OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 14 September 2000 *

Introduction

1. In this case the Commission alleges that the French Republic has failed to fulfil its obligations under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (hereinafter 'the Directive'). [1]

The application, which sets out four pleas in law, refers to failure to transpose the 'principle of complete protection' laid down in the Directive, infringement of the Directive by the adoption of particular opening and closing dates for the hunting season, and failure to communicate information relating to the departments of Lower Rhine, Upper Rhine and Moselle, which have a special system of administrative law.

2. Hunting is an extremely important activity, not only for those who practise it, but because it affects proprietary rights, personal safety and the conservation of the environment and of animal species, which are regarded as a common heritage to be preserved and shared with future generations.

The Spanish philosopher José Ortega y Gasset maintained that 'a love of hunting is part of the human condition and springs from the deepest recesses of Man's being', [2] and went on to say that 'young people's fondness for hunting and thoughts of love have, together, fuelled the whole process of what has been called civilisation.' [3]

The very varied interests which converge in the sphere of hunting cause inevitable conflicts which the law seeks to resolve.

3. In France, hunting law has a historical and political dimension which gives it particular characteristics. Indeed, hunting law was, during the Revolution towards the end of the eighteenth century, the subject of debate between people, such as Mirabeau,

* Original language: Spanish.

1 — OJ 1979 L 103, p. 1.

2 — Ortega y Gasset, J.: 'La caza solitaria', *Obras completas*, Volume 9, Alianza Editorial, Madrid, 1997, p. 454.

3 — Ibid., p. 456.

who took the view that hunting was the exclusive right of the owner of the land on which it was practised, a view supported by the *ancien régime* which considered it to be a privilege of the nobility, and the followers of Robespierre, who sought to introduce hunting everywhere for all citizens. [4]

4. Moreover, in France large numbers of people hunt and any measure which affects them may have an impact on elections. The problem becomes more sensitive if we take into account that France has the longest hunting season in the European Union: seven-and-a-half months a year, as opposed to five-and-a-half months in Belgium, four-and-a-half months in Italy and four months in Spain. [5]

Directive 79/409

5. The immediate objective of Directive 79/409 is 'the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States' (Article 1(1)). Adopted on the basis of Article 235 of the EC Treaty (now Article 308 EC), it seeks to counteract the decline, in some cases very rapid, in the numbers of many species of birds, which represents a serious threat to the conservation of the natural environment and of the biological balances (second recital in the preamble).

6. The Directive therefore pursues a clear policy of conserving ornithological species, by prohibiting in particular the destruction and pollution of their habitats, the capture and killing of the birds, and trade resulting from such practices (Articles 5 and 6).

Even so, the prohibitions are not absolute: the measure as a whole seeks to achieve what it calls the 'natural balances between species as far as is reasonably possible' (eighth recital), by recommending that the stringency of the conservation measures be adapted 'to the particular situation of the various species' (seventh recital) and to the 'specific conditions obtaining in the different regions' (tenth recital), and by agreeing to some forms of 'acceptable exploitation' of certain species, 'compatible with maintenance of the population of these species at a satisfactory level' (eleventh recital).

For those reasons Article 2, in an endeavour to respond to the various concerns,

4 — The first situation derived from a Decree issued by the Constituent Assembly on 2 August 1789, which established the principle that 'any landowner may shoot any kind of game, but only on his own land'.

5 — Cassia, P. and Saulnier, E.: *La loi du 3 juillet 1998 sur la chasse et le droit communautaire:* error communis facit ius?, Revue Europe, July 1999, pp. 5-8.

requires that the protective measures to be adopted by the Member States should be 'at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements'.

Specifically, the Directive allows hunting of the species specifically listed in Annex II (Article 7(1)), provided that the conditions laid down in Article 7 are met, amongst which those contained in Article 7(4) should be emphasised:

'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 principle 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.*' [6]

It is those last three sentences of Article 7(4) that form the basis of the action brought by the Commission.

The case-law of the Court of Justice

7. The Directive's policy of conservation and the fact that cases in which hunting is allowed constitute exceptions have inspired the Court of Justice to lay down a particularly clear line of precedents. The following two cases are particularly relevant.

