OPINION OF ADVOCATE GENERAL LÉGER

delivered on 7 November 2002 [1]

1. In the present action the Commission of the European Communities seeks a declaration that the Kingdom of Belgium has failed to fulfil its obligations under Article 4(1), (2) and (4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds. [2]

2. The aim of the Directive is the conservation of all species of birds naturally occurring in the wild in the territory of the Member States. It introduces rules for the protection, management and control of those species.

3. Article 4 of the directive concerns measures of special protection and similar measures. Article 4(1) requires Member States to determine the most suitable territories for the conservation of the species listed in Annex I and to classify them as special protection areas (hereinafter 'SPAs'). Article 4(2) requires Member States to take similar measures for regularly occurring migratory species not listed in Annex I. Finally, Article 4(4) [3] requires inter alia that Member States take appropriate steps to avoid deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated.

4. In the present action, the Commission makes three complaints against the Kingdom of Belgium. The complaints all concern the Région flamande (Flemish Region). [4]

5. First, the Commission points out that the Région flamande has not adopted the measures necessary to ensure the complete transposition of Article 4(1) and (2) of the directive. The Kingdom of Belgium does

1 — Original language: French.

2 — OJ 1979 L 103, p. 1 (hereinafter 'the directive').

3 — As amended by 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).

4 — At the outset the Commission also brought a number of complaints against the Région wallonne. However, it expressly withdrew those complaints in its reply (paragraphs 9 to 12).

not dispute this complaint. It admits that the provisions currently in force only ensure the 'partial transposition' of the provisions in question. [5]

6. Second, the Commission notes that, in accordance with the case-law of the Court, [6] Article 4 of the directive requires Member States to provide SPAs with a legal status that is capable of ensuring both the survival and reproduction of the species listed in Annex I and the breeding, moulting and wintering of migratory species not listed in Annex I which are regular visitors. The Commission states that the Région flamande has failed to adopt any measure automatically linking the classification of a site as an SPA to the application of an adequate legal protection regime. The Kingdom of Belgium does not dispute this complaint. [7] It indicates that the Flemish Parliament is currently examining draft legislation to that effect.

7. Third, the Commission submits that the Flemish authorities have not adopted the measures necessary to ensure that the geographical maps demarcating the SPAs have binding force and are enforceable against third parties. The Kingdom of Belgium disputes this complaint.

8. It is clear from the foregoing that the only issue between the parties concerns the third complaint, namely that the maps demarcating the SPAs lack binding force. I will therefore confine my observations to the assessment of that complaint and propose that the Court upholds the action in respect of the other complaints.

Complaint that the maps demarcating the SPAs lack binding force

9. The Commission submits that the Flemish authorities have failed to implement Article 4(1) and (2) of the directive correctly on the basis that the maps demarcating the SPAs in the Région flamande do not have binding force.

10. The Commission explains that, in Belgian law, [8] measures adopted by the regional authorities must be published in the *Moniteur belge* (official journal of the

5 — Defence (p. 3).

6 — The Commission refers to Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraphs 28 to 32, and Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 21.

7 — Rejoinder (pp. 2 and 3).

8 — See the Law of 31 May 1961 on the use of languages in legislation, the presentation, publication and the coming into force of statutory texts and regulations (*Moniteur belge* of 21 June 1961) and the Special Law of Institutional Reforms of 8 August 1980 (*Moniteur belge* of 15 August 1980).

Kingdom of Belgium) in order to have binding force. Only such publication creates an irrebuttable presumption that citizens are aware of the measures and, thereby, ensures that they are enforceable against third parties.

11. The Commission points out however that the maps demarcating the SPAs on Flemish territory have not been published in the *Moniteur belge*. To enable the population to become aware of them they were simply lodged in municipal offices. In the Commission's view, that is not sufficient to implement the legal protection regime required by Article 4 of the directive.

12. The Kingdom of Belgium contends that the question of the binding force of the maps demarcating the SPAs is a matter for the domestic law of the Member States. They enjoy considerable discretion in determining the manner in which they ensure the binding force of measures transposing directives. In any event, the Belgian Government submits that, according to the case-law of the Belgian Court of Cassation, the lodging of the maps at municipal offices gives them a force equivalent to that resulting from publication in the *Moniteur belge*.

13. In the light of the foregoing arguments, certain aspects of the obligations upon Member States when they transpose directives must be borne in mind.

