

JUDGMENT OF THE COURT (Second Chamber)

20 October 2005 (*)

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Conservation of natural habitats – Wild fauna and flora)

In Case C-6/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 9 January 2004,

Commission of the European Communities, represented by M. van Beek and L. Flynn, acting as Agents, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by C. Jackson, acting as Agent, and K. Smith, Barrister,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, R. Silva de Lapuerta, G. Arestis and J. Klučka (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 26 May 2005,

after hearing the Opinion of the Advocate General at the sitting on 9 June 2005,

gives the following

Judgment

- 1 By its action, the Commission of the European Communities requests the Court to declare that, by failing to transpose correctly the requirements 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, 'the Habitats Directive'), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive.

Legal context

Community legislation

- 2 According to Article 2(1) of the Habitats Directive, the aim of the directive is to contribute towards ensuring biodiversity through the conservation of natural habitats

and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies.

- 3 In accordance with Article 3(1) of the Habitats Directive, the Member States designate special areas of conservation ('SACs') with a view to maintaining or restoring, at a favourable conservation status, natural habitat types and habitats of species of Community interest. Those areas are to form part of a European ecological network under the title Natura 2000.
- 4 Article 6 of the Habitats Directive relates to the measures necessary in order to protect SACs. Surveillance of the conservation status of natural habitats and species of Community interest is governed by Article 11 of the directive. Articles 12 and 13 concern measures for protecting animal and plant species. Article 14 relates to the taking of specimens of species of wild fauna and flora. Article 15 prohibits certain indiscriminate means of capture or killing of some species of wild fauna. Article 16 sets out the circumstances in which the Member States may derogate, for specified purposes, from certain provisions of the directive.
- 5 Under Article 23(1) of the Habitats Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification and were forthwith to inform the Commission thereof. The directive was notified to the Member States on 10 June 1992.

National legislation

- 6 The principal instruments transposing the Habitats Directive in the United Kingdom that are relevant in the present case are the following:
 - the Conservation (Natural Habitats, &c.) Regulations 1994 ('the 1994 Regulations'), which apply in England, Wales and Scotland;
 - the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 ('the 1995 Regulations'), which apply in Northern Ireland;
 - the Nature Protection Ordinance 1991 as amended by the Nature Protection Ordinance (Amendment) Regulations 1995 ('the 1991 Ordinance'), which applies in Gibraltar;
 - the Conservation of Seals Act 1970 ('the Conservation of Seals Act').
- 7 Regulation 3(2) of the 1994 Regulations provides that the Secretary of State, the Minister of Agriculture, Fisheries and Food and the nature conservation bodies are to exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive.
- 8 Regulation 3(4) of the 1994 Regulations provides that, without prejudice to the provision referred to in the preceding paragraph, every competent authority in the exercise of any of its functions is to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.

Pre-litigation procedure

- 9 On 6 November 2000, the Commission sent to the United Kingdom a letter of formal notice in which it contended that certain provisions of the Habitats Directive had not been correctly transposed into that Member State's domestic law.
- 10 The United Kingdom authorities replied to the letter of formal notice by letter of 27 February 2001. They accepted that on two points, relating to offshore oil and gas

activities and to the extension of the application of the Habitats Directive beyond territorial waters, the letter of formal notice was well founded, but contested most of the other complaints raised in it.

- 11 Since it was not persuaded by the explanations provided by the United Kingdom, on 18 July 2001 the Commission issued a reasoned opinion in which it repeated its complaints and called on the United Kingdom to take the necessary measures to comply with the reasoned opinion within two months of its receipt.
- 12 By letter of 27 November 2001 ('the letter of 27 November 2001') the United Kingdom informed the Commission, in response to the reasoned opinion, of its intention to amend its legislation in order to establish greater legal certainty and clarity on a number of points at issue in the reasoned opinion, while maintaining that in general the measures in force complied with the Habitats Directive.
- 13 Finally, by letter of 2 December 2003, the United Kingdom authorities informed the Commission of progress made in the process of implementing changes in national legislation to transpose the Habitats Directive better.
- 14 It was in those circumstances that the Commission decided to bring the present action.

