Wild birds

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the Italian Republic had failed to fulfil its obligations under Articles 171 and 34 of the EEC Treaty. The court found that a failure to fulfil obligations under Article 171 of the Treaty had been established. Proceedings of the Court of Justice, 24/93 p 3.

See also Italian country report on p 259 of this issue.

Nature

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Case C-355/90, Commission v Spain, (Directive 79/409, wild birds, classification of special protection areas) 2 August 1993 (not yet reported)†

Factual Background

The present case concerns the implementation of Directive 79/409[1] relating to the conservation of wild birds in Spain. The Commission's complaints focus on Articles 3 and 4 of the Directive and their applicability to the "Marismas de Santoña", an estuary in the north of Spain on the Cantabrian coast where five rivers converge and the biotope for a large population of birds (between 15,000 an 20,000), consisting of some 100 different species. Amongst these is the spoonbill, which features on Annex 1 of the Directive, so that the region in theory is within the scope of application of Article 4(1) and (4). In addition, at least 40 species of migratory birds visit the Marismas de Santoña, in turn making the area of interest in the sense of Article 4(2) of the Directive.

Articles 3 and 4 provide thus:

"*Article 3*

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 the following measures:
   (a) creation of protected areas;
   (b) upkeep and management in accordance with the ecological need of habitats inside and outside the protected zones;
   (c) re-establishment of destroyed biotopes;
   (d) creation of biotopes."

"*Article 4*

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 special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where the 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 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.

3. Member States shall send the Commission all relevant information so that it may take appropriate initiatives with a view to the co-ordination necessary to ensure that the areas provided for in paragraphs 1 and 2 above form a coherent whole which meets the protection requirements of these species in the geographical sea and land area where this Directive applies.

4. In respect of the protection 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."

The Commission had received complaints in respect of a number of activities which were likely to lead to the pollution and deterioration of the Marismas de Santoña and affected the conservation of various bird species. In particular, these activities related to:

1. the creation of industrial zones in the Marismas de Santoña at Laredo and Colindres; the land reclamation projects of the terrains bordering that industrial zone; the construction of a dyke surrounding the industrial zone and the neighbouring terrains;
2. land reclamation of wetlands by the municipality of Escalante in order to create a park and sports fields;
3. the disposal of waste on the wetlands near Montehano consisting of building material from the quarry of Montehano;
4. the construction of a new road between Argoños and Santoña crossing the wetlands;
5. the permission granted to an association of fisherman of Santoña to breed clams in a sector of the wetlands and plans for other aquaculture projects;
6. the storage and disposal of untreated waste water in the Marismas de Santoña by the municipalities of Santoña, Cicero, Laredo, Colindres, Escalante and Argones.

In summary, the Commission argued that Spain was in breach of the Directive on three counts:
- the six facts referred to above constituted a breach of Article 3 of the Directive, in particular of paragraph 2 under b) and c) of that provision;

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†Author's translation from the French.

[1]OJ 1979 L103/1.

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- by not classifying the Marismas de Santoña as a special protection area, Spain was in breach of Article 4(1) and (2) of the Directive;
- the six facts referred to above constituted at the same time a violation of Article 4(4) of the Directive.

On 18 July 1988 the Commission sent the Spanish government a letter of formal notice pursuant to Article 169 EEC for violation of Articles 3 and 4 of Directive 79/409, and this was followed by a reasoned opinion on 27 June 1989 in which it allowed Spain a further month to comply with the Directive. After the Spanish government continued to contest the allegations, the Commission brought the case before the European Court on 30 November 1990.

Arguments of the Parties

A preliminary argument concerned the date from which Spain should adhere to the Directive. In this respect the Commission pointed out the Spanish Act of Accession[2] does not provide for an extended deadline for compliance with the Directive's obligations. Hence, Spain was under an obligation to adhere to the Directive's obligations as from 1 January 1986, ie the date of accession.

