OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 10 December 1998 *

1. In this infringement action, the Commission is seeking a declaration that the French Republic had, by 3 September 1995, failed to classify a sufficiently large Special Protection Area (hereinafter 'SPA') in the Seine estuary for the purposes of the wild birds directive, [1] that the protection regime adopted for the SPA classified in 1990 was legally inadequate, and that the construction of a titanogypsum plant had led to the deterioration of the SPA.

I — Facts and procedural background

2. The Seine estuary is, from the ornithological point of view, one of the most important wetlands of the French coast. It is visited by large numbers both of protected species listed in Annex I to the Directive, and of migratory species whose special protection is required by virtue of Article 4(2) of the Directive. A 1994 study published by the French Ministry of the Environment [2] identified the sites of major importance which accommodated specimens of wild birds deemed to be of Community and international importance according to criteria which corresponded to those of the Directive. An area of some 21 900 hectares in the Seine estuary figures under reference HN 03 in the inventory. The European ornithological inventory 'Important Bird Areas in Europe', published in 1989, mentioned an area of 7 800 hectares in the estuary.

3. On 11 April 1985, the Ministry of the Environment entered into an agreement (hereinafter 'the Agreement'), of ten years' duration, with the Autonomous Ports of Le Havre and Rouen for the protection of 3 300 hectares, the property of the French State. Some 2 000 hectares of this land were designated as being of long-term ecological interest, while the remaining 1 300 hectares were to be preserved pending their use by industry or the ports. Part of this territory, an area of some 2 750 hectares, was formally classified as an SPA in 1990.

4. The Commission wrote to the French authorities on 23 August 1991, following receipt of two complaints regarding the construction at Le Hode in the Seine estuary of a plant for the treatment and deposit of

* Original language: English.

1 — Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ 1979 L 103, p. 1; hereinafter 'the Directive'.

2 — Scientific inventory of important areas for bird conservation ('Zones Importantes pour la Conservation des Oiseaux'; hereinafter 'ZICO').

titanogypsum. In their replies of 7 and 22 November 1991, the French authorities argued that the plant was outside the SPA which had been classified, though they provided the Commission with a copy of the environmental impact assessment for the plant. That study noted the presence on the plant site of the Corncrake (*Crex crex*), a species protected under Annex I to the Directive. On 23 December 1992, the Commission sent France a formal letter of complaint pursuant to Article 169 of the Treaty establishing the European Economic Community, to which the French authorities replied on 18 November 1993. The Commission delivered a reasoned opinion on 3 July 1995 alleging the insufficiency of the area and of the legal protection regime of the Seine estuary SPA, as well as the failure to prevent the deterioration of the area; the French authorities were invited to take the necessary measures to comply with the opinion within two months. In their reply of 19 October 1995, they informed the Commission of their intention to classify an additional 10 000 hectares as an SPA, while contesting the remainder of the Commission's allegations. Following a further scientific study, Decree No 97-1329 of 30 December 1997 [3] established the Nature Reserve of the Seine Estuary, and classified an additional 14 500 hectares as an SPA.

5. The Commission initiated the present proceedings by an application registered at the Court on 30 April 1997.

II — The relevant provisions of Community law

6. The provisions of the Directive are well known to the Court, and need not be reproduced here *in extenso*. [4] The principal relevant obligations at issue are those imposed on the Member States, firstly, by Article 4(1) and (2), to 'classify in particular the most suitable territories in number and size as special protection areas for the conservation of [endangered and migratory] species, taking into account their protection requirements in the geographical sea and land area where this Directive applies', and, secondly, by Article 4(4), to avoid pollution and deterioration of habitats, and disturbances of birds, in respect of the areas so classified, 'in so far as these would be significant having regard to the objectives of this Article'.

III — Analysis

(a) The extent of the SPA

7. France has expressly admitted that the first SPA classified in 1990 was insufficient in area and recognised that the SPA should cover an area of approximately 16 800 hectares. This

3 — *Journal Officiel de la République Française* of 1 January 1998, p. 48.

4 — A more detailed account is to be found in paragraphs 11 to 23 of my Opinion in Case C-44/95 *Royal Society for the Protection of Birds* (hereinafter '*RSPB*') [1996] ECR I-3805.

state of affairs persisted until after the expiry of the period allowed for compliance with the requirements of the reasoned opinion. I therefore propose that the Court grant the Commission the declaration it has sought in regard to the first ground of complaint. The matters raised by France at the oral hearing to explain its delay in meeting its obligations, such as local opposition and the need to take account of future economic development, are clearly not relevant here.