The action

The method of transposing the Habitats Directive

Arguments of the parties

- 15 The Commission alleges that the United Kingdom has not transposed the Habitats Directive appropriately into its legal order. In particular, the Commission submits that the United Kingdom has wrongly adopted a general clause for the purpose of filling any gaps in the specific provisions designed to transpose it.
- 16 The United Kingdom maintains that it has correctly transposed the Habitats Directive by adopting, for its transposition, legislation which contains not only specific requirements but also general duties and administrative procedures. Those general duties must be read together with the specific requirements of that legislation, which they supplement, thereby ensuring that the directive is in fact implemented appropriately.
- 17 The United Kingdom authorities rely in particular on regulation 3(2) and (4) of the 1994 Regulations, the equivalent provisions of which are, for Northern Ireland, regulation 3(2) and (4) of the 1995 Regulations and, for Gibraltar, section 17A of the 1991 Ordinance. Those provisions require ministers, nature conservation bodies and all competent public authorities to exercise their functions so as to secure compliance with the requirements of the Habitats Directive.
- 18 The Commission submits, on the other hand, that the general clauses pleaded by the United Kingdom are not sufficiently precise to ensure transposition into national law of the specific obligations imposed by the directive.
- 19 In order to determine the scope of their rights and obligations, individuals must refer to the Habitats Directive each time, a situation which does not meet the requirements of legal certainty or the conditions with regard to specificity, precision and clarity required under the settled case-law of the Court.
- 20 The Commission adds that if the Court were to follow the logic of the United Kingdom's reasoning, the whole directive could presumably have been transposed

by such a general clause. This would be at odds with the requirement of specificity repeatedly noted in the case-law on the transposition of directives.

Findings of the Court

- 21 Under the third paragraph of Article 249 EC, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods for implementing the directive in question in domestic law. However, in accordance with settled case-law, while the transposition of a directive into domestic law does not necessarily require that the content of the directive be incorporated formally and verbatim in express, specific legislation and, depending on its content, a general legal context may be adequate for the purpose, that is on condition that that context does indeed guarantee the full application of the directive in a sufficiently clear and precise manner (see, inter alia, Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7, Case C-361/88 *Commission v Germany* [1991] ECR I-2567, paragraph 15, and Case C-58/02 *Commission v Spain* [2004] ECR I-621, paragraph 26).
- 22 In that regard, it is important in each individual case to determine the nature of the provision, laid down in a directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States (see Case C-233/00 *Commission v France* [2003] ECR I-6625, paragraph 77).
- 23 The United Kingdom's argument that the most appropriate way of implementing the Habitats Directive is to confer specific powers on nature conservation bodies and to impose on them the general duty to exercise their functions so as to secure compliance with the requirements of that directive cannot be upheld.
- 24 First, it is to be remembered that the existence of national rules may render transposition by specific legislative or regulatory measures superfluous only if those rules actually ensure the full application of the directive in question by the national authorities.
- 25 Second, it is apparent from the 4th and 11th recitals in the preamble to the Habitats Directive that threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Consequently, as the Advocate General has observed in point 11 of her Opinion, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see by analogy, in respect of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), Case 262/85 *Commission v Italy* [1987] ECR 3073, paragraph 39, and Case C-38/99 *Commission v France* [2000] ECR I-10941, paragraph 53).
- 26 It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by Articles 11, 12(4) and 14(2) of the directive.
- 27 However, it is apparent on examination of the legislation relied upon by the United Kingdom that it is so general that it does not give effect to the Habitats Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty (see, by analogy, Case 291/84 *Commission v Netherlands* [1987] ECR 3483, paragraph 15) and that it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the directive and allow harmonised and effective implementation of the rules which it lays down

(see, by analogy, the judgment of 10 March 2005 in Case C-531/03 *Commission v Germany*, not published in the ECR, paragraph 19).