8. In its judgment of 17 January 1991 in *Commission* v *Italy* [7] (hereinafter 'the judgment in *Commission* v *Italy*'), the Court of Justice (Full Court) had to adjudicate as to the compatibility of Italian hunting legislation with the second and third sentences of Article 7(4) of the Directive. It was necessary to establish whether, when laying down the opening and closing dates of the hunting season, Italy had fulfilled its obligations under the Directive.

6 — Emphasis added.

7 — Case C-157/89 [1991] ECR I-57.

Of the grounds on which the Commission's action was declared well founded, I think it useful to highlight the content of paragraph 14:

'... it must be pointed out that the second and third sentences of Article 7(4) of the Directive are designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat. Consequently, protection against hunting activities cannot be confined to the majority of the birds of a given species, as determined by average reproductive cycles and migratory movements. It would be incompatible with the objectives of the Directive if, in situations characterised by prolonged dependence of the fledglings on the parents and early migration, part of the population of a given species should fall outside the protection laid down.'

9. The judgment of 19 January 1994 in *Association pour la Protection des Animaux Sauvages and Others* [8] (hereinafter 'the *APAS* judgment') again provided the full Court with an opportunity to define, this time in preliminary-ruling proceedings, the scope of the prohibitions contained in the second and third sentences of Article 7(4) of the Directive.

By the first question on which it sought a preliminary ruling, the Tribunal Administratif (Administrative Court), Nantes, wished to ascertain whether it was possible to fix the closing date for the hunting of migratory birds and waterfowl by reference to the varying times of the commencement of migration. The Court of Justice recalled the principles laid down in the judgment in *Commission* v *Italy* and concluded as follows:

'... the closing date for the hunting of migratory birds and waterfowl must be fixed in accordance with a method which guarantees complete protection of those species during the period of pre-mating migration and..., as a result, methods whose object or effect is to allow a certain percentage of the birds of a species to escape such protection do not comply with that provision.' [9]

10. In its second question, the national court sought guidance as to whether national authorities are empowered by the Directive to fix closing dates for hunting which vary according to the species concerned.

The Court of Justice considered, in principle, that it had been proved that fixing staggered closing dates for the hunting season presented two difficulties: first the disturbances caused by hunting to other species of bird for which hunting has

8 — Case C-435/92 [1994] ECR I-67.

9 — Paragraph 13.

already closed and, secondly, the risk of confusion between the different species at the time of capture.

In the circumstances, the Court gave this reply:

'... The national authorities are not empowered by the Directive to fix closing dates for the hunting season which vary according to the species of bird, unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering.' [10]

The third question on which a preliminary ruling was sought is not pertinent to the present case.

11. In simple terms, it is clear from that doctrine that methods of fixing closing dates for hunting which provide significant, though not complete, guarantees should be rejected, and that any system which staggers the closing dates for the different species should be accompanied by scientific and technical proof that it will not prevent the protection provided from being complete, as required by the Directive.

The French legislation at issue

12. Article L.224-2 of the *Code Rural* (Rural Code), in the version thereof resulting from Law No 94-591 of 15 July 1994 (hereinafter 'the Law of 1994'), empowered the Administration to fix the opening dates for the hunting of waterfowl and migratory birds (the category which corresponds to that of 'migratory birds' used in the Directive), without imposing any criterion or restriction in that regard. The general close season for hunting ended, depending on the region, on a specified Sunday in September (Article 224-4 of the Rural Code), while the specific date for migratory birds was not, in principle, to be earlier (Article 224-5 of the Rural Code), [11] unless the Minister with responsibility for hunting ruled otherwise (Article 224-6 of the Rural Code). Thus, for example, on 29 May 1997, the Minister for the Environment adopted various orders designed to give early authorisation for the hunting of waterfowl in 68 departments (hereinafter 'the Ministerial Orders of 1997').

Article L.224-2 also gave a table of closing dates which varied according to the various species, extending from 31 January, for the mallard, to the last day in February for the species which are the last to migrate. In certain circumstances, the administrative authority could bring those dates forward.

10 — Paragraph 22.

11 — Introduced by Decree No 90-879 of 28 September 1990.