In respect of the relationship between Articles 3 and 4, the Commission maintained that these provisions were not mutually exclusive but complementary and inter-dependent. Thus, the measures enumerated in Article 3 applied to all birds. Apart from these measures, Article 4 provided for additional measures for the birds mentioned in this provision. Hence, for example, the re-establishment of destroyed biotopes was one of the obligations mentioned in Article 3(2), which was not expressly provided for in the context of Article 4. Yet, it was clear that this obligation applied to the birds mentioned in Article 4 too, since these birds were afforded a higher level of protection.

The Spanish government in reply argued that the Directive imposed an obligation of result, ie to safeguard the conservation of wild birds and the upkeep and management of habitats, but did not impose a precise obligation in respect of the means and criteria to be used. In the absence of precise deadlines, the Directive should be implemented progressively. In addition, the protection of habitats had to be weighed against other considerations, such as the social and economic conditions of the citizens of the Community. Finally, since the Commission argued that the Marismas de Santoña should be classified as a special protection area and that Spain was in violation of Article 4(2), it could not simultaneously raise the issue of Article 3, as these provisions were mutually exclusive.

The arguments subsequently focussed on the six individual complaints and their effects, which, according to the Commission, amounted to a breach of the ecological requirements set out in Article 3.

(a) The road between Argoños and Santoña

The Commission argued that the new section of the C-629 between Argoños and Santoña would result in the destruction of an important part of de Marismas de Santoña and the progressive disappearance of bird species in the area. In addition, Spanish authorities had rejected the possibility of compensating for the loss by recuperating other areas, whilst the impact on the Marismas de Santoña would have been significantly less serious had another option been chosen.

The Spanish government pointed out that the county of Santoña had a population of over 30,000 and that access was necessary for heavy goods vehicles. The present option had been chosen taking into account ecological considerations, road safety, the necessity of access to the industrial zones and requirements related to tourism. The road would cover 0.5 per cent of the total area. The idea of compensating for the loss by way of the recuperation of other areas had been considered but would have resulted in ecological damage.

(b) The industrial zones

The Commission held that the construction of industrial zones at Laredo and Colindres would lead to the disappearance of an important part of the wetlands near the estuary of the Rió Asón. The raising of the sites would affect the flow of the tides in the bay.

The Spanish government pointed out that the plans had been abandoned and a new zone was planned outside the Marismas de Santoña.

(c) The aquacultural projects

According to the Commission, four aquacultural projects occupying a total of 218,350 square metres of wetlands were incompatible with the Directive. In addition, two other projects had received authorization. The activities would change the natural process of sedimentation and destroy existing soil which would result in the disappearance of the fauna and alter the hydrodynamic processes.

The Spanish government stressed the economic and social importance of the aquacultural projects and the fact that only 0.3 per cent of the bay was affected by them. In addition, part of the project at Cofradia de Pescadores had been subsidized by Community funds.

(d) The storage of solid wastes

The Commission indicated that the storage of solid wastes affected the flow of the waters and hindered a change of the physical and chemical parameters in the bay.

The Spanish government drew attention to the fact that the problem had been solved in 1988, when measures had been taken in the framework of the waste management plan.

(e) The discharges of urban waste water

The Commission pointed out that the discharges of untreated waste water close to the wetlands had a deleterious effect on the area. The discharges contained dangerous and toxic substances which caused considerable damage to the Marismas de Santoña. In reply, the Spanish government noted that, although it was true that the waste waters of the Communities of Santoña, Laredo, Argonons, Escalante, Barcena de Cicero and Colindres were discharged into the Marismas without prior treatment, there was nothing in the Directive that required the localities to provide purification systems.

(f) The quarry of Montehano

In respect of the quarry at Montehano, the Commission maintained that the storage of unused materials in the wetlands had catastrophic effects on the fauna living in the Marismas de Santoña.

