As the Commission was not convinced by the Republic of Austria's observations in response to the reasoned opinion, it brought the present action.

The action

The first complaint, alleging that Article 4(1) or (2) of the Birds Directive has not been complied with because of the failure to classify the Hanság site as an SPA and the incorrect delimitation of the Niedere Tauern SPA

15 A preliminary point to be recalled is that Article 4(1) of the Birds Directive requires Member States to classify as SPAs the most suitable territories in number and size for

the conservation of the species mentioned in Annex I to the directive and that, under Article 4(2), Member States are also to classify as SPAs the breeding, moulting and wintering areas of regularly occurring migratory species not listed in the annex and the staging posts along their migration routes (Case C-240/00 *Commission* v *Finland* [2003] ECR I-2187, paragraph 16).

Failure to classify the Hanság site as an SPA

— Arguments of the parties

16 The Commission submits, first of all, that the Republic of Austria has not complied with its obligation to classify the Hanság site in accordance with the requirements of the Birds Directive. This site was identified as the most suitable territory for the protection of certain bird species such as, in particular, the great bustard (*Otis tarda*), the Montagu's harrier (*Circus pygargus*) and the short-eared owl (*Asio flammeus*).

17 The Republic of Austria states in response that the Hanság site can now no longer be considered the site best suited to the conservation of the species cited by the Commission. Territories other than that site have become more important for those species. The Republic of Austria nevertheless acknowledges that extension of the site, the main part of which is already subject to the protection regime provided for in Article 6(2) to (4) of the Habitats Directive by reason of its designation as a Natura 2000 site, is substantively justified. However, given that the Natura 2000 site and the populations of the bird species which it hosts have already been made subject to the protection regime established by those provisions, a delay in this regard presents no

risk. Nor has any deterioration occurred on the Hanság site. Finally, by a regulation of the Government of the Province of Burgenland of 3 June 2008, of which the Commission was notified, this site was declared pursuant to the Birds Directive to be the 'Waasen-Hanság European Area of Conservation'.

18 Consequently, the Republic of Austria considers that, in any event, the Birds Directive is no longer being infringed and that withdrawal of the action in this regard would therefore be justified.

— Findings of the Court

19 During the pre-litigation procedure the Republic of Austria accepted that it was necessary to classify the Hanság site as an SPA and it informed the Commission of its intention to actually designate the site.

20 In addition, it is not in dispute that, after the period laid down in the reasoned opinion expired, the Hanság site was classified, pursuant to the Birds Directive, as a 'European area of conservation' by a regulation of the Government of the Province of Burgenland.

21 It therefore appears undeniable that the Hanság site is among the most suitable sites with regard to conservation of the species in question, which fall within Annex I to the Birds Directive and are referred to in Article 4(1) thereof, and that the site consequently had to be classified as an SPA under that directive.

22 The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, inter alia, Case C-183/05 *Commission* v *Ireland* [2007] ECR I-137, paragraph 17). Therefore, as the classification referred to in paragraph 20 of the present judgment occurred after that period expired, the complaint that the Hanság site was not classified as an SPA, in breach of Article 4(1) of the Birds Directive, is well founded.

23 The finding made in the preceding paragraph cannot be affected by the fact that the Republic of Austria now contends before the Court, failing moreover to substantiate its assertions in this regard, that, when compared with another site, the Hanság site is no longer to be considered the most suitable for the conservation of the great bustard, the Montagu's harrier and the short-eared owl.

24 Nor can that finding be called into question by the fact, even if it is established, that, first, a good part of the Hanság site was already protected under the Habitats Directive in the Natura 2000 network and, secondly, the site has not suffered any deterioration. First, since the legal regimes of the Birds and Habitats Directives are separate, a Member State cannot exonerate itself from its obligations under Article 4(1) and (2) of the Birds Directive by relying on measures other than those prescribed by that directive (Case C-235/04 *Commission* v *Spain* [2007] ECR I-5415, paragraph 79). Second, the fact that the site concerned has not suffered any deterioration is not

capable of affecting the obligation imposed on Member States to classify sites as SPAs (see, to similar effect, Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 38).

Incorrect delimitation of the Niedere Tauern SPA

— Arguments of the parties

25 Noting that the Niedere Tauern SPA, which had an area of 137 742 hectares in 1999, was reduced to roughly 87 000 hectares in May 2001, the Commission submits that this area as delimited is insufficient in light of the requirements prescribed by Article 4(1) or (2) of the Birds Directive for the protection of the bird species which are referred to there. The birds concerned in this instance are, in particular, species such as the Eurasian dotterel (*Charadrius morinellus*), the capercaillie (*Tetrao urogallus*), the boreal owl (*Aegolius funereus*), the Eurasian pygmy owl (*Glaucidium passerinum*), the black woodpecker (*Dryocopus martius*), the Eurasian three-toed woodpecker (*Picoides tridactylus*), the grey-headed woodpecker (*Picus canus*) and the hazel grouse (*Bonasa bonasia*).