- 28 It follows that the general duties laid down by the United Kingdom legislation cannot ensure that the provisions of the Habitats Directive referred to in the Commission's application are transposed satisfactorily and are not capable of filling any gaps in the specific provisions intended to achieve such transposition. Consequently, there remains no need to consider the United Kingdom's arguments based on the general duties contained in that legislation when analysing the specific complaints relied upon by the Commission.

The complaints raised by the Commission

The complaint alleging incomplete transposition of Article 6(2) of the Habitats Directive

- 29 In the light of information that the United Kingdom provided, the Commission, in its reply and at the hearing, abandoned its complaint alleging breach of Article 6(2) of the Habitats Directive with regard to England, Wales, Scotland and Northern Ireland, while maintaining it with regard to Gibraltar.
- 30 The Commission submits that, by merely protecting designated sites from any operation with potential to cause disturbance without also ensuring that deterioration due to neglect or inactivity is avoided, the United Kingdom has failed to implement Article 6(2) of the directive fully in Gibraltar.
- 31 The United Kingdom, without genuinely contesting the Commission's line of argument, contends that only non-natural deterioration is to be avoided.
- 32 In addition, it argues that the 1991 Ordinance set in place a complete and stringent enforcement regime. That regime adequately implements the Habitats Directive, particularly when it is read in conjunction with the general rule laid down in section 17A of the ordinance.
- 33 As to those submissions, it should first be noted that Article 6(2) of the Habitats Directive obliges the Member States to avoid the deterioration of natural habitats and the habitats of species.
- 34 As the Advocate General has observed in point 19 of her Opinion, it is clear that, in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate.
- 35 Second, at the end of the period laid down in the reasoned opinion, Article 6(2) of the Habitats Directive had not been formally reproduced in the legislation applicable in Gibraltar. Section 17G of the 1991 Ordinance, allowing the competent authorities to enter into site management agreements with the owners or occupiers of sites, appears to be the only provision applicable in Gibraltar for avoiding any deterioration.
- 36 It is clear that this provision confers only a non-mandatory power on those authorities and that it is not such as to avoid deterioration, contrary to the requirements of Article 6(2) of the Habitats Directive.
- 37 Accordingly, inasmuch as domestic law contains no express provision obliging the competent authorities to avoid the deterioration of natural habitats and the habitats of species, it involves an element of legal uncertainty as to the obligations with which those authorities must comply.

38 It follows from the foregoing that, in any event, Article 6(2) of the Habitats Directive has not been transposed clearly, precisely and completely in Gibraltar.

39 In those circumstances, the complaint alleging incomplete transposition of Article 6(2) of the Habitats Directive must be held to be well founded as regards Gibraltar.

The complaint alleging incomplete transposition of Article 6(3) and (4) of the Habitats Directive

40 The Commission submits that United Kingdom legislation does not properly transpose these provisions in three specific areas: water abstraction plans and projects, land use plans and, in respect of Gibraltar, the review of existing planning rights.

– Water abstraction plans and projects

41 In the Commission's submission, no provision of domestic law requires water abstraction licences granted under Chapter II of Part II of the Water Resources Act 1991 to comply with the obligation, imposed by Article 6(3) of the Habitats Directive, to take account of the significant effects which water abstraction may have on sites forming part of a SAC. No such provisions exist in Northern Ireland or Gibraltar either. Thus, water abstraction activities, which may have a significant adverse effect on a SAC, are not fully covered or correctly controlled by the United Kingdom's implementing legislation.

42 The Commission adds that in its letter of 27 November 2001 the United Kingdom had indicated that the relevant provisions of the 1994 Regulations would be amended in order to clarify the rules relating to water abstraction activities.

43 The United Kingdom contends, on the other hand, that it has set up, in conjunction with the general clauses, a system which enables potentially damaging operations to be determined in advance for each site.

44 As to those submissions, Article 6(3) of the Habitats Directive provides that any plan or project not directly connected with or necessary to the management of a site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

45 In the present case, it is not disputed that, at the end of the period laid down in the reasoned opinion, no legal provision expressly required water abstraction plans and projects to be subject to such an assessment.