The Spanish government noted that the Commission's allegations related

[2]OJ 1985 L302/23, Article 395.

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to projects which had never become operational or to activities which were initiated well before Spain entered the Community.

The Commission argued that these six individual complaints amounted to breach of Articles 3, 4(1) and (2) and (4).

1. Article 3

According to the Commission, the degradation of the ecosystem of the Marismas de Santoña affected above all the spoonbill which migrates south during the autumn, and in particular the young birds which spend the winter on the coast. In respect of the migratory movements of spoonbills from The Netherlands, the Commission observed that a large number of birds visited the Marismas for some days, making the Marismas a more important area than any other site in northern Spain.

The Spanish government felt that the Commission had not shown sufficiently that the contested activities were of such a nature as to alter the habitat of the birds mentioned in Annex I of the Directive and that the habitat was essential for the conservation of these birds to the extent that, in the absence of the habitat, the birds would be threatened with extinction. For a breach of the Directive to exist it was necessary that a change in the environment should lead to a significant reduction in the number of birds. The Directive therefore protected habitats and biotopes only to the extent that the quality of the habitat had an impact on the conservation of birds. Meanwhile, there was no causal link between the alleged infringements and the objectives pursued by the Directive. In fact, statistics showed that the number of birds present in the Marismas de Santoña had risen, in particular during the year 1989. The Commission had not submitted any evidence showing a reversal of that trend.

2. Articles 4(1) and (2)

The Commission held that, in respect of birds listed in Annex I, Spain was in breach of its obligation to adopt special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution, and to classify the most suitable territories in number and size as special protection areas for the conservation of these species. In fact, the Marismas de Santoña were not classified as a special protection area in the sense of Article 4 of the Directive, since the classification of that area as wild refuge merely afforded partial protection.

Although it was true that Article 4 did not determine which territories had to be classified, Member States did not enjoy absolute discretion in this respect. The Marismas de Santoña were an essential habitat for certain Annex I birds. Almost 600 of the 1,100 spoonbills living in The Netherlands had migrated through northern Spain and the Marismas de Santoña was indispensable for the survival of the spoonbill. The Spanish authorities therefore should have taken special conservation measures for the Marismas de Santoña pursuant to Article 4(1). Neither had Spain taken such measures in respect of regularly occurring migratory species not listed in Annex I.

The Spanish government disputed the importance of the Marismas for the survival of the spoonbill. In addition, Member States possessed a degree of discretion in deciding which territories should be classified as special protection areas. Although the Marismas had not yet been classified, other conservation measures for birds had been adopted. Thus, the estuary had been declared a bird sanctuary and by a law of 27 March 1992 the Marismas de Santoña had been classified as a nature reserve.

3. Article 4(4)

According to the Commission, in the protection areas referred to in paragraphs 1 and 2 of Article 4 of the Directive, Spain had failed to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds. Spain had also failed to avoid pollution or deterioration of habitats outside these areas. The classification of the Marismas de Santoña as a nature reserve was not sufficient to comply with the Directive. It was not enough to prohibit the hunting of birds, since the Directive also required that their habitats be maintained and protected.

The Spanish government pointed out that the Marismas de Santoña had been declared a nature reserve within a reasonable time, without compromising the objectives of the Directive, and within the discretionary limits left to the Member States. The Commission's complaints were based on isolated facts of minimal importance, related to projects that had not been carried out or even to activities prior to the Spanish accession to the Community.

The Judgment

I. The Interpretation of Articles 3 and 4 of the Directive

The court first turned to the question from what date Spain should have complied with the Directive. Since the Act of Accession of Spain did not contain any provisions relating to the present Directive, in accordance with Article 395 of the Act, Spain should have adhered to the Directive from the moment it acceded to the Community. In addition, the Directive itself did not give any indication in respect of the time-limits afforded to the national authorities to comply with the obligations of Articles 3 and 4 which, like the whole of the Directive, needed to be implemented within the deadline of two years as provided in Article 18. The court further pointed out that the Commission had afforded the Spanish government a considerable time to comply with its obligations. It had only initiated the proceedings two years after it had sent the letter of compliance and almost five years after the Spanish accession to the Community.