26 According to the Commission, the Republic of Austria has still not proved scientifically that the original delimitation of the Niedere Tauern site must be considered technically incorrect.

27 The Republic of Austria states that, in order to protect the Eurasian dotterel, the Province of Styria extended the Niedere Tauern SPA in 2008. Moreover, this extension,

which is founded on scientific studies, enables the conditions set out in Article 4(1) of the Birds Directive to be met, since the most suitable territories in number and size for the conservation of the protected species concerned have been classified as SPAs.

— Findings of the Court

28 The Niedere Tauern SPA, the area of which was first reduced from 137 742 hectares to roughly 87 000 hectares, was then extended to 101 880 hectares in 2008, that is to say after the expiry of the period laid down in the reasoned opinion, by reference to which, as recalled in paragraph 22 of the present judgment, the failure to fulfil obligations pleaded by the Commission must be assessed.

29 On the Republic of Austria's own admission, the reason for that extension was the requirement to provide adequate protection for the Eurasian dotterel, a species listed in Annex I to the Birds Directive.

30 It is therefore appropriate, in any event, simply to find that, when the period laid down in the reasoned opinion expired, the area of the SPA in question was insufficient in light of the requirements for protection that are referred to in Article 4(1) of the Birds Directive.

31 Consequently, the first complaint must be upheld in so far as it alleges infringement of Article 4(1) of the Birds Directive.

The second complaint, alleging that Article 4(1) or (2) of the Birds Directive and Article 6(2), read in conjunction with Article 7, of the Habitats Directive have not been complied with because of the inadequate legal protection provided for some of the SPAs already classified

Admissibility

— Arguments of the parties

32 The Republic of Austria submits that the Commission, first, has widened the subject-matter of the action and, second, has not adduced sufficient arguments to establish specific breaches of obligations committed in relation to particular protected sites.

33 So far as concerns the first point, the Republic of Austria submits that, whilst the reasoned opinion did not cover 'European area of conservation regulations' in respect of areas already designated, the application refers also to alleged infringements of the directives at issue that result from those regulations. Furthermore, the complaints set out in the reasoned opinion can be summarised as concerning non-compliance with the obligations to set out conservation objectives for each SPA, to safeguard the protection objectives by binding measures and to draw up maps that have binding form and are the subject of adequate publicity. In the application, on the other hand, the substantive requirements concerning the legal status of SPAs were considerably extended to the effect that the Commission requires the regulations relating to the SPAs to contain obligations and prohibitions specific to sites and to particular species as well as concrete measures to ensure compliance with the relevant provisions of the Birds and Habitats Directives.

34 By way of example, the Republic of Austria states inter alia that the complaint alleging that the rules relating to European areas of conservation that were adopted by the Provinces of Styria and Lower Austria do not fulfil the requirements of European Union law does not correspond to what is set out by the Commission in its reasoned opinion. Furthermore, in the case of the Province of Salzburg, the Commission did not state in the supplementary letter of formal notice that the legal status of this province's SPAs was inadequate and it has mentioned only – moreover for the first time in the reasoned opinion – the Salzachauen site as an SPA lacking an adequate protective legal status.

35 As regards the second point, the Republic of Austria submits that neither the reasoned opinion nor the application enable it to be ascertained what failures to fulfil obligations are relied upon by the Commission and which SPAs are concerned. Consequently, it is not in a position to defend itself effectively. Furthermore, given that the content and the scope of the measures necessary to comply with the obligations imposed by the Birds and Habitats Directives are not determined, the Republic of Austria will, for an unlimited period, run the risk of proceedings for a declaration that it has failed to fulfil the obligations resulting from the judgment to be delivered establishing the infringement that is the subject-matter of the present action.

36 Thus, as regards first of all the Province of Burgenland, the Commission does not specify the sites which lack an adequate protective status. Next, the Commission merely characterises the legal position of the sites in the Province of Upper Austria as inadequate. Finally, in the case of the Province of Tyrol, the Commission relies on the example of the Tiroler Lechtal site in order to categorise all the provisions which have been adopted to protect Tyrol's Natura 2000 sites as general provisions not ensuring an adequate protective status.