13. Law No 98-549 of 3 July 1998 (hereinafter 'the Law of 1998') introduced significant amendments.

With regard to opening dates, the new Article L.224-2 (2) contains a table of dates for early opening of the hunting season in 68 French departments. Those dates coincide, in general, with the dates laid down in the Ministerial Orders of 1997.

With regard to closing dates, the Law of 1998 retains, in essence, the staggered system already in force, although it abolishes the power of the administration to bring them forward.

The action for failure to fulfil obligations

14. The Commission brought this action on 10 February 1999, after sending the relevant reasoned opinion to the French authorities on 5 August 1998, calling on them to adopt the requisite measures in order to comply with the provisions of the Directive. When the prescribed period elapsed two months later, the Commission's requirements had not been met.

15. The action is based on four separate pleas, namely:

(a) the principle of complete protection has not been transposed;

(b) the dates fixed for the opening of the hunting season are too early;

(c) the dates fixed for the close of the hunting season are too late;

(d) there has been no communication of any provisions transposing the Directive in relation to the departments of Lower Rhine, Upper Rhine and Moselle.

16. For clarity of presentation, I shall first analyse pleas (b) and (c) together, then plea (d) and, lastly, plea (a).

Assessment of the application

— The alleged failure to fulfil obligations by opening the hunting season too early and closing it too late

17. According to the Commission, the various French provisions regulating the opening of the hunting season for migratory birds are contrary to the Directive since they do not take into account the ban on hunting during the nesting, reproduction and rearing periods, as laid down by Article 7(4).

18. With regard to the system introduced by the Law of 1994, the Commission considers that the dates adopted by the Ministerial Orders of 1997 are not founded on scientific considerations and are too early to ensure complete protection of the species. It cites, in this respect, a survey carried out in February 1998 by the Office National de la Chasse (hereinafter 'the ONC'), from which it emerges that, in the 1997/1998 season, there was a significant overlap between the hunting seasons and the nesting, reproduction and rearing periods of the mallard and the coot.

The Commission also refers to several judgments of the Conseil d'État (Council of State) of 11 May 1998 annulling a number of the Ministerial Orders of 1997 on the ground that, by opening the hunting season within periods and areas in which the various species had not yet completed their reproduction and rearing cycles, they were in breach of the objectives of the Directive.

19. With regard to the rules laid down in the Law of 1998, the Commission considers that these have served only to aggravate France's failure to fulfil its obligations, since, although they do not make any major substantive amendments, they replace a provision which was subject to the Minister's discretion and of temporary scope with a mandatory and permanent rule which has the status of a law.

20. In its defence, the French Government contends that the opening dates for the hunting of waterfowl were fixed in accordance with a method developed jointly by the ONC and the Muséum National d'Histoire Naturelle. This method, based on the average date which may be deduced from the behaviour of the birds over the last five years, made it possible to protect the species against any 'significant reduction' in their numbers.

21. The French Government's objection must be rejected. From its own statements

it is clear that the opening dates for the hunting season given both in the Ministerial Orders of 1997 and the Law of 1998 are designed to protect the populations of migratory birds from suffering significant losses. However, as the Court of Justice stated in its judgment in *Commission* v *Italy*, [12] 'protection against hunting activities cannot be confined to the *majority* of the birds of a given species.' [13] The Directive does not recognise terms like 'significant reduction'; the protection it aims to achieve is complete protection. Therefore, methods whose object or effect is to allow a certain percentage of the birds of a species to fall outside such protection are contrary to the objectives of the Directive. [14]

22. The plea that the dates fixed for the opening of the hunting season are too early should be upheld.

23. In my view, the same can be said in relation to the setting of the closing dates.

24. According to the Commission, the closing dates expressly indicated in the Law of 1994 enable the hunting season to overlap with the scientifically recognised return migration period of 31 species and, in the case of 12 of them, to do so by more than 20 days. The Law of 1998 does not introduce significant amendments in that respect.