The court then turned to the nature of the obligations in Articles 3 and 4 of the Directive. According to the Commission, these provisions implied that precise measures needed to be taken in order to protect the habitats of wild birds. The Spanish government on the other hand believed that the aforementioned provisions merely imposed an obligation of result, to guarantee the protection of wild birds. In this respect, the court sanctioned the Commission's views. Articles 3 and 4 required Member States to preserve, maintain or re-establish the habitats in view of their ecological value. It followed from the Directive's ninth recital that the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. The obligations on the part of the Member States

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pursuant to Articles 3 and 4 of the Directive therefore existed before any deterioration in the number of birds is observed or any risk of the disappearance of a protected species has materialised.

In respect of Article 4, whereas the Commission had stressed the binding character of the obligations laid down in this provision, according to the Spanish government the ecological requirements needed to be subordinated to other interests such as social and economic concerns or, at least, be weighed against those interests. Referring to case C-57/89[3], the court noted that it followed from this case that Member States, in the implementation of the Directive, were not allowed to invoke derogations at will, based on the taking into account of other interests. In respect of Article 4 in particular, the court had ruled in the aforementioned case that such interests, in order to be admissible, had to correspond to a general interest superior to the ecological objective of the Directive. In particular, the interests mentioned in Article 2 of the Directive, ie economic and recreational requirements, could not be taken into account. In this respect, the court had ruled in its cases of 8 July 1987, *Commission v Belgium* and *Commission v Italy*, that provision did not constitute a separate derogation to the protective regime established by the Directive (Case 247/85 [1987] ECR 3029 and case 262/85 [1987] ECR 3073).

The court then turned to the relation between Articles 4(1) and (2) and (4). According to the Spanish government, it was not possible simultaneously to challenge a Member State for a violation of the two provisions, since the protective measures could only be taken after a decision relating to the classification of a territory as a special protection area had been taken. The court rejected this argument, stating that it would not be possible to achieve the objective of the Directive if Member States only respected the obligations of Article 4(4) where a special protection area had been established. In respect of the relation between Articles 3 and 4 of the Directive, the court pointed out that the former imposed obligations of a general nature, namely the obligation to ensure a sufficient diversity and area of habitats for all the species to which the Directive applies, whilst the latter contained specific obligations in respect of the species listed in Annex I and migratory birds which are not listed in Annex I. Given that both categories of birds lived in the Marismas de Santoña, it sufficed to examine the Commission's complaints relating to Article 4 of the Directive.

II. The obligation to classify the Marismas de Santoña as a special protection area in accordance with Article 4(1) and (2)

The court noted that the Spanish government recognised the ecological importance of the area, and that by the law of 27 March 1992 the Marismas de Santoña had been classified a nature reserve. Yet, the Spanish government felt that the national authorities possessed a degree of discretion in respect of the choice and delimitation of the special protection area as well as the moment of their classification. This line of reasoning was to be rejected.

Although it was true that Member States retained a certain degree of discretion in respect of the choice of special protection areas, the classification of the areas nonetheless had to be based on ornithological criteria, determined by the Directive, such as the presence of birds listed in Annex I and the qualification of a habitat as a wetland. In this respect, the Marismas de Santoña constituted one of the most important ecosystems of the Iberian peninsula for numerous water birds. In fact, various migratory birds hibernated in the swamps on their way to Africa. Amongst those birds there were various species threatened with extinction, in particular the spoonbill. The area regularly harboured 19 species listed in Annex I of the Directive as well as at least 15 species of migratory birds.