46 Furthermore, the system established by the United Kingdom legislation, inasmuch as it essentially provides that all water abstraction plans and projects which fall within the conditions laid down in Article 6(3) of the Habitats Directive are deemed in advance to be potentially damaging for the site concerned, does not appear to be capable of ensuring compliance with the requirements of that provision.

47 As the Advocate General has observed in point 33 of her Opinion, while this kind of advance assessment of potential risks can be based on concrete facts with regard to the site, that is not the case with regard to the projects themselves, contrary to the requirements of Article 6(3) of the Habitats Directive, under which an appropriate assessment of the project's implications for the site in question should be carried out. Consequently, in merely defining potentially damaging operations for each site concerned, the risk is run that certain projects which on the basis of their specific characteristics are likely to have an effect on the site are not covered.

48 Nor is it possible to uphold the United Kingdom's argument that, as regards Scotland, the Water Environment and Water Services Act 2003 has laid down, as

part of the transposition of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), a framework for a comprehensive new system of water abstraction which introduces controls consistent with Article 6(2) and (3) of the Habitats Directive.

- 49 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 obtaining in the 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-103/00 *Commission v Greece* [2002] ECR I-1147, paragraph 23, and Case C-323/01 *Commission v Italy* [2002] ECR I-4711, paragraph 8).
- 50 Having regard to the foregoing, it must be found that the United Kingdom has not transposed Article 6(3) and (4) of the Habitats Directive correctly as regards water abstraction plans and projects.
- Land use plans
- 51 The Commission submits that United Kingdom legislation does not clearly require land use plans to be subject to appropriate assessment of their implications for SACs in accordance with Article 6(3) and (4) of the Habitats Directive.
- 52 According to the Commission, although land use plans do not as such authorise development and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land use plans must also be subject to appropriate assessment of their implications for the site concerned.
- 53 The United Kingdom accepts that land use plans can be considered to be 'plans and projects' for the purposes of Article 6(3) of the Habitats Directive, but it disputes that they can have a significant effect on sites protected pursuant to the directive. It submits that they do not in themselves authorise a particular programme to be carried out and that, consequently, only a subsequent consent can adversely affect such sites. It is therefore sufficient to make just that consent subject to the procedure governing plans and projects.
- 54 As to those submissions, the Court has already held that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (see, to this effect, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 43 and 44).
- 55 As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.
- 56 It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard.
- Review of existing planning rights in Gibraltar

- 57 The Commission submits that, so far as concerns Gibraltar, the competent authorities do not comply with the requirements of Article 6(3) of the Habitats Directive in that they are not obliged to review whether existing planning permits affect sites protected under the directive.
- 58 As the Advocate General rightly observes in point 55 of her Opinion, while it is true that such an obligation to carry out a subsequent review may be based on Article 6(2) of the Habitats Directive, the fact remains that Article 6(3) of the directive contains no provision obliging the Member States to carry out a review of that kind.
- 59 On the contrary, it follows from the very wording of the latter provision that the procedure laid down must be applied before a Member State agrees to the carrying out of plans or projects likely to affect the site concerned.
- 60 It follows that this part of the complaint alleging incomplete transposition of Article 6(3) and (4) of the Habitats Directive cannot be upheld.
- The complaint alleging failure to transpose Articles 11 and 14(2) of the Habitats Directive
- 61 The Commission alleges that the United Kingdom has failed to transpose into domestic law the surveillance obligations set out in these provisions. It maintains that, until those obligations have been clearly assigned to the competent authorities, it will be unable to establish whether the required surveillance is actually being carried out.
- 62 In support of this complaint, the Commission relies on the letter of 27 November 2001, in which the United Kingdom stated, first, that a surveillance obligation was implicitly imposed on the competent authorities and, secondly, that the 1994 Regulations, the 1995 Regulations and the 1991 Ordinance would be amended to provide greater legal certainty through provisions more specific than those of that legislation.
- 63 In the United Kingdom's submission, Articles 11 and 14(2) of the Habitats Directive simply provide that the Member States are to undertake surveillance, without imposing any specific requirement as to how it is to take place, or as to how such surveillance is to be provided for in national law. It further contends that the list of surveillance activities carried out in accordance with domestic legislation demonstrates that surveillance is being carried out effectively in the United Kingdom in accordance with Articles 11 and 14(2) of the directive.
- 64 The Commission replies that it never asserted that no surveillance of the conservation status of natural habitats and species was undertaken in the United Kingdom. It contends, on the other hand, that the surveillance obligation is neither clearly implemented in that Member State nor clearly assigned to a particular authority of the latter.
- 65 With regard to those submissions, first, as has already been stated in paragraph 26 of this judgment, the surveillance obligation is fundamental to the effectiveness of the Habitats Directive and it must be transposed in a detailed, clear and precise manner.
- 66 However, at the end of the period laid down in the reasoned opinion, no provision of domestic law imposed an obligation on the national authorities requiring the surveillance of natural habitats and species.
- 67 Second, the United Kingdom's argument that the list of surveillance activities carried out proves that surveillance is undertaken effectively cannot be upheld. As the Court has already held, the fact, should it be established, that a practice is in conformity with the requirements of a directive which concern protection cannot