25. The French Government acknowledges from the outset that some of the closing dates fixed in accordance with the Laws of 1994 and 1998 are open to challenge under Article 7(4) of the Directive. It contends, however, that they are based on the Ornis method, which was adopted in April 1993 by the committee set up under Article 16 of the Directive ('the Ornis Committee') and published by the Commission on 24 November 1993. This method enables staggered closing dates to be fixed on the basis of two combined criteria: the state of conservation of the species in question and whether it migrates early or late. According to the French Government, the Ornis method accepts the possibility of an overlap, provided that it does not affect a significant percentage of the members of a species.

26. For the reasons given above, that argument should be rejected. A method whose object or effect is to allow a certain percentage of the birds of a species to be excluded from protection does not comply with the provisions of Article 7(4).

27. Nor is the practice of staggering closing dates by reference to species without pro-

12 — Cited in point 8 above.
13 — Emphasis added.
14 — Judgment in *APAS*, cited in point 8 above.

blems regarding compatibility with the Community rule.

As the Court of Justice recognised in the *APAS* judgment, from the conservation point of view, as expressed in the Directive, the method of fixing staggered closing dates entails two serious risks: the inevitable disturbances caused by hunting to other species of bird for which hunting has already closed and the risk that hunters may become confused between the different species when shooting them. In view of these difficulties, the Court held that a method such as that used in France was compatible with the Directive only if 'the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering.'

However, since the evidence adduced by the French Government refers to protection which, as I have concluded, is not complete, it cannot be relied on to justify an exceptional case of the kind contemplated by the Court in the aforementioned judgment.

28. Therefore, the plea that the dates fixed for the closing of the hunting season for migratory birds are too late should also be upheld.

— The alleged failure to fulfil obligations by omitting to communicate the hunting season dates applicable in the departments of Lower Rhine, Upper Rhine and Moselle

29. The last sentence of Article 7(4) of the Directive imposes on the Member States the obligation to send the Commission all relevant information on the practical application of their hunting regulations.

The Commission alleges that it has not received any communication in relation to those three French departments.

30. In relation to this plea, it need only be said that the French Government concedes that it did not communicate to the Commission — within the time-limit for responding to the reasoned opinion — the provisions applicable in the departments of Lower Rhine, Upper Rhine and Moselle which, it claims, are contained in Article R.229-1 et seq. of the Rural Code.

31. Consequently, the third plea should also be upheld.

— The alleged failure to fulfil obligations by failing to transpose the principle of complete protection into national law

32. In the preceding points I have reached the conclusion that the French Republic has failed to fulfil its obligations under the second and third sentences of Article 7(4) of the Directive, since it has not fixed the dates of the hunting season for migratory birds in such a way as to guarantee their complete protection during specific periods in which they are particularly vulnerable.

33. As a separate plea, the Commission claims that France has not incorporated into its legislation the provisions contained in those two sentences of Article 7.

34. The French Government does not deny that it has failed to do so.

35. It could be argued that the effectiveness of what I have been calling 'the principle of complete protection' [15] is achieved by setting hunting season dates which respect the nesting, reproduction and rearing cycles, and also the return migration periods, of migratory birds. If that is so, the question arises as to what further purpose would be served by formulating, in national law, a principle which is required to be given effect by means of the relevant legislation.

That is the view taken by the French Government, which invokes in its support the case-law embodied in various judgments, amongst them Case C-252/85 *Commission* v *France*, [16] in which it was held that 'the transposition of Community legislation into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision; a general legal context may be sufficient if it actually ensures the full application of the Directive in a sufficiently clear and precise manner.' [17]

36. I am not convinced that, in the present case, the incorporation into French law of a principle such as the one contained in Article 7(4) of the Directive is a purely formal matter. To put it another way, I do not think it is possible to guarantee the full

15 — This is merely a phrase which serves to summarise the obligations laid down in Article 7(4) of the Directive.

16 — Case C-252/85 [1988] ECR I-2243.

17 — Paragraph 5.

application of the Directive unless the principle of full protection is enunciated in French law.

37. As the Court of Justice recognised in *Commission* v *Italy*, cited above, 'birds'... migratory movements are subject to a degree of variability which, owing to meteorological circumstances, affects in particular the periods during which reproduction and migration take place. Thus, a number of birds of a given migratory species may begin their return journey to their rearing grounds comparatively early relative to average migratory flows. That is particularly true when the species concerned regularly travel between migration and rearing grounds which are sometimes at a considerable distance from each other, crossing numerous borders and affecting different countries and where, within one species, there are different populations whose routes sometimes diverge and pass through separate areas.' [18]

And if the birds' behaviour is variable, the level of scientific knowledge about such behaviour is also variable or, rather, evolving, as both the applicant and the defendant agree.