37 On the first point, the Commission states in response that the application and the reasoned opinion are essentially identical so far as concerns the complaint alleging that the protective status conferred upon some of the SPAs already classified is

inadequate. Accordingly, the existing regulations relating to European areas of conservation were not excluded from the dispute. Furthermore, the obligations and prohibitions concerning the SPAs are, in any event, binding on the Republic of Austria. Consequently, the argument that what is set out in the reasoned opinion does not specifically cover the complaint relating to the inadequate level of protection in the Provinces of Styria and Lower Austria can only be rejected. Finally, while it is true that the legal position in the Province of Salzburg is not mentioned in the supplementary letter of formal notice, the Republic of Austria is not justified in concluding that the complaint set out by way of example in respect of the protective status of the SPAs in Burgenland did not also apply to the rules of the Province of Salzburg and, in particular, to the Salzachauen site.

38 As regards the second point, the Commission maintains that the reasoned opinion was to be understood more broadly, to the effect that the level of protection to be attained was defined qualitatively by specified requirements enabling the Republic of Austria to discern clearly which SPAs required further implementing measures and what form those measures were to take. This is explained more specifically in the application for each province and SPA concerned, without the subject-matter of the dispute being thereby modified. The Republic of Austria was in a position to defend itself on this point easily and, moreover, it made wide use of this opportunity.

39 Finally, the Commission submits that the application leaves no doubt that, when the period laid down in the reasoned opinion expired, none of the SPAs in the Provinces of Burgenland and Upper Austria had an adequate protective status, and no specific protection or conservation objectives had been set for those areas. The Tiroler Lechtal site likewise lacked specific protection and conservation objectives, centred around the position of each bird species. Furthermore, the protective status is inadequate in the 11 Natura 2000 areas designated by the authorities of the Province of Tyrol.

— Findings of the Court

40 The subject-matter of an action for failure to fulfil obligations is determined by the Commission's reasoned opinion, so that the action must be based on the same grounds and pleas as the reasoned opinion (see Case C-236/05 *Commission* v *United Kingdom* [2006] ECR I-10819, paragraph 10 and the case-law cited).

41 Also, in accordance with settled case-law, the letter of formal notice sent by the Commission to the Member State and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure. If that is not the case, that irregularity cannot be regarded as having been cured by the fact that the defendant Member State submitted observations on the reasoned opinion (see Case C-186/06 *Commission* v *Spain* [2007] ECR I-12093, paragraph 15 and the case-law cited).

42 Furthermore, the reasoned opinion and the action must set out the complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the scope of the infringement of European Union law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged (see Case C-186/06 *Commission* v *Spain*, paragraph 18).

Widening of the subject-matter of the action

43 First, although the reasoned opinion states that a large number of SPAs still remain without any specific regulation, which in Austria generally takes the form of a 'European area of conservation regulation', to protect the bird life concerned, that opinion is couched in terms which do not preclude it from covering SPAs for which a 'European area of conservation regulation' exists. In this regard, it may be noted in particular that, following the reasoned opinion, the Republic of Austria informed the Commission of the fact that the Flachwasserbiotop Neudenstein bird conservation area had, in 2005, been declared a European area of conservation by a regulation of the Government of the Province of Carinthia of 23 May 2005 (LGBl. No 47/2005).

44 Second, in so far as it is submitted in the Commission's application that the regulations relating to the SPAs must contain obligations and prohibitions specific to sites and to particular species as well as concrete measures to ensure compliance with the relevant provisions of the Birds and Habitats Directives, the application essentially takes up the terms of the reasoned opinion. It is stated in the reasoned opinion that 'generally, … the conservation objectives, that is to say, the bird species and the specific requirements relating to their protection and to the re-establishment of their habitats, must be included, together with the corresponding measures and obligations, as an essential element of the regulations relating to those protected areas'.

45 Third, the complaint to the effect that the regulations relating to European areas of conservation that were adopted by the Provinces of Styria and Lower Austria do not fulfil the requirements of European Union law is not set out in the reasoned opinion and must therefore be declared inadmissible.

46 As regards the complaint concerning the inadequate protective legal status of the SPAs of the Province of Salzburg, in particular the Salzachauen site, it is not disputed that the supplementary letter of formal notice did not refer at all to the situation in that province or, in particular, to the situation in respect of that site. Consequently, the action is also inadmissible in so far as it relates to the protective legal status of the SPAs of the Province of Salzburg.

47 It follows from the foregoing that the action is inadmissible in so far as it concerns the legal protection regime for the SPAs of the Provinces of Salzburg, Styria and Lower Austria.

Lack of precision and coherence

48 It is not in dispute that the Commission complains that the Republic of Austria has failed to confer upon some of the SPAs already classified legal protection consistent with the requirements of European Union law. In support of this complaint, it sets out what are, in its submission, the shortcomings of the system in force in Austria for the legal protection of SPAs. In this connection, the Commission defines its general complaint more precisely by referring to the situation obtaining in the various provinces of the Republic of Austria.