In respect of the classification of the Marismas de Santoña as a nature reserve by the law of 27 March 1992, this could not be considered as satisfying the Directive's requirements both in view of its territorial scope as well as because of its legal status. The reserve's territory excluded an area of 40,000 square metres. These wetlands were of particular importance for birds threatened with extinction in the sense of Article 4(1)(a) of the Directive, given the fact that a progressive reduction of areas suitable for nest-building had been observed in other wetlands close to the coast.

Even for the wetlands which were situated in the nature reserve, the necessary measures had not been taken. It also transpired from the dossier that the reserve's management plan as foreseen in Article 4 of the law had not been approved by the competent authorities. That plan meanwhile was of prime importance for the protection of wild birds because it identified the activities which could result in an alteration of the area's ecosystems.

As long as these essential measures, which determined the management of the area, the use of the wetlands and the activities carried out there were not adopted, the Directive's requirements were not satisfied.

Therefore, by failing to classify the Marismas de Santoña as a special protection area, Spain had failed to fulfil its obligations under Article 4(1) and (2).

III. The obligation to protect the Marismas de Santoña in accordance with Article 4(4) of the Directive

(a) The road between Argoños and Santoña

The Commission maintained that the new stretch of the C-629 between Argoños and Santoña resulted not only in an important reduction of the size of the Marismas de Santoña but also would cause disturbances which would affect the tranquility of the area and hence the birds protected by the provisions of the Directive.

The Spanish government had noted that the new road was necessary in order to improve road access to the city of Santoña. The new stretch constituted the best alternative of all the different possibilities, especially in view of the small proportion of the Marismas that would be affected by the road.

The court rejected the Spanish government's arguments. As it had previously ruled in the case *Commission v Germany*, although it was true that Member States enjoyed a certain discretion in the classification of special protection area, they did not possess the same margin of discretion in the context of Article 4(4) of the Directive if they modified or reduced the size of those zones. In this respect,

[3]Case C-57/89, *Commission v Federal Republic of Germany* [1991] ECR 1-883.

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it should be noted that the construction of the new stretch of the C-629 between Argoños and Santoña implied a reduction of the size of the wetlands, which was aggravated by the erection of various new structures in the close vicinity of the road. These activities had led to the disappearance of resting and nest-building areas for the birds. Apart from the disturbances caused by the traffic, the intervention would also have the effect of altering the flow of the wetlands and provoke the sedimentation of that part of the wetlands.

Because, in view of the considerations formulated above, such an intervention could not be justified by the need to improve access to Santoña, the court upheld this complaint.

(b) The industrial zones at Laredo and Colindres

The Commission believed that the creation of industrial zones at Laredo and Colindres led to the disappearance of an important part of the wetlands close to the mouth of the Rió Asón. Land reclamation of sites surrounding the zones would also affect the water flow in the wetlands in the bay.

The Spanish government had noted that the competent authorities had abandoned the idea of the industrial zones as initially planned.

The court, while taking into account these facts, noted that the local authorities had still constructed dykes surrounding the industrial sites after the Spanish accession to the Community. In addition, no action had as yet been taken to destroy those dykes, even though the authorities had recognised the negative impact of those dykes on aquatic life and were committed to destroying them. Under these circumstances, the complaint should be upheld.

(c) The aquacultural industry

The Commission had been critical of the granting by the Spanish administration of a permit to an association of fishermen to breed clams in a central part of the wetlands, as well as other aquacultural projects in the estuary. The Spanish government had drawn attention to the economic value of these activities and their relatively small effect on the ecology of the wetlands.

The court underlined the fact that the aquacultural structures led to a loss of wetlands and a change in the structure of the existing soil, in turn leading to the destruction of the vegetation in the area which formed an important source of food for the birds.

As had already been pointed out, considerations of an economic nature could not justify a derogation from the requirements laid down in Article 4(4) of the Directive.

Since the size of the area affected by the activity was by no means negligible and the activity provoked a significant deterioration of the habitat and living conditions for the birds in the centre of the Marismas de Santoña, the complaint was upheld.