It is desirable that the uncertainty of the criteria for fixing the hunting season for birds should be offset by flexible regulations capable of adapting to differing circumstances and scientific discoveries, particularly if the intention is to have the longest hunting season in the European Union. [19] Only an authority such as the legislature seems to be in a position to adopt, opportunely and rapidly, the protective measures called for; and that authority, or any other called on to carry out a similar task, should act within a clear and precise regulatory framework suited to the requirements of the Directive. For this reason, I consider that the complete transposition of the Directive into national law requires the formulation, with sufficient mandatory status, of the principle enshrined in the second and third sentences of Article 7(4).

In all other respects, I share the view of the Court of Justice, for which a faithful transposition of a Directive into national law 'becomes particularly important in a case such as this in which the management of the common heritage is entrusted to the Member States in their respective territories.' [20]

38. The defendant, on the other hand, purports to prove the effectiveness of the

18 — Paragraph 12.

19 — See point 4 above.

20 — *Commission* v *Italy*, cited above, paragraph 9; Case 247/85 *Commission* v *Belgium* [1987] ECR 3029, paragraph 9; Case 236/85 [1987] ECR 3989, paragraph 5; and *Commission* v *France*, cited above, paragraph 5.

principle of complete protection in national law by reference to the litigation to which the issue of the compatibility of the Ministerial Orders of 1997 and the Law of 1998 with the provisions of the Directive has given rise in France. [21]

39. To my mind, and without going into the detail of those judgments, the very existence of the debate — which is in any event not relevant here since the judgments cited were given after expiry of the period with which this case is concerned [22] — is evidence of the legal uncertainty attributable to the French legislation and, indeed, lends weight to the need for an express enunciation in French law of the obligations laid down in Article 7(4) of the Directive.

40. In any event, it is comforting to see the attachment to Community law displayed by the French judicial authorities. Particularly welcome are the judgments of the Council of State of 3 December 1999 and 21 April 2000, referred to in these proceedings by the defendant, which have held that almost all the provisions of Article L.224-2 (2) of the Rural Code, as amended by the Law of 1998, are incompatible with the aim of conservation pursued by the Directive.

41. I am pleased to note that the draft law finally adopted by the National Assembly on 28 June last amends Article L.224-2 to include, amongst other provisions, the following: 'Birds shall not be hunted during the nesting period or during the various stages of reproduction and rearing. Furthermore, migratory birds shall not be hunted during their return to their nesting grounds.'

It is also established in the new legislation that the procedures for implementing those prohibitions will be prescribed by decree (*décret en Conseil d'État*).

42. Consequently, this plea in law should also be upheld, and I therefore propose that the Court uphold the application in its entirety and order the defendant, pursuant to Article 69(2) of the Rules of Procedure, to pay the costs.

21 — The French Government cites the following judgments given on: 24 November 1998 in *Association Côte d'Or Nature Environnement*, by the Tribunal Administratif, Dijon; 10 December 1998 in *Centre Ornithologique Rhône-Alpes*, by the Tribunal Administratif, Grenoble; 17 December 1998 in *Association FNE*, by the Tribunal Administratif, Pau; 30 December 1998 in *Association FNE*, by the Tribunal Administratif, Bordeaux; and 10 May 1999 in *Fédération Départementale du Gers*, by the Cour Administrative, Bordeaux.

22 — See point 14 above.

Conclusion

43. For all the reasons I have given, I propose that the Court uphold the action brought by the Commission in its entirety, declare that the French Republic has failed to fulfil its obligations under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds by failing to transpose into its national law the provisions of the second and third sentences of Article 7(4) of the Directive, by failing to set the dates of the hunting season for the birds to which the Directive applies in accordance with those provisions and by failing to send the Commission all relevant information on the practical application of its hunting legislation in the departments of Lower Rhine, Upper Rhine and Moselle, and order the French Republic to pay the costs.