constitute a reason for not transposing that directive into the domestic law of the Member State concerned (see, to this effect, Case C-361/88 *Commission v Germany*, cited above, paragraph 24).

68 Accordingly, inasmuch as it is common ground that United Kingdom domestic law does not contain any statutory duty requiring the national authorities to undertake surveillance of the conservation status of natural habitats and species, that domestic law involves an element of legal uncertainty. Hence, it is not guaranteed that surveillance of their conservation status is undertaken systematically and on a permanent basis.

69 It follows that Articles 11 and 14(2) of the Habitats Directive have not been transposed completely, clearly and precisely in the United Kingdom.

70 Consequently, the complaint alleging failure to transpose Articles 11 and 14(2) of the Habitats Directive must be held to be well founded.

The complaint alleging incorrect transposition of Article 12(1)(d) of the Habitats Directive

71 The Commission submits that the United Kingdom has not transposed correctly the obligation to take the requisite measures to establish a system of strict protection for certain animal species by prohibiting deterioration or destruction of their breeding sites or resting places. National legislation uses the verb 'to damage' instead of the word 'deterioration' used in Article 12(1)(d) of the Habitats Directive.

72 First, in the Commission's submission the use of the verb 'to damage' means that the effects of deterioration resulting from neglect or inactivity on the part of the competent authorities are not covered. However, in its reply, the Commission went back on this argument, accepting that the provision does not require breeding sites and resting places of the species concerned to be protected from deterioration due to neglect or inactivity on the part of the competent authorities. Accordingly, there is no longer any need to rule on this point.

73 Second, the Commission contends that by creating offences only for acts having the effect of harming or damaging the breeding sites or resting places of the species in question, without prohibiting their deterioration, the measures transposing the Habitats Directive introduce a condition, not provided for in Article 12(1)(d) thereof, linked to whether the harmful act is intentional.

74 The United Kingdom does not dispute that Article 12(1)(d) of the Habitats Directive requires activities which would lead to the deterioration or destruction of the sites concerned to be prohibited. On the other hand, it contests the Commission's interpretation of the national legislation, according to which transposition of the directive in the United Kingdom, with the exception of Gibraltar, is limited to deliberate or intentional acts.

75 As to those submissions, it is settled case-law that in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove the allegation that the obligation has not been fulfilled and it may not rely on any presumption (see, inter alia, Case 96/81 *Commission v Netherlands* [1982] ECR 1791, paragraph 6, and Case C-194/01 *Commission v Austria* [2004] ECR I-4579, paragraph 34).

76 Accordingly, inasmuch as the United Kingdom contends that its domestic law in force is consistent with Article 12(1)(d) of the Habitats Directive, it is for the Commission, in order to prove that that provision has not been transposed completely, to put before the Court the evidence or arguments necessary in order for it to determine that there has been such a failure to fulfil obligations.

