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JUDGMENT OF THE COURT (Second Chamber)

11 January 2007 (*)

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Articles 12(1) and (2), 13(1)(b) and 16 – Conservation of natural habitats and of wild fauna and flora – Protection of species)

In Case C-183/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 22 April 2005,

Commission of the European Communities, represented by M. van Beek, acting as Agent, assisted by M. Wemaëre, avocat, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris, J. Klučka (Rapporteur), J. Makarczyk and G. Arestis, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2006,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities requests the Court to declare that:
 - by limiting the transposition of the provisions of Articles 12(2) and 13(1)(b) 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) to the species listed in Annex IV to that directive that occur in Ireland,

- by failing to take all the requisite specific measures for the effective implementation of the system of strict protection required by Article 12(1) of that directive ('the system of strict protection'), and
- by retaining provisions of Irish legislation that are inconsistent with those of Articles 12(1) and 16 of that directive,

Ireland has failed to comply with those articles and with its obligations under the EC Treaty.

Legal context

2 The 4th and 11th recitals in the preamble to Directive 92/43 are worded as follows:

'... in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; ... given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;

...

... it is recognised that the adoption of measures intended to promote the conservation of priority natural habitats and priority species of Community interest is a common responsibility of all Member States; ...'

3 Article 12(1) and (2) of Directive 92/43 states:

'1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

...

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

...

(d) deterioration or destruction of breeding sites or resting places.

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.'

4 Article 13 of Directive 92/43 provides for the establishment of a system of strict protection for the plant species listed in Annex IV(b) to that directive.

5 Article 16(1) of Directive 92/43 provides as follows:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

Pre-litigation procedure

- 6 On 18 October 2002, following complaints, the Commission sent Ireland a letter of formal notice in which it informed it of its doubts regarding several aspects of that Member State's implementation of Articles 12, 13 and 16 of Directive 92/43.
- 7 As the Commission did not consider the Irish authorities' response of 20 December 2002 to be convincing, on 11 July 2003 it sent Ireland a reasoned opinion calling on it to take the requisite measures to comply with its terms within two months of the date of its notification.
- 8 Ireland responded to the reasoned opinion by letters of 12 September 2003 and 8 January 2004. However, the Commission did not consider that response to be satisfactory and decided to bring the present action.

The action

- 9 In its action the Commission puts forward three complaints:
 - the first complaint relates to the incomplete transposition of Articles 12(2) and 13(1)(b) of Directive 92/43 with regard to the species listed in Annex IV to that directive which do not naturally occur in Ireland;
 - the second complaint relates to Ireland's failure to adopt specific measures for the effective implementation of the system of strict protection;
 - the third plea relates to the existence in Irish legislation of provisions which are inconsistent with both Article 12(1) and Article 16 of Directive 92/43.
- 10 The Commission withdrew the first complaint during the procedure in the light of Ireland's response to that point in its statement in defence. There is therefore no need to consider it.

The second complaint

- 11 The second complaint put forward by the Commission consists of seven parts. The second part of that complaint will be examined together with the third complaint since the wording of the two is identical.

The first part of the second complaint

- 12 As regards the first part, which alleges that Ireland has failed to fulfil its obligation to establish a system of strict protection in respect of the species listed in Annex IV to Directive

92/43, in that neither the leatherback turtle nor the Kerry slug was listed among the species in the First Schedule to the European Communities (Habitats) Regulations 1997, as amended by the European Communities (Natural Habitats) (Amendment) Regulations 1998 ('the (Habitats) Regulations'), the Commission indicates that the response provided by Ireland in that respect is satisfactory. Ireland pointed out that the field of application of the national legislation which transposes Directive 92/43 had been widened to cover those species. It is therefore not necessary to consider the first part of the second complaint.