14. It is settled case-law that the provisions of directives must be implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. [9] The principle of legal certainty requires appropriate publicity of the national measures adopted to transpose directives [10] in such a way as to enable individuals to be fully aware of their rights and, where appropriate, to rely on them before the national courts. [11] Nevertheless, the Court has made clear that the principle of legal certainty does not prescribe any specific form of publicity, such as the publication of

9 — See, for example, Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32.

10 — See, to that effect, Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraph 51.

11 — See, for example, Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, paragraph 9, and Case C-144/99 *Commission* v *Netherlands* [2001] ECR I-3541, paragraph 17.

the national measures in the Official Journal of the Member States. [12]

15. As regards the directive it is common ground that the maps demarcating the SPAs must of necessity have binding force. If that were not the case, the geographical extent of the SPAs could be put in doubt at any time and the aims of the directive seriously jeopardised.

16. In the present action, the Kingdom of Belgium does not dispute that, as a matter of federal law (the Special Law of Institutional Reforms, cited above), the measures adopted by the regional authorities must be published in the *Moniteur belge* if they are to have binding force. It nevertheless relies on an exception to the rule. It states that, in a judgment of 7 October 1983, [13] the Court of Cassation ruled that a draft area plan does not necessarily become binding solely by virtue of publication in the *Moniteur belge* but rather by being lodged at the municipal offices of each municipality to which the plan extends. The Belgian Government submits that this judgment, on town and country planning, is perfectly applicable to the maps demarcating SPAs.

17. We share the Commission's view that this argument cannot be accepted.

18. It is clear from the case-file [14] that the judgment which the Belgian Government relies on was given in particular circumstances. Thus the organic Law on Town and Country Planning of 29 March 1962 [15] provides that a draft area plan must be the subject of a public enquiry, announced by way of notices in all municipal offices, by notices placed on three occasions in the *Moniteur belge*, by notices published on three occasions in three newspapers of the capital and, if possible, in three newspapers of the region concerned and also by bulletins broadcast on three occasions by the National Institute of Radio Broadcasting.

19. Moreover, it is clear from the grounds of the judgment cited above that, in acknowledging the binding force of the draft area plans, the Court of Cassation relied on a number of specific factors such as the wording of the provision in question, the general scheme of the law and all the pronouncements made by the minister

12 — See *Mulligan and Others*, cited above, paragraph 51.
13 — Pas., 1983, I, 142.
14 — See application, paragraphs 34 and 35.
15 — *Moniteur belge*, 12 April 1962.

responsible during the passage of the law through parliament.

20. It should be borne in mind that, in the present case, the Kingdom of Belgium has not shown the existence of such factors. It is true that the Belgian Government submits that the decree of the Flemish executive of 17 October 1988 requires that the maps demarcating the SPAs be lodged at municipal offices. [16]

21. Nevertheless, it cannot be established from the case-file that the maps in question are the subject of a public enquiry identical to that required by the law cited above. Equally, it is not certain that the lodging of the maps is preceded by publicity measures comparable to those prescribed by that law. It is also unclear whether, as in the case cited, the legislature in fact intends to give the maps binding force by their being lodged at municipal offices. Lastly, and in particular, it is unclear whether, in Belgian law, a measure adopted by a federal body (the decree of the Flemish executive) can validly derogate from the principle of publication laid down by the federal law (the Special Law of Institutional Reforms).

22. In the light of those factors and on the basis of the documents before the Court, I take the view that the Kingdom of Belgium has not adequately proved that the maps demarcating the SPAs in the Région flamande have 'unquestionable' binding force in accordance with the case-law of the Court. [17]

23. As a consequence I propose that the Court uphold the third complaint brought by the Commission.

16 — See application, paragraph 32.

17 — See, for example, *Commission* v *Italy*, cited above, paragraph 32.

Conclusion

24. In the light of the foregoing, I propose that the Court should:

(1) declare that the Kingdom of Belgium has failed to fulfil its obligations under Article 4(1), (2) and (4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, in that the Région flamande has failed to adopt:

— within the period prescribed, all the laws, regulations and administrative provisions necessary fully to transpose Article 4(1) and (2) of that directive;

— all the laws, regulations and administrative provisions necessary automatically to link the classification of a site as a special protection area with the application of a legal protection system in accordance with Article 4(1), (2) and (4) of that directive; and

— the laws, regulations and administrative provisions necessary to give unquestionable binding force to the maps demarcating the special protection areas located on its territory.

(2) order the Kingdom of Belgium to pay the costs.