- 77 However, it does not appear from the documents before the Court that the Commission has put forward evidence or arguments capable of proving that the transposition of that provision is limited to deliberate or intentional acts. On the contrary, it appears that the criminal offence provided for by United Kingdom domestic law, which punishes acts consisting in damaging or destroying a site, is a strict liability offence not in any way requiring the damage or destruction to be deliberate or intentional.
- 78 In those circumstances, since the Commission has not proved that the United Kingdom, other than in respect of Gibraltar, has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive, this part of the complaint cannot be upheld.
- 79 As regards Gibraltar, suffice it to state that the United Kingdom acknowledges that, by prohibiting only the deliberate damaging or destruction of breeding sites or resting places of the species concerned, the legislation applicable in Gibraltar does not satisfy the requirements of Article 12(1)(d). Accordingly this part of the complaint must be held to be well founded.
- 80 Third, the Commission states that the United Kingdom legislation as currently drafted would protect breeding sites and resting places only against activities having a direct effect on them, and does not take account of indirect impairment in accordance with the requirements of Article 12(1)(d) of the Habitats Directive.
- 81 This argument cannot be upheld. The Commission has adduced no evidence capable of proving that the United Kingdom has failed to fulfil its obligations in this regard.
- 82 It follows from the foregoing that the complaint alleging that Article 12(1)(d) of the Habitats Directive has been transposed incorrectly must be partially upheld.
- The complaint alleging incomplete transposition of Articles 12(2) and 13(1) of the Habitats Directive
- 83 The Commission submits that the national measures intended to transpose the prohibition on the keeping, transport, sale or exchange of specimens of animal and plant species fail to comply with the temporal limitation laid down in those articles.
- 84 It need only be stated that the United Kingdom acknowledged, during the written procedure and at the hearing, that the derogations in force in its domestic law are broader than those envisaged by the Habitats Directive and that, consequently, the provisions in question have not been correctly transposed in that Member State.
- 85 Accordingly, the complaint alleging incomplete transposition of Articles 12(2) and 13(1) of the Habitats Directive must be held to be well founded.
- The complaint alleging incorrect transposition of Article 12(4) of the Habitats Directive
- 86 The Commission submits that the United Kingdom's implementing measures contain no provision requiring the establishment of a monitoring system such as that required in Article 12(4), in respect of the incidental capture and killing of certain animal species. In the absence of further information the Commission is unable to establish whether such monitoring is in fact carried out.
- 87 It need only be stated that the United Kingdom, first, has acknowledged that national legislation contains no provision designed to establish such a monitoring system and, second, accepted in its letter of 27 November 2001 that national legislation had to be amended so that such monitoring is expressly established.

88 In any event, it does not appear that such a measure was adopted within the period laid down in the reasoned opinion.

89 Accordingly, the complaint alleging that Article 12(4) of the Habitats Directive has been transposed incorrectly must be held to be well founded.

The complaint alleging incorrect transposition of Article 15 of the Habitats Directive

90 The Commission complains that the United Kingdom has failed to comply with its obligations under Article 15 of the Habitats Directive. First, it criticises that Member State for having prohibited only the methods expressly listed in Annex VI(a) and (b) to the directive, without imposing a general prohibition on the use of indiscriminate means. Second, the Commission submits that sections 1 and 10 of the Conservation of Seals Act prohibit the use of only two methods of killing seals, whilst providing for exemptions, in the form of licences granted by the Secretary of State, which appear to go beyond the derogations allowed by the directive.

– No general prohibition on all indiscriminate means

91 The Commission pleads that United Kingdom legislation contains no general prohibition on the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the relevant species of wild fauna. The national legislation does not therefore preclude the emergence of as yet unknown means of indiscriminate capture and killing.

92 The United Kingdom contends that Article 15 of the directive has been transposed by regulation 41 of the 1994 Regulations, regulation 36(2) of the 1995 regulations and section 17V(2) of the 1991 Ordinance. It states that those provisions establish lists of every indiscriminate means of capture and killing of the protected species that is currently recorded in that Member State and that the lists are kept under review in order to be updated if necessary.