The third, fourth and sixth parts of the second complaint

- 13 By the third, fourth and sixth parts of the second complaint the Commission submits that the measures taken by Ireland in respect of monitoring the species listed in Annex IV(a) to Directive 92/43 are, on the whole, disparate and patchy and cannot be regarded as effectively implementing the system of strict protection.
- 14 As regards, first, the third part of that complaint, the Commission points out that the species action plans which Ireland intends to prepare for the species listed in Annex IV(a) to Directive 92/43 may, on condition that they are correctly established and applied, constitute an effective means of implementing specifically the requirements regarding protection laid down in Article 12(1) of that directive. However, in the absence of such plans, the system of strict protection contains gaps, except in relation to the natterjack toad, which is covered by an appropriate specific monitoring system.
- 15 Ireland submits that those plans are currently being published. It also puts forward several government initiatives which have not yet been completed and which, in its opinion, will lead to improved concerted action and a more systematic monitoring of the species listed in Annex IV(a) to Directive 92/43.
- 16 However, such arguments cannot be upheld.
- 17 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 Member State at the end of the period laid down in the reasoned opinion, and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-282/02 *Commission v Ireland* [2005] ECR I-4653, paragraph 40).
- 18 The third part of the second complaint must therefore be held to be well founded.
- 19 As regards the sixth part, which needs to be examined before the fourth, the Commission submits that, with the exception of the horseshoe bat and the natterjack toad, the Irish authorities are not in possession of the necessary information in relation to several of the species listed in Annex IV(a) to Directive 92/43, their resting places and breeding sites and the threats to which those species are subject, which prevents the effective implementation of the system of strict protection.
- 20 Ireland first of all acknowledges that, with regard to bats other than the horseshoe bat, its pilot monitoring project is no substitute for more detailed survey work. Ireland states that it will provide, in due course, vital information on the population trends of those species and refers to several initiatives for the compilation of information regarding bats. According to the Commission, such an indication shows neither that Ireland is sufficiently informed about the species of bats nor that that Member State will implement a coherent long-term programme in order to obtain the necessary information.
- 21 Second, Ireland submits that the national study, which was launched in 2004 and was due to come to a close in autumn 2005, is part of the framework of a pre-existing programme and is capable of forming the basis of a future programme for the monitoring of otters. According to the Commission, that assertion is not sufficient to establish with certainty that

an adequate monitoring system and programme will be put in place for the species in question.

- 22 Third, Ireland points out that a national expert on Kerry slugs is preparing an action plan which is due to be published in spring 2006 and will include recommendations in respect of a continuous monitoring programme for that species. According to the Commission, the measures and actions taken by Ireland do not provide any certainty as to the regular provision of monitoring information compiled in a coherent and integrated manner on the presence of that species, its breeding sites and resting places and the threats to which that species might be subject.
- 23 Fourth, Ireland refers to current initiatives, such as the decision to establish a national biological records database and the setting up of the National Biological Records Centre or the collection of observer data on incidental catches of cetaceans in certain fishing activities, which have been adopted since the entry into force of Council Regulation (EC) No 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98 (OJ 2004 L 150, p. 12).
- 24 In that regard, it should be pointed out that, for the purpose of challenging the sixth part of the second complaint, Ireland refers to a number of initiatives which had not yet been concluded by the date on which the period prescribed in the reasoned opinion expired. Such initiatives cannot, according to the case-law cited in paragraph 17 of this judgment, be taken into account by the Court in its assessment of the failure to act alleged by the Commission.
- 25 Consequently, the sixth part of the second complaint must be held to be well founded.
- 26 As regards, finally, the fourth part of that complaint, the Commission submits that, although a network of full-time officials responsible for conservation is of general importance for the implementation of the legislation concerning wild fauna and flora, the existence of such a network does not, as alleged by Ireland, in itself demonstrate that the specific measures required have been adopted for the purpose of transposing Article 12(1) of Directive 92/43.
- 27 Ireland responds that its officials are highly effective and also protect the natterjack toad by playing a vital role in the enforcement of the protection of that species. Similarly, by reason of the direct knowledge which conservation rangers and district conservation officers have of the zones for which they are responsible, the national network of such rangers and officers is aware of the conservation status of the animal and plant species in those zones.
- 28 In that regard, it should be recalled that Article 12(1) of Directive 92/43 requires the Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range.
- 29 As noted by the Advocate General in point 24 of his Opinion, the transposition of Article 12(1) of the Directive requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (see, to that effect, Case C-103/00 *Commission v Greece* [2002] ECR I-1147, paragraphs 34 to 39).
- 30 Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (Case C-518/04 *Commission v Greece*, not published in the ECR, paragraph 16).
- 31 In the present case, the existence of a network of full-time rangers and officers responsible for monitoring and protecting species does not, in itself, demonstrate effective implementation of the system of strict protection for all of the species listed in Annex IV(a) to Directive 92/43 that occur in Ireland.