(d) The storage of solid waste

The Commission maintained that the storage of solid waste led to a significant change in the physical and chemical parameters of the wetlands.

The Spanish government had explained that the problem had ceased to exist in 1988. Measures had been taken in the framework of a waste management plan. Only some illegal storage had taken place but this had ceased in 1990.

The court concluded that, since the authorized storage of waste had ceased in 1988, ie before the Commission's reasoned opinion, the complaint had to be rejected as inadmissible.

(e) The discharge of waste waters

The Commission had underlined that the discharge of untreated water had produced deleterious effects on the water quality in the bay of Santoña.

The Spanish government did not deny this fact. However, in its opinion, no provision in the Directive obliged Member States to provide for purification plants so as to ensure the quality of water in special protection areas.

The court rejected this argument. The discharges of waste water containing dangerous and toxic substances caused considerable damage to the ecological conditions in the Marismas de Santoña and produced a significant change in the water quality of the area. In view of the fundamental importance of the water quality for the wetlands, Spain was required to provide purification systems so as to prevent pollution of the habitats. The complaint was therefore upheld.

(f) The land reclamation at Escalante and the activities of the quarry of Montehano

The Commission had held that the land reclamation activities carried out by the municipality of Escalante on the wetlands, as well as the exploitation of the quarry and the storage of unused materials in the marshes, had led to a reduction of the size of the protected area. The Spanish government had observed that these complaints related to facts existing prior to the Spanish accession to the Community. The disposal of those materials in the marshes had been forbidden in 1986 and had hence become illegal.

The court pointed out that in the course of the proceedings before the court, it had not become clear when these activities had taken place. It was therefore not possible to determine whether and to which extent the land reclamation and the disposal of waste in the marshes had taken place since 1986. In contrast, it was undisputed that the works carried out by the municipality of Escalante had been completed in 1986, that thereafter no authorization had been granted for other activities, that the activities at the quarry of Montehano was controlled and the disposal of solid waste in the marshes had been prohibited. The complaint was therefore rejected.

(g) The totality of the complaints under III

It followed from the complaints formulated above, apart from those under III-d) and f), that Spain had failed to fulfil its obligations under Article 4(4) of the Directive, by not taking the appropriate measures to prevent the pollution or deterioration of the habitats in the Marismas de Santoña.

Spain had therefore failed to fulfil its obligations under the Treaty, by not classifying the Marismas de Santoña as a special protection area and taking the appropriate measures in order to prevent the deterioration of the habitats in that area, contrary to the provisions in Article 4 of the Directive.

Commentary

Unlike the examples of the drinking water or bathing water Directives, which have been subject to extensive

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and often emotional debate, the practical significance of Directive 79/409 on the conservation of wild birds has as yet received relatively little attention. This is surprising in view of the large number of cases to which the Directive has already given rise, even more so since one of these cases clearly contained the seeds of the court's present landmark ruling. Yet, these ominous signals were ignored by the vast majority of commentators, with the important exception of David Freestone[4]. In what is the first judgment against Spain involving the implementation of a Community environmental Directive, the latter's interpretation of the implications of *Leybucht* case has now been largely vindicated. Thus, Freestone argued in 1991:

> "It would not be surprising at all if the next stage in the development of this process were for the European Court to accept that the obligation to designate sites has to be exercised in the light of objective criteria elaborated by Community law. (. . .) Such requirements would be objectively reviewable by the European Court and radically restrict the margin of discretion (or appreciation) apparently left to each Member State, in so far as it could be challenged for failing to classify a site which met these objective criteria (. . .)."[5]

Indeed, one of the most important elements of the present case is undoubtedly the clarification of the nature of the duty to classify special protection areas in accordance with Article 4(1) along the lines predicted by Freestone. Meanwhile, the other elements of the judgment also deserve attention.

