JUDGMENT OF THE COURT (Second Chamber)

15 December 2005 *

In Case C-344/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 1 August 2003,

Commission of the European Communities, represented by G. Valero Jordana and P. Aalto, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Finnish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Schintgen, G. Arestis and J. Klučka, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 22 September 2005,

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

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by failing to apply the derogation laid down in Article 9(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is

founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('the Directive'), in accordance with the criteria laid down therein, and by failing to establish that, in the spring hunting of aquatic birds in mainland Finland and the province of Åland, the conditions laid down in that provision for such a derogation were fulfilled, as regards in particular the application of the criteria 'no other satisfactory solution' and 'small numbers' with respect especially to the following species: eider *(Somateria mollissima)*, golden-eye *(Bucephala clangula)*, red-breasted merganser *(Mergus serrator)*, goosander *(Mergus merganser)*, velvet scoter *(Melanitta fusca)* and tufted duck *(Aythya fuligula)*, the Republic of Finland has failed to fulfil its obligations under that directive.

Legal context

Community legislation

2 Article 7 of the Directive provides:

'1. Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation. Member States shall ensure that the hunting of these species does not jeopardise conservation efforts in their distribution area.

2. The species referred to in Annex II/1 may be hunted in the geographical sea and land area where this directive applies.

3. The species referred to in Annex II/2 may be hunted only in the Member States in respect of which they are indicated.

4. Member States shall ensure that the practice of hunting, including falconry, if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2. They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. Member States shall send the Commission all relevant information on the practical application of their hunting regulations.'

3 Article 9(1) of the Directive provides:

'Member States may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution, for the following reasons:

...

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.'

4 According to Article 16(1) of the Directive, for the purposes of the amendments necessary for adapting certain parts of that directive to technical and scientific progress, a committee for the adaptation to technical and scientific progress is set up, consisting of representatives of the Member States and chaired by a representative of the Commission. The ORNIS committee is the Committee for the Adaptation to Technical and Scientific Progress, instituted under Article 16.

5 Annex II to the Directive refers to inter alia eider, golden-eye, red-breasted merganser, goosander, velvet scoter, tufted duck and long-tailed duck (*Clangula hyemalis*).

National legislation

Mainland Finland

6 Article 24 of Decree No 666 of 12 July 1993 on hunting, as amended by Decree No 869 of 27 November 1998 ('the decree on hunting'), sets the normal dates for the closing of the hunting season as follows:

'Normal dates for the closing of the hunting season

Game shall be protected as follows:

...

(13) ... golden-eye ... female eider and the year's young: from 1 January to 20 August 12.00 hrs;

(14) male eider from 1 January to 31 May;

(15) long-tailed duck, red-breasted merganser and goosander from 1 January to 31 August.'

7 Article 29 of the decree on hunting provides for certain derogations to those dates for the closing of the hunting season as follows:

'Spring hunting of certain species of aquatic birds:

Where there is no other satisfactory solution and provided that hunting does not jeopardise the maintenance of a favourable level of conservation, persons having their usual residence in the coastal communes in the hunting districts in the provinces of Uusimaa, Varsinais-Suomi and Satakunta may, notwithstanding the normal dates for the closing of the hunting season provided for in the first paragraph of Article 24, hunt long-tailed ducks and eiders, golden-eyes, red-breasted mergansers and male goosanders in small numbers from 10 April to 21 May.'

8 From 1998 to 2001, the Ministry of Agriculture and Forests, acting pursuant to the decree on hunting, authorised, on a regular basis, the issue of spring hunting permits in respect of all or some of those species.

The islands of Åland

9 The first and second paragraphs of Article 20 of Provincial Law of Åland No 31 of 5 July 1985 on hunting in the province of Åland (Jaktlag för landskapet Åland 5.7.1985/31), as amended by Provincial Laws No 68/1995 and No 46/1999 ('Provincial Law No 31'), provide:

'The authorities of the province of Åland, after having consulted the hunting associations, may adopt by provincial decree provisions specifying which species of game may be hunted, at which times of year the species concerned may be hunted and in which territories hunting is authorised, and also the conditions applicable to the hunting of a species. Subject to the exceptions provided for in the second and third paragraphs, hunting of those species of birds shall not be authorised during their return to their rearing grounds, during their period of reproduction or during the rearing season.

If there is no other satisfactory solution, the authorities of the province of Åland may issue permits authorising the hunting in small numbers, during a certain period between 15 March and 25 May, of eider, velvet scoter, tufted duck, golden-eye, red-breasted merganser, goosander, long-tailed duck and woodcock ... '.