32 As pointed out by the Advocate General in points 45 to 48 of his Opinion, those species are not covered by an appropriate monitoring system, with the exception of the horseshoe bat, the natterjack toad and the leatherback turtle, given the limited numbers of the latter species in Irish waters. Such is the case for the otter, the Kerry slug, various species of bats other than the horseshoe bat, and cetaceans, as is apparent from paragraphs 20 to 24 of this judgment.

33 The fourth part of the second complaint must therefore be held to be well founded.

The fifth part of the second complaint

34 By the fifth part of the second complaint, the Commission submits that, although environmental impact assessments undertaken pursuant to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) can play a useful role in alerting the competent authorities to specific threats to the breeding sites and resting places of the species listed in Annex IV to Directive 92/43, only a limited number of projects are subject to such assessments in Ireland. In addition, even where such assessments are undertaken, the Irish authorities require property developers to provide information on protected species only after development consent has been granted for the project concerned. Therefore, that procedure does not prevent certain developments which may be harmful to the environment.

35 The Commission refers, in particular, to three projects having negative impacts on bat populations (the Lough Rynn Estate project), horseshoe bat roosts (the Ennis Bypass project) and the breeding sites and resting places of cetaceans (the project for the construction of a gas pipeline in Broadhaven Bay).

36 In that regard, as noted by the Advocate General in points 53 to 61 of his Opinion, the authorisation of a project prior to the environmental impact assessment concluding that that project would have negative impacts on the environment (the Lough Rynn Estate project), or the authorisation of other projects without a derogation, even though the preliminary assessment also concluded that that project would have negative impacts on the environment (the Ennis Bypass project and the project for the construction of a gas pipeline in Broadhaven Bay), shows that the species listed in Annex IV(a) to Directive 92/43 and their breeding sites and resting places are subject to disturbances and to threats which the Irish rules do not make it possible to prevent.

37 Consequently, as regards the projects put forward by the Commission in its application, it cannot be concluded that all measures have been taken to implement effectively the system of strict protection. Consequently, the fifth part of the second complaint must be held to be well founded.

The seventh part of the second complaint

38 By the seventh part of the second complaint the Commission submits that Ireland has failed to demonstrate that it instituted any appropriate strategy for responding to the types of threat to the breeding sites and resting places of bat species. It claims, in particular, that timber treatment, building renovations and demolition work constitute threats to bat roosts.

39 In that regard, it must be borne in mind that, according to settled case-law, in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove that the obligation has not been fulfilled without being able to rely on any presumption (Case C-221/04 *Commission v Spain* [2006] ECR I-4515, paragraph 59 and the case-law cited).

40 In the present case, it must be held that the Commission has not put forward any concrete evidence to substantiate the seventh part of its second complaint.