1. The nature of Articles 3 and 4 of the Directive

The objective of Directive 79/409 is, according to Article 2, 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 (. . .) or to adapt the population of these species to that level". The Directive contains a number of general and specific obligations and prohibitions to achieve that aim, for example in Articles 3 and 4.

A preliminary question is whether Member States must respect these obligations and prohibitions even if they are not strictly necessary to achieve the objective of Article 2 or, alternatively, they must only be attained in as far as necessary for the conservation of wild birds. Although, as is evidenced by the Directive's ninth recital, the Directive creates a causal link between the conservation of birds and the conservation of their habitats, the answer to this question is not as self-evident as may at first appear. This is because the Directive, quite uniquely, does not fix a deadline for the kind of practical measures referred to in Articles 3 and 4[6]. In this respect, it is significant that the court has ruled that the whole of the Directive needed to be implemented within the two year deadline of Article 18. It therefore rejected the Spanish argument to the effect that the Directive's provisions merely imposed an obligation of result. As the court correctly pointed out, the whole point of the measures to be taken under Articles 3 and 4 of the Directive is to *prevent* any deterioration in the number of birds.

The court's strict interpretation of Article 4 had already been demonstrated in the *Leybucht* case. The Spanish arguments that the Directive's ecological requirements were in competition with other social and economic interests were hence doomed from the start.

Much more contentious and significant is the relationship between Articles 4(1) and (2) and (4). In other words, is it possible for the court to rule on the legality of activities which deteriorate, disturb or pollute habitats which have not been (but arguably should have been), classified in accordance with Article 4(1) or made subject to "similar measures" pursuant to Article 4(2)? Employing a line of reasoning which begs comparison with its interpretation of Article 1(2)(a) of the bathing water Directive in respect of Blackpool and Southport in case 56/90[7], the court noted that it would not be possible to achieve the Directive's objectives if Member States were only to respect the obligations of Article 4(4) where a special protection area had been established. The significance of this ruling is at least two-fold. Evidently, in the first place it implies that Member States cannot avoid or delay the obligations arising out of Article 4(4) by simply delaying or avoiding the classification of special protection areas. The second implication is perhaps less obvious but is at least as important. Prior to this ruling, it seemed that the reference in Article 4(4) to Article 4(1) and (2) – which after all allow Member States considerable discretion – deprived this provision of its direct effect[8]. However, since the court has now ruled that the applicability of Article 4(4) is not in any way conditional upon the prior classification of a site as a special protection area, this obstacle has been removed. It is now likely that Article 4(4) produces direct effect. The importance of this possibility should not be underestimated, particularly in view of the many NGOs involved in bird protection.

The court's ruling in respect of the relationship between Articles 3 and 4 on the other hand is rather less comprehensible. What the court seems to suggest is that Article 4, as a *lex specialis*, has precedence over Article 3, being *lex generalis*. Hence, since the birds to which Article 4 applies lived in the Marismas de Santoña, the obligations of Article 3 did not need to be considered. Yet, as A G Van Gerven correctly emphasised in his Opinion, the fact that Article 4 provides for additional obligations for certain groups of birds (ie those on Annex I and regularly occurring migratory birds), does not mean that the general obligations of Article 3

[4]Freestone, D, "The Leybucht Dikes Case" [1991] *Water Law* vol 2/5 pp 152–156.

[5]Op cit at p 155.

[6]Note, however, that when the Directive was adopted the Council adopted a Resolution calling upon the Member States to notify the Commission within two years of "the special protection areas which they had classified under the Directive; the wetlands which they had designated or intended to designate as wetlands of international importance [and] any other areas classified according to national legislation for bird protection." (OJ 1979 C 103).

[7]Case C-56/90, *Commission v United Kingdom*, 14 July 1993 (not yet reported) in particular grounds 34 and 35 of the judgment.

[8]Although Freestone (op cit) has argued that Article 4(4) produces direct effect, he does not pay attention to the fact that the obligations in Article 4(4) would seem prima facie conditional upon prior classification.