10 Hunting is authorised in the province of Åland during the period between 1 September and 31 December in respect of the following species: tufted duck, golden-eye, long-tailed duck, goosander, red-breasted merganser and woodcock.

11 From 1998 to 2001, the authorities of the province of Åland authorised the issue of spring hunting permits in respect of all or some of the species referred to in the second paragraph of Article 20 of Provincial Law No 31.

Background to the case and pre-litigation procedure

12 Following complaints it received in 1995 and 1996 concerning the spring hunting of birds in Finland, on 19 February 1998 the Commission sent the Republic of Finland a letter of formal notice in which it found that the Republic of Finland had authorised, in breach of Article 7(4) of the Directive, spring hunting of certain species of wild aquatic birds referred to in Annex II to that directive during their rearing season, both in mainland Finland and on the islands of Åland. In its view, the conditions required for the application of the derogation provided for in Article 9(1)(c) of that directive were not fulfilled. In that letter of formal notice, the Commission stated in particular that the criteria relating to there being 'no other satisfactory solution' and 'small numbers' were not met.

13 Since the Commission was not satisfied with the response to that letter of formal notice, on 28 April 1999 it sent the Republic of Finland a reasoned opinion, reiterating in substance the complaints put forward in the letter of formal notice and calling on the Republic of Finland to take the measures necessary to comply with that opinion within two months of its notification.

14 The Finnish Government replied to the reasoned opinion by letters of 21 June 1999 and 30 March 2001.

15 After examining the responses from the Finnish authorities, on 25 July 2001 the Commission issued a supplementary reasoned opinion in which it reaffirmed its previously stated position.

16 As the Republic of Finland had responded to the supplementary reasoned opinion by stating that, in its view, the conditions necessary for the implementation of the derogation provided for in Article 9(1)(c) of the Directive were fulfilled, the Commission decided to bring the present action.

The action

17 The Commission, whilst acknowledging that recreational spring hunting may be regarded as 'judicious use' within the meaning of Article 9(1)(c) of the Directive, maintains that, in the present case, such a form of hunting does not meet the requirement that there be no other satisfactory solution or the one relating to the taking of birds in small numbers.

The requirement that there be no other satisfactory solution

Arguments of the parties

18 The Commission states that, as regards the bird species at issue in the present case, there are satisfactory solutions other than spring hunting, both in mainland Finland and on the islands of Åland. Relying on a study produced by the Republic of Finland,

it states that all or nearly all the species which may be hunted in spring are generally present in the autumn as well in the territories where spring hunting is practised. Thus, spring hunting of eider, golden-eye, goosander and tufted duck cannot be justified by the fact that those species are not present in those territories in the autumn.

19 The Commission does acknowledge, however, that it does not seem reasonably possible to hunt long-tailed duck in the autumn in the same regions as those where hunting is practised in the spring.

20 As to red-breasted merganser and velvet scoter, they are birds which may, to a certain extent, be more difficult to hunt in the autumn.

21 In any event, the Commission considers that, as regards the three species referred to in paragraphs 19 and 20 of this judgment, hunting them in the autumn, even if it is in smaller numbers than in the spring, and 'the hunting of other species of aquatic birds present in the autumn' are another satisfactory solution which can replace spring hunting. Those three species are not used for any particular purpose which might prevent them from being replaced by another species of game in the same territory. Long-tailed duck in particular could be replaced by mallard, teal or wigeon. The Commission states in the alternative that it should be possible to authorise the spring hunting of aquatic birds which are not present in the autumn, provided that the other conditions laid down in Article 9(1)(c) of the Directive are fulfilled.

22 The Finnish Government contends that there is no other satisfactory solution for replacing spring hunting as it is currently practised in Finland. For each species concerned by the action for failure to fulfil obligations, it states the reasons why such a solution cannot be envisaged.

23 The Finnish Government states that, as regards mainland Finland, since the spring of 2001, spring hunting has in reality concerned only long-tailed duck, eider and goosander. As to the islands of Åland, all the species referred to in paragraph 5 of this judgment could be hunted there in the spring.

24 As regards eider, the Finnish Government states that the competent authorities found, on the basis of the information available to them, that the spring hunting of that species is necessary in certain geographical areas because the specimens of that species are not present there in the autumn in sufficient numbers to be hunted. The individual eiders present in the autumn in those areas are females or chicks born that year. In addition, eider is a species which nests in Finland, in whose interest hunters eliminate small predators present in the areas concerned, so as to foster better rearing conditions.