93 As to those submissions, Article 15 of the Habitats Directive provides that, in respect of the capture or killing of species of wild fauna listed in Annex V(a) thereto and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV(a), Member States are to prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species.

94 That provision, as is apparent from its very wording, imposes a general obligation designed to prohibit the use of all indiscriminate means of capture or killing of the species of wild fauna concerned.

95 In the present case, it is not in dispute that, at the end of the period laid down in the reasoned opinion, domestic law did not impose a general prohibition of that kind.

96 Furthermore, as the Advocate General has observed in point 89 of her Opinion, the possibility of updating a list of prohibited methods is less effective than a general prohibition. Delay in updating the aforementioned lists would necessarily lead to lacunae in protection which are specifically intended to be prevented by means of the general prohibition in Article 15 of the Habitats Directive. This interpretation is all the more justified because domestic law contains no statutory duty to review the lists.

97 In those circumstances, it is not in any way guaranteed that all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the protected species are prohibited in the United Kingdom.

98 Therefore, it must be held that the United Kingdom has not transposed Article 15 of the Habitats Directive correctly as regards the prohibition on all indiscriminate means of capture or killing of the species of wild fauna concerned.

– Conservation of Seals Act

99 A preliminary point to note is that in its reply the Commission withdrew its complaint relating to the Conservation of Seals Act, on the basis of the fact that the United Kingdom had undertaken in its defence to adopt amending legislation in that regard. However, in its rejoinder the United Kingdom considered it necessary to alert the Commission that it would await the outcome of the present proceedings before amending its legislation. It was in those circumstances that at the hearing the Commission wished to maintain this complaint, and the United Kingdom did not contest this.

100 The Commission submits that, by prohibiting only two methods of killing seals and allowing licences to be granted on conditions which go beyond the derogations provided for by the Habitats Directive, the Conservation of Seals Act does not comply with Article 15 of the directive.

101 According to the United Kingdom, such an interpretation of the Conservation of Seals Act is incorrect. The Act simply supplements regulation 41 of the 1994 Regulations, which transposes Article 15 of the Habitats Directive, and it therefore provides additional protection for the various seal species.

102 As to those submissions, first, as has been held in paragraph 98 of this judgment, regulation 41 of the 1994 Regulations does not transpose Article 15 of the Habitats Directive correctly. Therefore, the United Kingdom's argument that the Conservation of Seals Act supplements regulation 41 of the 1994 Regulations cannot be upheld.

103 Second, even if the Conservation of Seals Act were to supplement the 1994 Regulations, it could be interpreted as meaning that only the two methods expressly mentioned by it are prohibited.

104 In those circumstances, the Conservation of Seals Act involves an element of legal uncertainty as to the methods of killing seals which are prohibited in the United Kingdom and it therefore does not ensure that Article 15 of the Habitats Directive is transposed correctly.

105 It follows from the foregoing that the complaint relating to incorrect transposition of Article 15 of the Habitats Directive must be upheld.

The complaint alleging incorrect transposition of Article 16 of the Habitats Directive

106 First, the Commission submits that the body of national provisions establishing derogations from Articles 12, 13, 14 and 15(a) and (b) of the Habitats Directive, which are set out in particular in regulation 40 of the 1994 Regulations, regulation 35 of the 1995 Regulations and section 17U of the 1991 Ordinance, does not comply with the two conditions specified in Article 16 of the directive. The Commission observes that, as provided in Article 16, a derogation may be granted only if 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.

107 It need only be stated (i) that the United Kingdom has accepted that any derogation granted pursuant to Article 16 of the directive must necessarily fulfil the two aforementioned conditions and (ii) that although that Member State has admitted that those conditions are not reproduced in the national legislation, no amendment designed to remedy that breach of obligations had been made at the end of the period laid down in the reasoned opinion.