49 It does not therefore appear that this complaint structured in that way is imprecise or incoherent.

50 Furthermore, while the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty, the Commission is not, however, obliged to set out in that opinion the steps to be taken to

remedy the infringement complained of (see Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 21 and the case-law cited). Nor, likewise, is the Commission obliged to set out such steps in its application.

51 The alleged insufficiency of evidence and arguments demonstrating that the protection regime for the SPAs in the Provinces of Burgenland, Upper Austria and Tyrol is inadequate will have to be examined as to the substance.

52 Consequently, it must be held that the action for failure to fulfil obligations is admissible subject to what is stated in paragraph 47 of the present judgment.

Substance

— Arguments of the parties

53 The Commission contends that some of the SPAs already classified in Austria do not receive legal protection in accordance with the requirements referred to in Article 4(1) or (2) of the Birds Directive and Article 6(2), read in conjunction with Article 7, of the Habitats Directive. In that regard, it argues that the obligations or prohibitions which result from those provisions, and which must not only be specific to particular SPAs and species but also have binding form and be the subject of adequate publicity, must be contained in the same binding legal measure as that which lays down, for each SPA, the protected species and habitats and the conservation objectives. Thus,

generally, the protective legal status of the SPAs is inadequate in the instances where the classification of an SPA is linked to an existing nature reserve or classified site of another type that is protected by national or regional measures.

54 The Republic of Austria states in response first of all that the Commission's proposition that obligations and prohibitions concerning the various bird species must have binding form and be the subject of adequate publicity is overstated when expressed in this general manner. Nor does any rule require those obligations and prohibitions to be contained in the same binding legal measure as that which lays down, for each SPA, the protected species and habitats and the conservation objectives. Furthermore, the argument that the conservation objectives for the purposes of Article 4(1) and (2) of the Birds Directive must be laid down in such a legal measure is unfounded. Finally, the defendant Member State observes that, in view of the fact that the protection of nature reserves extends generally to all animal and plant species and to their habitat and the landscape, the prohibitions on any impairment are broader than in the case of 'European areas of conservation', which are generally intended to protect specific habitats and species.

55 In its statement in intervention, the Federal Republic of Germany submits that the Birds and Habitats Directives do not require the protection and conservation measures to consist of obligations or prohibitions that are specific, that is to say, that relate to particular areas and subjects of protection. Even supposing that the Member States have to adopt such obligations and prohibitions, those directives do not in any way contain requirements for a particular degree of specificity. Nor do the directives give rise to an obligation on the Member States to set 'conservation objectives' of a binding nature and all the less to define them in the very legal measure that lays down what is to be protected and the specific obligations and prohibitions to be complied with.

— Findings of the Court

56 According to the case-law of the Court, Article 4(1) and (2) of the Birds Directive requires the Member States to provide SPAs with a legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the directive and the breeding, moulting and wintering of migratory species not listed in that annex which are, nevertheless, regular visitors (see Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 21; Case C-418/04 *Commission* v *Ireland*, paragraph 153; and judgment of 11 December 2008 in Case C-293/07 *Commission* v *Greece*, paragraph 22).

57 It is also settled case-law that Article 4 of the Birds Directive lays down a regime which is specifically targeted and reinforced, both for the species listed in Annex I to the directive and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the European Union (Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraph 23; Case C-418/04 *Commission* v *Ireland*, paragraph 46; and Case C-293/07 *Commission* v *Greece*, paragraph 23).

58 By virtue of Article 6(2) of the Habitats Directive, the obligations under which replace those arising under the first sentence of Article 4(4) of the Birds Directive in respect of classified areas, the protective legal status of SPAs must also guarantee the avoidance therein of the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been classified (see Case C-415/01 *Commission* v *Belgium* [2003] ECR I-2081, paragraph 16, and Case C-293/07 *Commission* v *Greece*, paragraph 24).

59 Moreover, the protection of SPAs is not to be limited to measures intended to avoid external anthropogenic impairment and disturbance but must also, according to the situation that presents itself, include positive measures to preserve or improve the state of the site (see, to this effect, Case C-418/04 *Commission* v *Ireland*, paragraph 154).

60 According to the wording of the third paragraph of Article 249 EC, now the third paragraph of Article 288 TFEU, a directive, while being binding, as to the result to be achieved, upon each Member State to which it is addressed, leaves to the national authorities the choice of form and methods. It follows that the Republic of Austria, just like any other Member State, may choose the form and methods for implementing the Birds Directive (see, to this effect, Case C-418/04 *Commission* v *Ireland*, paragraph 157).

61 Whilst it is true that faithful transposition becomes particularly important in the case of the Birds Directive, where management of the common heritage is entrusted to the Member States in their respective territories (see Case C-418/04 *Commission* v *Ireland*, paragraphs 64 and 159), it cannot, in any event, require the Member States to include the obligations and prohibitions flowing from Article 4(1) and (2) of the Birds Directive and Article 6(2) of the Habitats Directive in legal measures laying down for each SPA the protected species and habitats and the conservation objectives.