25 As regards golden-eye and tufted duck, the hunting of those species is not possible in the autumn because the birds then remain in large groups mostly more than 50 metres from the shore. The range of the rifles used for hunting birds is 35 metres maximum and, for safety reasons, the use of shotguns is not permitted. Furthermore, golden-eye is a species which nests in holes and therefore needs

nesting-boxes put in place by humans. In practice, most of them are put in place by hunters. Hunting thus plays a role in these birds' reproduction.

26 As to the spring hunting of goosander, it is justified essentially by the need to ensure that the nesting-boxes essential for the species' reproduction are put in place by humans, in particular hunters.

27 As regards long-tailed duck, velvet scoter and red-breasted merganser, the Finnish Government states that it is not possible to hunt those species in the autumn because in that season they are not present in sufficient numbers to be hunted in the geographical areas open for spring hunting.

28 Lastly, the Finnish Government contests the Commission's argument that the requirement that there be no other satisfactory solution is not fulfilled when the spring hunting of an aquatic bird species may be replaced equitably by the hunting of another species during the autumn. It contends that the Commission's reasoning on this point is not consistent with the foundations of the Directive, which takes a species-by-species approach and also envisages the protection of birds by species. Moreover, it cannot be required that the hunting of one species replace the hunting of another species, without an examination being conducted of the impact of an increase in the hunting of the first species on the protection of that same species.

Findings of the Court

29 According to Article 7(1) of the Directive, the species listed in Annex II thereto may be hunted under national legislation. Article 7(4), however, provides that Member

States are to ensure in particular that the species to which hunting laws apply are not hunted during the rearing season or during the various stages of reproduction.

30 In this case, the species at issue in the present dispute, as referred to in paragraph 5 of this judgment, are covered by the two provisions referred to in the preceding paragraph. It is, moreover, common ground that the spring hunting periods in effect in Finland coincide with the rearing seasons of those species. Thus under Article 7 (4) of the Directive, they should not be hunted during the periods in question.

31 However, Article 9(1)(c) of the Directive permits authorisation by way of derogation, in compliance with the conditions set out in that provision, of the hunting of the species listed in Annex II thereto during the periods referred to in Article 7(4) and thus in particular during the rearing season and during the various stages of reproduction (see, to that effect, Case C-182/02 *Ligue pour la protection des oiseaux and Others* [2003] ECR I-12105, paragraphs 9 to 11, and Case C-135/04 *Commission* v *Spain* [2005] ECR I-5269, paragraph 17).

32 The conditions which must be met for such hunting to be authorised under Article 9 (1)(c) of the Directive include the absence of any other satisfactory solution (see *Ligue pour la protection des oiseaux and Others*, paragraph 15, and C-135/04 *Commission* v *Spain*, paragraph 18).

33 That condition cannot be considered to have been satisfied when the hunting season under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection. There would be no such need, in particular, if the sole purpose of the derogation authorising hunting were to extend the hunting seasons for certain species of birds in territories which they already frequent during the hunting seasons fixed in accordance with Article 7 of the Directive (see *Ligue pour la protection des oiseaux and Others*, paragraph 16, and C-135/04 *Commission* v *Spain*, paragraph 19).

34 As regards the spring hunting of the seven species of birds referred to in paragraph 5 of this judgment, the Court finds, first, that, at the time the time-limit fixed in the supplementary reasoned opinion expired, only long-tailed duck, eider and goosander could be hunted in mainland Finland, as indicated by the evidence in the file in this case and the Finnish Government's submissions. All seven species could be hunted on the islands of Åland, however. It follows that only long-tailed duck, eider and goosander could be hunted in the spring, both in mainland Finland and on the islands of Åland.

35 As regards eider, the Court notes that it is apparent from the ornithological study carried out by the Riista ja kalatalouden tutkimuslaitos (Institute for the Study of Game and Fishing), referred to by the parties ('the study'), that a not inconsiderable number of specimens of that species is present in the spring hunting territories from early autumn onwards. As to the Finnish Government's assertion that the individuals of that species present in the autumn in those territories are females or chicks born that year, that assertion is not supported by any evidence, as the Finnish Government moreover acknowledges. Lastly, although it is true that hunters perform a useful function in environmental management, by hunting small predators in the spring so that the eider's rearing can produce better results, it is not apparent that that function can be fulfilled only if the eider hunting season is open in the spring.

36 Accordingly, the Court finds that it has not been established that the spring eider hunting season, opened under a derogation, fulfils the condition that there be no other satisfactory solution as referred to in Article 9(1)(c) of the Directive.