41 The seventh part of the second plea must therefore be held to be unfounded.

The third complaint

- 42 By its third complaint, the wording of which is identical to that of the second part of the second complaint, the Commission alleges that there exists a parallel regime of derogations which are incompatible with the scope and the conditions of application of Article 16 of Directive 92/43. That regime is to be found, first, in section 23(7) of the 1976 Wildlife Act, as amended by the 2000 Wildlife (Amendment) Act ('the Wildlife Act'), and, second, in section 42 of that act.
- 43 In the light of Ireland's defence in respect of the failure relating to section 42 of the Wildlife Act, the Commission has withdrawn that part of its third complaint. Therefore, it is not necessary to consider it.
- 44 As regards the part of the third complaint relating to section 23(7)(a) to (c) of the Wildlife Act, the Commission submits that, under those provisions, it is not an offence for a person: unintentionally to injure or kill a protected wild animal while engaged in agriculture, fishing, aquaculture, forestry or turbarry (section 23(7)(a)); to interfere with or destroy the breeding place of such an animal while engaged in such activities (section 23(7)(b)); or unintentionally to kill or injure such an animal or unintentionally to destroy or injure the breeding place or resting place of such an animal while constructing a road or carrying on any archaeological operation, building operation or work of engineering construction, or while constructing or carrying on such other operation or work as may be prescribed (section 23(7)(c)).
- 45 Ireland submits that the Commission has misinterpreted the purpose of section 23(7). However, in order to remove any ambiguity in that regard, Ireland states that it has made amendments to the (Habitats) Regulations in order to define clearly the regime under section 23 of the Wildlife Act and the provisions of Regulation 23 of the (Habitats) Regulations. The 2005 European Communities (Natural Habitats) Regulations inserted a new provision into the Wildlife Act, namely section 23(8).
- 46 In that regard, it must, first, be pointed out that the amendment of section 23 of the Wildlife Act brought about by the 2005 Regulations cannot, according to the case-law cited in paragraph 17 of this judgment, be taken into account by the Court in its assessment of the alleged failure to fulfil obligations inasmuch as that amendment was made after the two-month period laid down in the reasoned opinion had expired.
- 47 Second, suffice it to state that, by providing that acts which unintentionally interfere with or destroy breeding sites or resting places of wild species do not constitute an offence, section 23(7)(b) of the Wildlife Act does not satisfy the requirements of Article 12(1)(d) of Directive 92/43, which prohibits such acts, whether they are intentional or not (see, to that effect, Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, paragraph 79).
- 48 In addition, it appears that the derogations laid down in section 23 of the Wildlife Act go beyond what is provided for in Article 16 of Directive 92/43, since the latter determines, in an exhaustive manner, the conditions under which derogations may be made from Article 12 of that directive.
- 49 It follows that the Commission is correct in law to allege that there is a parallel regime of derogations under Irish legislation which are inconsistent with Articles 12 and 16 of Directive 92/43.
- 50 The third complaint advanced by the Commission in support of its action is therefore well founded.
- 51 In the light of all of the foregoing, it must be held that:

- by failing to take all the requisite specific measures for the effective implementation of the system of strict protection, and
- by retaining the provisions of section 23(7)(a) to (c) of the Wildlife Act which are incompatible with those in Articles 12(1) and 16 of Directive 92/43,

Ireland has failed to comply with those articles of Directive 92/43 and to fulfil its obligations under that directive.

Costs

- 52 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs to be awarded against Ireland, and as the latter has been unsuccessful in the essential aspects of its submissions, Ireland must be ordered to pay the costs.

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

1. Declares that

- **by failing to take all the requisite specific measures for the effective implementation of the system of strict protection laid down in Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and**
- **by retaining the provisions of section 23(7)(a) to (c) of the 1976 Wildlife Act, as amended by the 2000 Wildlife (Amendment) Act, which are incompatible with those in Articles 12(1) and 16 of Directive 92/43,**

Ireland has failed to comply with those articles of Directive 92/43 and to fulfil its obligations under that directive;

2. Orders Ireland to pay the costs.

[Signatures]