62 As regards those obligations, which in the Commission's submission must be positive and specific to SPAs and to particular species, it is apparent from paragraph 59 of the present judgment and paragraph 34 of the judgment in Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017 that the adoption of positive measures to preserve and improve the state of an SPA is not systematic in nature, but depends on the specific situation in the SPA concerned.

63 As to the prohibitions which, it is alleged, should be specific to SPAs and to particular species, whilst it is true, for example, that protection of SPAs against the activities of individuals requires that the latter be prevented in advance from engaging in potentially harmful activities (Case C-418/04 *Commission* v *Ireland*, paragraph 208), it does not appear that attainment of that objective necessarily requires prohibitions specific to each area or, as is apparent from paragraph 20 of the judgment in Case C-374/98 *Commission* v *France* [2000] ECR I-10799, to each particular species to be laid down.

64 As regards identification of the protected species and habitats in each SPA, just as the delimitation of an SPA must be invested with unquestionable binding force (see *Commission* v *Belgium*, paragraph 22), the identification of the species which have warranted classification of that SPA must satisfy the same requirement. If that were not the case, the protective objective arising from Article 4(1) and (2) of the Birds Directive and from Article 6(2), read in conjunction with Article 7, of the Habitats Directive might not be fully attained.

65 So far as concerns conservation objectives, it is apparent from paragraphs 20 and 21 of the judgment in Case C-374/98 *Commission* v *France* that the protective legal status which SPAs must obtain does not mean that those objectives have to be specified for each species considered separately. Nor, having regard to what is stated in paragraphs 60 and 61 of the present judgment, can it be held in any event that the conservation objectives must be contained in the same legal measure as that relating to the protected species and habitats of a particular SPA.

66 As to the alleged inadequacy of the protective legal status of SPAs linked to an existing nature reserve or classified site of another type that is protected by national or regional measures, it is to be recalled that, as stated in paragraph 57 of the present judgment, Article 4 of the Birds Directive lays down a regime which is specifically targeted and reinforced, both for the species listed in Annex I to the directive and for

migratory species. That is the particular nature of the protection regime which SPAs must enjoy, in contrast to the general, less strict, protection regime laid down in Article 3 of the Birds Directive for all the species of birds covered by the directive (see, to this effect, *Royal Society for the Protection of Birds*, paragraphs 19 and 24). It does not follow, however, that only a specifically defined legal regime established for each SPA might protect this kind of site effectively.

67 In light of the foregoing, it must be held that in the present case the complaint alleging a general failure by the defendant Member State to fulfil the obligations referred to in Article 4(1) or (2) of the Birds Directive and Article 6(2), read in conjunction with Article 7, of the Habitats Directive has not been shown to be well founded.

68 It is therefore necessary to examine the merits of the action for failure to fulfil obligations in light of the rules in force in the various provinces upon expiry of the period laid down in the reasoned opinion, within the limits specified in paragraph 47 of the present judgment.

Province of Burgenland

— Arguments of the parties

69 The Commission submits that, given that the Natura 2000 areas have not been converted into European areas of conservation and endowed with the legal status relating to the latter, the SPAs of the Province of Burgenland do not have an adequate protective status.

70 The Republic of Austria mentions certain sites for which the regulations classifying them as European areas of conservation are stated by it to be in the course of being drawn up. Only the Auwiesen Zickenbachtal site has been designated, as the 'Auwiesen Zickenbachtal European area of conservation', by a regulation of the Government of the Province of Burgenland of 23 March 2008.

— Findings of the Court

71 It is apparent both from the arguments of the parties and from the letter sent by the Republic of Austria to the Commission on 20 February 2007 in response to the reasoned opinion that, when the period laid down in the reasoned opinion expired, no SPA had been classified in the Province of Burgenland. However, the second complaint, as is indicated in the form of order sought in the application, concerns only SPAs that had already been classified.

72 Consequently, in so far as the second complaint concerns the situation in that province, it is nugatory and must therefore be dismissed.

Province of Vienna

— Arguments of the parties

73 The Commission submits that this province's four SPAs, which were not classified until 17 October 2007, do not enjoy a legal status conferring them sufficient protection.

74 The Republic of Austria counters by stating that those SPAs are protected in a manner consistent with the requirements of Article 4(1) or (2) of the Birds Directive and Articles 6(2) and 7 of the Habitats Directive.

— Findings of the Court

75 It is not disputed that the sites at issue here had not been classified as SPAs when the period laid down in the reasoned opinion expired.

76 In those circumstances, for the same reason as that stated in paragraph 71 of the present judgment, the second complaint is to be dismissed in so far as it concerns the situation in the Province of Vienna.