37 As regards golden-eye and tufted duck, it is not disputed that, in the autumn, those species are present in certain numbers in the spring hunting territories. Moreover, the study indicates that 36 to 37% of the specimens of those species present in the autumn in those territories are located less than 50 metres from the shore. The study also states that the percentages of birds thus indicated result from counts made from moving boats and reflect a situation at a specific point in time. Hunting, by contrast, is an activity which is carried out over a period of time and in which the hunter expects the birds to change location. Therefore, according to that study, it is probable that the proportion of birds which may be hunted from the shore is even greater than that recorded in the counts.

38 Regarding more specifically golden-eye, although it is true that, by putting nesting-boxes in place during the spring hunting season, hunters are performing a useful function for that species' reproduction, it is not apparent that that function can be fulfilled only if the hunting season for that bird is open in the spring.

39 In those circumstances, the Court finds that the Finnish Government has not proven that the spring hunting of golden-eye and tufted duck fulfils the condition that there be no other satisfactory solution, as referred to in Article 9(1)(c) of the Directive.

40 As to the spring hunting of goosander, which is justified essentially by the need to ensure the putting in place by humans, in particular hunters, of nesting-boxes which are essential for that species' reproduction, suffice it to refer to paragraphs 38 and 39 of this judgment, which apply mutatis mutandis to this point.

41 Turning to red-breasted merganser and velvet scoter, the Court notes that the Finnish Government merely stated, without providing evidence to support its assertions, that it was not possible to hunt those species in the autumn because, during that season, they were not present in sufficient numbers to be hunted in the geographical areas open for spring hunting. The study indicates that those two species are in fact present on the islands of Åland, although in considerably smaller numbers than in the spring, at least during part of the autumn.

42 It is therefore clear that it has not been established that the spring hunting of red-breasted merganser and velvet scoter fulfils the condition that there be no other satisfactory solution, as referred to in Article 9(1)(c) of the Directive.

43 Regarding, lastly, long-tailed duck, a species which the Commission unfortunately omitted to refer to in the form of order sought in its application, although in that same application it specifically criticised the defendant Member State for having authorised the spring hunting of that species without the condition that there be no other satisfactory solution having been fulfilled, it is not disputed that it cannot be hunted in the autumn in the geographical areas open for spring hunting.

44 The Court notes in this connection that a measure consisting in authorising the hunting in the autumn, or in the spring, of other species of aquatic birds present in those areas by way of replacement for the spring hunting of long-tailed duck cannot be regarded as another satisfactory solution within the meaning of Article 9(1)(c) of the Directive. Such a solution would risk rendering that provision nugatory, at least partially, because it would allow in certain territories for prohibitions on hunting certain species of birds, even though hunting in small numbers might, in theory, not jeopardise the maintenance of their populations at a satisfactory level and, therefore, constitute judicious use of those species (see, to that effect, *Ligue pour la protection des oiseaux and Others*, paragraph 17). Moreover, unless all bird species are considered to be equivalent for the purposes of hunting, that solution would, in any event, be a source of legal uncertainty, because the basis on which it may be considered that the hunting of a given species can replace the hunting of another species is not clear from the applicable legislation.

45 It follows that the spring hunting of long-tailed duck fulfils the condition that there be no other satisfactory solution, as referred to in Article 9(1)(c) of the Directive.

46 In the light of the foregoing, the Commission's complaint, that the spring hunting of eider, golden-eye, red-breasted merganser, goosander, velvet scoter and tufted duck does not comply with the condition that there be no other satisfactory solution, as referred to in Article 9(1)(c) of the Directive, must be upheld.

The requirement of small numbers

Arguments of the parties

47 The Commission states that, according to the ORNIS committee, 'small numbers' is to be understood to mean less than 1% of the average annual mortality rate of the species in question as regards the species the hunting of which is prohibited and approximately 1% as regards the species the hunting of which is permitted.

48 As regards the hunting of eider, goosander, red-breasted merganser, velvet scoter, golden-eye and tufted duck, the Republic of Finland did not comply with the condition relating to taking 'in small numbers' within the meaning of Article 9(1)(c) of the Directive. That condition was complied with, however, as regards long-tailed duck.

49 The Finnish Government acknowledges that that condition was not complied with in respect of eider, goosander, red-breasted merganser and velvet scoter.

50 However, the Finnish Government states that during the 2001 spring hunting season, 1 461 golden-eyes and 2 585 tufted ducks were hunted. A comparison of those figures with the annual mortality rates of those species gives a proportion of 0.8% for golden-eyes and 1.2% for tufted ducks. Each of those two species therefore

fulfils the decisive condition established by the ORNIS committee, according to which the number of birds hunted must correspond to approximately 1% of their annual mortality rate. Moreover, the population situation of those species indicates that their levels have increased.