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need not be satisfied. This is particularly true since some of the obligations in Article 3, such as the re-establishment of destroyed biotopes, are not reproduced in Article 4. By way of example, in respect of the industrial zones at Laredo and Colindres, it would appear that the obligation to destroy the dykes (which the court merely hinted at) is not something that falls within the ambit of Article 4(4) but Article 3(2)(c).

2. The obligation to classify the Marismas de Santoña as a special protection area

Freestone's prediction that "the next step . . . [would be] for the European Court to accept that the obligation to designate sites has to be exercised in the light of objective criteria elaborated by Community law", has proved accurate. Thus, the court stressed that, whilst Member States possess a certain degree of discretion in respect of the choice of special protection areas, the classification of those areas had to follow certain ornithological criteria determined by the Directive, such as the presence of birds listed in Annex I of the Directive and the qualification of the habitat as a wetland. Applying these criteria to the Marismas de Santoña, the court reached the conclusion that this site should have been classified. The court also found Spain to be in breach of Article 4(2) in view of the importance of the Marismas for various migratory birds. Interestingly, A G Van Gerven had advised the court to reject the Commission's complaint in respect of Article 4(2) since the Commission had failed to provide sufficient statistical evidence.

Has Member States' discretion now become sufficiently circumscribed to argue that Article 4(1) is directly effective? At present such a conclusion seems rather premature. Even though the obligation to protect certain birds by means of the classification of special protection areas appears to be an absolute one, the exact form these measures must take (such as the location and size of the site) is largely left open by the Directive. Under these circumstances, it is difficult to see how Article 4(1) could produce direct effect.

3. The obligation to protect the Marismas de Santoña in accordance with Article 4(4) of the Directive

As was pointed out above, the fact that the Spanish authorities had failed to classify the Marismas de Santoña as a special protection area did not preclude the court from ruling on the legality of the activities affecting the territory in the light of Article 4(4). This being the case, planning authorities are well advised to take into account Directive 79/409 when dealing with planning applications, even if a certain site is not deemed to fall under the terms of Article 4(1) of the Directive. The examples of the new section of the C-629 road between Argoños and Santoña and the industrial zones at Laredo and Colindres clearly illustrate this point.

Interesting too is the court's ruling that water purification systems should be installed to protect the aquatic environment of the Marismas de Santoña, even though EC water Directives themselves do not directly impose such an obligation. Evidently, once more national authorities must not make the mistake of focussing exclusively on the Community's water legislation when determining the legality of certain discharges into the aquatic environment under Community law.

Now that the court has established that the activities in the Marismas de Santoña constitute a violation of Article 4(4) of the Directive, it becomes crucially important for the Commission to enforce the implementation of the judgment. In the present instance, practical measures will have to be taken by the Spanish authorities, such as the destruction of the dykes near Laredo and Colindres and any section of the C-629 that has already been built. Although, as A G Van Gerven stressed in his Opinion, Spain will be under an obligation to take all the necessary measures to comply with the judgment, in practice it is difficult for the Commission to enforce the court's judgments[9]. It is in cases involving practical implementation such as the present instance that it becomes particularly clear that the court should have the power to impose financial penalties on Member States which fail to adhere to a judgment. The amount of the payment should be such that it works as a real deterrent for Member States and hence should exceed or equal the cost of complying with the court's judgment.

[9]For the latest statistics see Tenth Annual Report on the monitoring of the application of Community law 1992 COM(93) 320 final.

Publications

Administrative Structures for Environmental Management in the European Community

This report describes, for each Member State and the Community and Commission, the national structure, the administrative structure of the agencies responsible for the environment, regional and local structures, principal areas of activity, support structures, lists of references and diagrams of administrative hierarchies. The report is available from the Office for Official Publications and its outlets and the price in Luxembourg is Ecu 11 (excluding VAT).