Province of Carinthia

— Arguments of the parties

77 In the Commission's submission, the legal status of the Flachwasserbiotop Neudenstein European area for the conservation of birds, the only SPA that was classified before the period laid down in the reasoned opinion expired, cannot be regarded as giving that area adequate protection, on the ground that the domestic rules provide neither for specific measures and conservation objectives relating to the birds specifically concerned nor for a cartographic representation of that SPA.

78 The Republic of Austria merely confirms that the SPA exists.

— Findings of the Court

79 Paragraph 2 of the regulation of the Government of the Province of Carinthia of 23 May 2005, relating to that SPA, provides that, since the protection conditions laid down in Paragraph 2 of the regulation of that government of 8 November 1994, published in the province's Official Journal No 92/1994, ensure adequate protection, it is not necessary to lay down, by way of supplement, obligations, prohibitions, authorisation restrictions and conservation measures for the Flachwasserbiotop Neudenstein European area of conservation.

80 In addition, Paragraph 3 of the regulation of 23 May 2005 provides that the latter serves to preserve, develop or re-establish a favourable conservation status of the protected species listed in the annex to the regulation.

81 In this context, having regard to the considerations set out in paragraph 65 of the present judgment and in the absence of any evidence that, in order to attain the conservation objectives for the bird species referred to in Article 4(1) and (2) of the Birds Directive, which include the species listed in the annex to that regulation, provisions more detailed than those adopted by the Government of the Province of Carinthia would be required in this instance, the Commission's complaint must be rejected in this regard.

82 As to the alleged lack of cartographic representation of the SPA, it must be stated that, while such representation is capable of delimiting a site clearly, it is not, as the Advocate General has observed in point 84 of her Opinion, the only possible and reliable form of delimitation of a site.

83 Accordingly, the Commission's complaint must also be rejected in this regard.

84 The second complaint is therefore to be dismissed in so far as it concerns the situation in the Province of Carinthia.

Province of Upper Austria

— Arguments of the parties

85 The Commission submits that the protection regime in force in this province's 11 notified SPAs is inadequate. First, there are no rules relating to the Maltsch, Wiesengebiete im Freiwald, Pfeifer Anger, Oberes Donautal and Untere Traun SPAs. Second, the rules applicable to the Traun-Donau-Auen, Ettenau, Frankinger Moos, Dachstein, Unterer Inn and Nationalpark Kalkalpen SPAs do not confer adequate protection.

86 The Commission pleads, as regards the Ettenau, Traun-Donau-Auen and Frankinger Moos SPAs, that general regulations relating to nature reserves exist, which, in the

latter two cases, govern only authorised interventions. The Dachstein, Unterer Inn and Nationalpark Kalkalpen SPAs are covered by specific regulations relating to European areas of conservation which essentially lay down only a general prohibition on interference.

87 The Republic of Austria states that the missing regulations are in the course of being drawn up by the Government of the Province of Upper Austria. It nevertheless contests the Commission's view that all of this province's SPAs lack an adequate protective status. Thus, the SPAs which are currently protected as nature reserves enjoy, under Paragraph 25 of the Upper Austria Law on Nature and Landscape Protection of 2001 (Oö. Natur-und Landschaftsschutzgesetz 2001, LGBl. No 129/2001), absolute protection going beyond the requirements of the Birds Directive. Furthermore, the Republic of Austria cites as examples of SPAs that have an adequate protective status the Dachstein and Nationalpark Kalkalpen SPAs, mentioning a series of domestic provisions specifically targeted at bird conservation.

— Findings of the Court

88 So far as concerns the Maltsch, Wiesengebiete im Freiwald, Pfeifer Anger, Oberes Donautal and Untere Traun SPAs, it is clear that no relevant rules were produced to the Commission or pointed out during the proceedings before the Court. Accordingly, the Commission's complaint concerning the inadequacy of the rules relating to these SPAs is well founded.

89 As to the legal regime governing the other SPAs, since the Commission has failed to show that, taking account of the specific situation in each area, the regime would be inadequate in light of the relevant requirements of the Birds and Habitats Directives,

it has not proved, by its assertions which are thus insufficiently detailed, the merits of its complaint, which must accordingly be dismissed in this regard.

90 It follows that, to the extent that the second complaint concerns the situation in the Province of Upper Austria, it can be upheld only in so far as it relates to the Maltsch, Wiesengebiete im Freiwald, Pfeifer Anger, Oberes Donautal and Untere Traun SPAs.

Province of Vorarlberg

— Arguments of the parties

91 The Commission submits that the rules in force in this province do not lay down for SPAs specific protection and conservation objectives, concrete measures, or obligations or prohibitions. As regards the Klostertaler Bergwälder SPA in particular, the Commission observes that the protection provided for this area by the forest management plan adopted by the Government of the Province of Vorarlberg is inadequate. The Verwall SPA is specifically protected by a regulation of that government, but which was adopted after the period laid down in the reasoned opinion expired, containing obligations, prohibitions and provisions for the protection and conservation of the site and the protected species that it hosts.