Findings of the Court

51 It must be borne in mind that hunting is not to be authorised under Article 9(1)(c) of the Directive unless it applies only to certain birds in small numbers (see *Ligue pour la protection des oiseaux and Others*, paragraph 15).

52 In this case, it is not disputed that the requirement that hunting must relate only to the taking of birds in small numbers was not complied with in respect of eider, goosander, red-breasted merganser and velvet scoter. It remains therefore to be determined whether that requirement was complied with in respect of golden-eye and tufted duck.

53 In that regard, the Commission's paper, entitled 'Second report on the application of Directive 79/409/EEC on the conservation of wild birds' (COM(93) 572 final of 24 November 1993), indicates that, according to the work of the ORNIS committee, 'small numbers' should be understood to mean any sample of less than 1% of the

total annual mortality rate of the population in question (average value) for those species which are not to be hunted and a sample in the order of 1% for those species which may be hunted, with 'population in question' being understood, with regard to migratory species, to mean the population of those regions from which come the main contingents passing through the region to which the derogation applies during its period of application.

54 Although it is true that the criterion of small numbers as defined by the ORNIS committee is not legally binding, in this instance it can, by reason of the acknowledged scientific value of that committee's opinions and the failure to adduce any scientific evidence to the contrary, be used by the Court as a basis of reference for assessing whether the derogation granted by the defendant Member State under Article 9(1)(c) of the Directive fulfils the condition that the capture of the birds in question must be carried out in small numbers (see, inter alia, Case C-79/03 *Commission* v *Spain* [2004] ECR I-11619, paragraph 41).

55 It is established that, in the spring of 2001, 1 461 golden-eyes and 2 585 tufted ducks were caught on the islands of Åland. The case-file further shows that, according to the ORNIS committee, the taking in the spring of 1 758 golden-eyes and 2 208 tufted ducks corresponds to 1% of the total annual mortality rate of the populations in question and therefore meets the requirement that birds must be taken in small numbers as stated by that committee.

56 It is therefore apparent that, when the time-limit set in the supplementary reasoned opinion expired, the number of golden-eyes caught on the islands of Åland was below the small numbers threshold as fixed by the ORNIS committee.

57 As for tufted duck, the number of specimens caught corresponded to less than 1.2% of the total annual mortality rate of the population in question. Given that, according to the ORNIS committee, first, a 'small number' must be considered to be any sample in the order of 1% of the total annual mortality rate of the population in question for the species which may be hunted, such as tufted duck, and that, second, it is not disputed that the population of that species was on the increase, the Court finds that the number of tufted ducks caught on the islands of Åland did not exceed the small numbers threshold as fixed by that committee.

58 It follows that, on the date the time-limit set in the supplementary reasoned opinion expired, the spring hunting of golden-eye and tufted duck complied with the requirement that it must relate only to the taking of birds in small numbers.

59 It follows from the foregoing that the Commission's complaint, that the spring hunting of eider, goosander, red-breasted merganser and velvet scoter does not comply with the requirement relating to the capture of birds in small numbers, as referred to in Article 9(1)(c) of the Directive, must be upheld.

60 Consequently, the Court finds that, since it has failed to establish that, in the context of the spring hunting of aquatic birds in mainland Finland and the province of Åland:

— the condition laid down in Article 9(1)(c) of the Directive for the purpose of a derogation, that there be no satisfactory solution other than spring hunting, was fulfilled in respect of eider, golden-eye, red-breasted merganser, goosander, velvet scoter and tufted duck; and that

— the condition laid down in that same provision for the purpose of a derogation, relating to the fact that hunting must concern only the taking of birds in small numbers, was fulfilled in respect of eider, goosander, red-breasted merganser and velvet scoter;

the Republic of Finland has failed to fulfil its obligations under that directive.

61 The remainder of the action is dismissed.

Costs

62 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Republic of Finland and the latter has been unsuccessful in its main pleas, the Republic of Finland must be ordered to pay the costs.

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

1. Declares that, since it has failed to establish that, in the context of the spring hunting of aquatic birds in mainland Finland and the province of Åland:

— **the condition laid down in Article 9(1)(c) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, for the purpose of a derogation, that there be no satisfactory solution other than spring hunting, was fulfilled in respect of eider, golden-eye, red-breasted merganser, goosander, velvet scoter and tufted duck; and that**

— **the condition laid down in that same provision for the purpose of a derogation, relating to the fact that hunting must concern only the taking of birds in small numbers, was fulfilled in respect of eider, goosander, red-breasted merganser and velvet scoter;**

the Republic of Finland has failed to fulfil its obligations under that directive;

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

3. **Orders the Republic of Finland to pay the costs.**

[Signatures]