(b) The legal protection regime of the SPA under the Agreement

8. The Commission's complaint under this heading raises a number of interesting issues, such as the existence under Article 4(1) of the Directive of an obligation to establish a legal regime which may be binding upon and capable of being relied upon by third parties. It asks for consideration of whether an SPA may be established by an arrangement of a contractual nature as opposed to a statutory or administrative act. I do not consider, however, that the Court either need or should address these issues, for the simple reason that, by the date of the expiry of the deadline for compliance fixed in the reasoned opinion, viz. 3 September 1995, the Agreement was no longer in force.

9. It is settled case-law that 'the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion'. [5] In its reasoned opinion, so far as the issue under consideration is concerned, the Commission relied solely on the insufficiency of the contractual regime of legal protection provided under the Agreement, while expressly conceding that France had in fact classified as an SPA an area of 2 750 hectares within the land which was covered by the contract. The Commission did not seek to show that France had failed in its substantive obligations under Article 4(4) of the Directive, [6] by failing to prevent the pollution or deterioration of bird habitats, or disturbances affecting the birds, in the areas so classified. This line of argument is faithfully reproduced in its application before the Court.

10. Without some concrete suggestion that the contractual arrangements entered into by the French Government with the Port authorities of Le Havre and Rouen in respect of State-owned land were such as to allow identifiable damage to be caused to ornithological interests, or, put otherwise, that the French

5 — Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraph 36.

6 — See '*Santoña Marshes*', Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 22.

State failed to protect those interests on its own land, I cannot see any purpose in entering on the abstract question of whether a contractual regime can secure adequate protection. In any event, some 80 % of the affected area (3 300 hectares) was included at all material times in the SPA (2 750 hectares) classified in 1990. The Commission has not made any specific point regarding the 550 hectares omitted from the SPA, an issue which relates to the first ground of complaint.

11. I therefore recommend that the Court reject the Commission's complaint concerning the insufficiency of the legal protection regime of the SPA under the Agreement of 11 April 1985, on the ground that it was no longer in force on the expiry of the deadline for compliance with the reasoned opinion.

12. This latter recommendation should not, of course, be taken as equivalent to a finding that, on its terms, the regime established by the Agreement constituted a legally sufficient fulfilment of France's obligation to classify the Seine estuary SPA, but rather that the Commission has not, in the present circumstances, shown the existence of an obligation in the terms it relies upon in this head of complaint, or the breach of any such obligation.

(c) The construction of a titanogypsum plant at Le Hode

13. The Commission's third head of complaint is that the French authorities allowed the construction of a titanogypsum plant in an area which should have been classified within the Seine estuary SPA, and that by so doing France has breached its obligations under the first sentence of Article 4(4) of the Directive. It relies on the fact that the plant and its appurtenances, which cover 50 hectares, are situated in wetlands which are very important for the staging, feeding and reproduction of numerous endangered and migratory species of wild birds. At the hearing, the Commission indicated that this was the only point under the third head of complaint which concerned it, and I do not therefore propose to deal with the other aspects raised in its written pleadings.

14. The Commission does not specify whether it is referring to the obligations which are imposed by Article 4(4) of the Directive in its original form, or those which arise as a result of Article 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. [7] As it appears from the case-file that the construction of the plant commenced before the latter directive came into force, I assume that the original version of Article 4(4) is applicable.

7 — The Habitats Directive, OJ 1992 L 206, p. 7.

15. France has vigorously contested the Commission's allegations in this regard, both on the ground that it was not obliged under the Directive to classify the terrain in question as an SPA, and because the operation of the plant does not constitute a breach of its obligations under Article 4(4) to maintain the habitats actually protected. It relies in particular on the following arguments:

— the construction of the titanogypsum plant is a direct consequence of the application of Council Directive 92/112/EEC of 15 December 1992 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry; [8]

— the construction had been preceded by two environmental impact assessment studies in 1991 and 1993, the latter study concluding that the titanogypsum deposit would not cause any significant deterioration in the habitat of the species concerned; this was confirmed by an independent assessor following a public enquiry into the operation of the plant in December 1994 and January 1995;

— no obligation to classify the site of the plant as an SPA flowed from the mere fact that it was listed in the ZICO and in any case the Commission has not provided any scientific evidence to demonstrate that the area should have been classified;

— the site chosen for the titanogypsum plant was not amongst the most important sites as regards biodiversity, as classified by the regional environment department ('Direction Régionale de l'Environnement' or 'DIREN'). Moreover, the site could not be classified as 'wetlands' in accordance with the Ramsar Convention, and it had in fact dried out several decades ago, though it was still generally described as marshland;

— the storage of titanogypsum carried out at the Le Hode plant did not contravene the conservation requirements of Article 4(4) because artificial gypsum is not eco-toxic, the water discharges contain a very low quantity of pollutants, the storage of gypsum to a maximum height of 25 metres is not such as to disturb the migratory behaviour of birds, and the operation of the site has only increased road traffic by 2.3%;

— a number of significant measures have been taken specifically with a view to avoiding any pollution or deterioration of the habitats or of species on the site.