92 The Republic of Austria states in response that the Rheindelta, Lauteracher Ried, Bangser Ried and Matschels SPAs are covered by protected area regulations prohibiting

measures and uses which result in deterioration of the natural habitats of the species for which those areas have been designated or in significant disturbance for those species. As regards the Klostertaler Bergwälder SPA, the forest plan concerning it was drawn up, with binding force, upon the instructions of the authorities in order to implement the conservation measures which are necessary in order to maintain the bird species referred to in Annex I to the Birds Directive that the site hosts at a favourable conservation status.

— Findings of the Court

93 Paragraph 13(2) of the Regulation on Nature Protection (LGBl. No 36/2003) provides that the Government of the Province of Vorarlberg is required, so far as is necessary, to adopt, by means of management plans or other agreements, or by decision or regulation, measures that are for the upkeep, development and conservation of the areas referred to and are in accordance with the ecological requirements of, in particular, the bird species listed in Annex I to the Birds Directive which those areas host.

94 Paragraph 14 of that regulation expressly lays down a prohibition of deterioration, whilst paragraph 15 provides for an impact study and, as the case may be, a requirement for authorisation in light of the conservation objectives which result from the requirements as to a favourable conservation status of the natural habitats and the species indicated in the annex which are decisive for the area's designation.

95 This is supplemented, in the case of the Rheindelta, Lauteracher Ried, Bangser Ried, Matschels and Klostertaler Bergwälder SPAs, by the measures indicated by the Republic of Austria, referred to in paragraph 92 of the present judgment.

96 In such a context, having regard in particular to the considerations set out in paragraph 65 of the present judgment and in the absence of any evidence that, in order to attain the conservation objectives for the bird species referred to in Article 4(1) of the Birds Directive, provisions more detailed than those adopted by the Government of the Province of Vorarlberg are required in this instance, the Commission's complaint must be rejected in so far as it concerns the SPAs referred to in the preceding paragraph of this judgment.

97 As regards the Verwall SPA, it does not appear that this site, unlike the SPAs referred to in paragraph 95 of the present judgment, benefited from specific legal protection when the period laid down in the reasoned opinion expired. Furthermore, as shortly after that period's expiry the Government of the Province of Vorarlberg adopted a regulation introducing a series of specific protection measures, it should be held here that that SPA was not adequately protected until those measures were adopted. Consequently, the action is well founded in this regard.

98 Therefore, in so far as the second complaint concerns the situation in the Province of Vorarlberg, it must be upheld with regard to the Verwall SPA.

Province of Tyrol

— Arguments of the parties

99 In the Commission's submission, the general rules in force in this province do not establish an adequate protective status for the SPAs located in the province. The Government of the Province of Tyrol admittedly adopted a regulation including a list of 11 Natura 2000 areas, but that measure does not specify the protected bird species, the protection and conservation objectives or the essential rules of conduct to be observed. The absent specific conservation measures are replaced, generally, by protection of the habitats and birds referred to in the standard technical data sheets, in accordance with Paragraph 14(11) of the 1997 Law on Nature Protection of the Province of Tyrol, as amended on 12 May 2004 (LGBl. No 50/2004; 'the TNSchG'). The Commission contends, in particular, that the protective status of the Tiroler Lechtal SPA is inadequate.

100 The Republic of Austria states that implementation of the Birds and Habitats Directives has been integrated into a protection system that was already developed comprising, in particular, nature reserves, nature parks, landscape protection areas, tranquillity areas and protected sites. This implementation consisted in linking the rules of those directives to the rules existing in the protected areas and in supplementing such rules. A number of prohibitions, obligations and authorisation systems are imposed in those protected areas.

101 On the basis of a plan adopted in December 2004, all the SPAs of the Province of Tyrol are subject to coordinated management designed to achieve the protection objectives set for each of the areas and to ensure in a sustainable manner inter alia conservation of the bird species hosted by each area concerned. The Republic of Austria

also submits that the transitional regime laid down in Paragraph 14 of the TNSchG ensures that the SPAs are adequately protected until the conservation objectives are defined by a specific regulation.

102 The defendant Member State sets out in detail the protection regime applicable to the Tiroler Lechtal SPA and submits that it is adequate in light of the Birds and Habitats Directives.

— Findings of the Court

103 Under Paragraph 3(9)(9) of the TNSchG, the conservation objectives are defined as the maintenance and re-establishment of a favourable conservation status of the species referred to in Annex I to, and Article 4(2) of, the Birds Directive which a European area for the conservation of birds hosts, including of their habitats.

104 By virtue of Paragraph 14(3) of the TNSchG, the Government of the Province of Tyrol is required to lay down, by regulations, the conservation objectives for each Natura 2000 site and, if need be, the provisions and conservation measures necessary to achieve a favourable conservation status.

105 Paragraph 14(11) of the TNSchG provides, so far as concerns the transitional period preceding the adoption of those regulations, that the conservation objectives are temporarily replaced by protection of the habitats and the wild fauna and flora, including birds, included in the standard data forms.

106 This type of form, which is prescribed by Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1997, L 107, p. 1) and which under the relevant legislation of the Province of

Tyrol – as is common ground – is published and can be relied upon against third parties, refers to the bird species which have warranted classification of the site concerned as an SPA. Moreover, the form also contains, inter alia, a description of the site, an overview of its quality and importance having regard in particular to the conservation objectives of the Birds Directive, and an assessment of the site for each of those species.

107 Furthermore, it is not in dispute that, in each of the Province of Tyrol's SPAs, numerous prohibitions, obligations and authorisation systems are imposed which, for each of those areas, supplement the authorisation obligations and general statutory prohibitions.

108 Thus, for example, it is apparent from the case file that, in nature reserves, the construction, erection or positioning of installations, the construction, extension or diversion of roads and paths, the excavation and filling-in of land other than enclosed built-on land, the creation of new afforestation, landing and taking off in the countryside, any production of considerable noise, the spreading of fertiliser, the use of toxic products and the use of motor vehicles are fundamentally prohibited. In SPAs those prohibitions are even supplemented by a general prohibition on access.

109 Having regard to the foregoing, it cannot be considered proven that the system for protection of SPAs in force in the Province of Tyrol is inadequate in light of Article 4(1) or (2) of the Birds Directive and Article 6(2), read in conjunction with Article 7, of the Habitats Directive.

110 That is true in particular of the Tiroler Lechtal SPA, which also enjoys protection as a nature park and part of which, namely Tiroler Lech, has been classified as a nature reserve.

111 The conclusions set out in the preceding two paragraphs cannot be called into question by the fact that Paragraph 14(3) of the TNSchG provides that the Government of the Province of Tyrol is required to lay down, by regulations, the conservation objectives for each Natura 2000 site. Even if such a system is capable of being improved, it none the less does not appear that, in the present instance, the system already in place in this province is inadequate in light of the conservation requirements.

112 Consequently, the second complaint must be rejected in so far as it concerns the situation in the Province of Tyrol.

113 In the case of the SPAs found in the present case not to enjoy an adequate protective legal status in light of the requirements flowing from the relevant provisions of the Birds and Habitats Directives, the Court does not have information enabling it to determine whether the species on account of which those SPAs have been classified fall within both, or only one of, Article 4(1) and Article 4(2) of the Birds Directive.

114 It is accordingly appropriate, in this regard, to refer to Article 4 of the Birds Directive.

115 In light of all the foregoing considerations, it must be found that:

— by failing to classify the Hanság site in the Province of Burgenland as an SPA, and to delimit the Niedere Tauern SPA in the Province of Styria, correctly in accordance with ornithological criteria, under Article 4(1) of the Birds Directive, and

— by failing to provide legal protection in accordance with the requirements of Article 4 of the Birds Directive and Article 6(2), read in conjunction with Article 7, of the Habitats Directive for the Maltsch, Wiesengebiete im Freiwald, Pfeifer Anger, Oberes Donautal and Untere Traun SPAs in the Province of Upper Austria and the Verwall SPA in the Province of Vorarlberg,

the Republic of Austria has failed to fulfil its obligations under those provisions.

Costs

116 Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order that the costs should be shared or that the parties are to bear their own costs where each party succeeds on some and fails on other heads. Since both parties have succeeded on some and failed on other heads, they should each be ordered to bear their own costs.

117 In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Federal Republic of Germany, which has intervened in the present proceedings, must bear its own costs.

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

1. Declares that:

— by failing to classify the Hanság site in the Province of Burgenland as a special protection area, and to delimit the Niedere Tauern special pro-

tection area in the Province of Styria, correctly in accordance with ornithological criteria, under Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, and

— **by failing to provide legal protection in accordance with the requirements of Article 4 of Directive 79/409 and Article 6(2), read in conjunction with Article 7, of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora for the Maltsch, Wiesengebiete im Freiwald, Pfeifer Anger, Oberes Donautal and Untere Traun special protection areas in the Province of Upper Austria and the Verwall special protection area in the Province of Vorarlberg,**

the Republic of Austria has failed to fulfil its obligations under those provisions;

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission, the Republic of Austria and the Federal Republic of Germany to bear their own costs.**

[Signatures]