8 — OJ 1992 L 409, p. 11.

16. There appears to be some disagreement as to the exact area of the site, with estimates varying between 35 and 100 hectares. In its reply, the Commission indicated that the plant, the deposit and the access road are situated on 50 hectares of natural prairies of major ornithological interest in an enclave within, but excluded from, the 1997 SPA. France has stated, without being contradicted on this point, that a further 50 hectares contiguous to the site has been set aside as reserve land, which is to be maintained as wet prairie and managed in liaison with the natural reserve; no storage is to take place on this area. In line with the delimitation of the Commission's complaint at the hearing, I will confine my remarks to the site, of between 35 and 50 hectares, containing the plant, the deposit and the access road.

17. In order for the Commission to succeed under this head, it must first show that the site was amongst the 'most suitable territories ... for the conservation of [the] species [concerned]', and hence that France was under an obligation to classify it as, or within, an SPA. It is settled case-law that 'in proceedings under Article 169 ... it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled ... and in so doing the Commission may not rely on any presumption'. [9] As proof of such suitability, the Commission relies on the fact that the site is included in the ZICO.

18. In the first place, it is clear that the relatively modest size of the site of the titanogypsum plant is not determinative of the absence of any duty on the Member State to classify it as, or include it within, an SPA. The *RSPB* case concerned Lappel Bank, an area of just 22 hectares, the ornithological importance of which was not in dispute, within a very much larger area. [10]

19. That said, I find it difficult to see how the Commission can rely upon a study drawn up in 1994 to prove that a particular territory was amongst the most suitable territories for classification at the time of the construction of the titanogypsum plant in 1992. If, as France maintains, the ZICO was a preliminary inventory of the sites of ornithological interest from which the most suitable territories would be chosen, then it follows that the mere inclusion of the site in question in the ZICO does not show that it should have been classified as an SPA. Member States should be encouraged to arrange for comprehensive surveys of their national territories with a view

9 — Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6.

10 — Case C-44/95, cited in footnote 4 above.

to carrying out their duty of classification under the Directive. It would be counter-productive, in my view, to treat every area identified as suitable for the protection of wild birds as automatically requiring classification.

20. It is important, however, before reaching a conclusion on this point to recall the obligation of Member States as laid down most recently in *Commission* v *Netherlands*, where the Court stated that 'the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Directive'. [11]

21. It is not contested that a plant for the treatment and storage of titanogypsum has been constructed on an enclave in the (current) Seine estuary SPA; it is also clear from a study published by the DIREN in April 1995 that the enclave falls within the nesting area of the Corncrake. The nesting area, which hosts some 15 to 50 couples, is, however, much larger than the enclave, and the Commission has not shown that the site was itself amongst the 'most suitable territories' for classification. In particular, it has not responded to France's citation of the study by the Museum of Natural History on which the 1993 environmental impact assessment was based; according to the study, none of the rarest species in the locality, including the Corncrake, would suffer directly from the project, notwithstanding the disappearance of 35 hectares of prairie. Nor has the Commission answered France's argument that the site was in a sector of the estuary which had been classified by the DIREN in 1993 as being of low interest from the point of view of biodiversity, and that the site had dried out several decades before the construction of the plant and could not therefore be considered to be wetlands within the meaning of the Ramsar Convention of 2 February 1971. [12]

22. The Commission's third head of complaint should also be rejected, on the ground that it has failed to show that the titanogypsum plant was constructed on a site which should have been classified as or within an SPA.

(d) Costs

23. In the present case, the Commission has won on the principal head of complaint, and the initiation of the proceedings may have encouraged France to bring the lengthy classification procedure to a close. Its application was not, however, contested on this head; had

11 — Case C-3/96, cited in footnote 5 above, paragraph 61.

12 — United Nations Treaty Series Volume 996, p. 245; see also Commission Recommendation 75/66/EEC of 20 December 1974 to Member States concerning the protection of birds and their habitats (OJ 1975 L 21, p. 24), recommending that Member States accede to the Ramsar Convention.

this been the only head of complaint, the Commission would, in all probability, have withdrawn the case after the adoption of Decree No 97-1329 of 30 December 1997, before the lodging of its reply. Should the Court follow my recommendations, the Commission would have failed on the two contested heads of complaint. In these circumstances, I would consider it appropriate for the Court to order each party to bear its own costs, in accordance with Article 69(3) of the Rules of Procedure.

IV — Conclusion

24. In the light of the foregoing, I recommend to the Court that it:

(1) declare that, by failing, by 3 September 1995, to classify as a special protection area within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, a territory in the Seine estuary of a sufficiently large area, the French Republic has failed in its obligations under that Directive;

(2) dismiss the remainder of the application;

(3) order each party to bear its own costs.