- 108 This part of the complaint must therefore be upheld.
- 109 Second, the Commission submits that the specific derogations set out in regulations 40(3)(c) and 43(4) of the 1994 Regulations and in the equivalent provisions of the 1995 Regulations and the 1991 Ordinance go beyond the scope of Article 16 of the Habitats Directive. It states that the prohibitions laid down in order to transpose Articles 12, 13 and 16 of the directive are not applicable where the act in question is the result of a lawful operation.
- 110 The United Kingdom contends that since it transposed the requirements of Articles 12 and 13 of the Habitats Directive by making their infringement a criminal offence, it is necessary to exclude the application of such an offence in cases where persons act without criminal intent.
- 111 As to those submissions, Article 16 of the Habitats Directive defines in a precise manner the circumstances in which Member States may derogate from Articles 12, 13, 14 and 15(a) and (b) thereof, so that Article 16 must be interpreted restrictively.
- 112 Furthermore, as the Advocate General has observed in point 113 of her Opinion, Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16.
- 113 The derogation at issue in the present case authorises acts which lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, where those acts are as such lawful. Therefore such a derogation, founded on the legality of the act, is contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16 thereof.
- 114 Having regard to the foregoing, the action must be held well founded in this regard.
- Failure to apply the Habitats Directive beyond the territorial waters of the United Kingdom
- 115 The Commission alleges that the United Kingdom has limited the application of the provisions which transpose the Habitats Directive into national law to just national territory and United Kingdom territorial waters. It contends that within their exclusive economic zones the Member States have an obligation to comply with Community law in the fields where they exercise sovereign powers and that the directive therefore applies beyond territorial waters. In particular, the Commission complains that the United Kingdom has not complied in its exclusive economic zone with its obligation to designate SACs under Article 4 of the directive or the obligation to provide species protection laid down in Article 12 of the directive.
- 116 The United Kingdom, without contesting the validity of this complaint, states, first, that in 2001 it adopted appropriate legislation so far as concerns the petroleum industry, namely the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001, and second, that it has prepared suitable legislation to extend the application of the Habitats Directive's requirements to the marine area beyond its territorial waters.
- 117 As the Advocate General has rightly observed in points 132 and 133 of her Opinion, it is common ground between the parties that the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive is to that extent applicable beyond the Member States' territorial waters. It follows that the directive must be implemented in that exclusive economic zone.

118 Furthermore, it is common ground that the legislation to which the United Kingdom refers in its letter of 27 November 2001, which extends the application of the measures designed to transpose the requirements of the Habitats Directive beyond United Kingdom territorial waters, had not yet been adopted at the end of the period laid down in the reasoned opinion.

119 Consequently, the only national legislation in force at the end of that period was the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001. It is clear that those regulations concern only the petroleum industry and are therefore not capable by themselves of transposing the Habitats Directive beyond United Kingdom territorial waters.

120 The Commission's action must accordingly be held well founded in this regard.

121 In light of all the foregoing considerations, it must be held that, by failing to adopt, within the prescribed period, all the measures necessary in order to implement completely and correctly the requirements of the Habitats Directive, and in particular of:

- Article 6(2), as regards Gibraltar,
- Article 6(3) and (4), as regards water abstraction plans and projects and land use plans,
- Article 11,
- Article 12(1)(d), as regards Gibraltar,
- Article 12(2),
- Article 12(4),
- Article 13(1),
- Article 14(2),
- Article 15,
- Article 16,
- the whole of the Habitats Directive beyond its territorial waters,

the United Kingdom has failed to fulfil its obligations under that directive.

Costs

122 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. Since the Commission has applied for costs and the United Kingdom has been essentially unsuccessful, the United Kingdom must be ordered to pay the costs.

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

- 1. Declares that, by failing to adopt, within the prescribed period, all the measures necessary in order to implement completely and correctly the requirements of Council Directive 92/43/EEC of 21 May 1992 on**

the conservation of natural habitats and of wild fauna and flora, and in particular of:

- **Article 6(2), as regards Gibraltar,**
- **Article 6(3) and (4), as regards water abstraction plans and projects and land use plans,**
- **Article 11,**
- **Article 12(1)(d), as regards Gibraltar,**
- **Article 12(2),**
- **Article 12(4),**
- **Article 13(1),**
- **Article 14(2),**
- **Article 15,**
- **Article 16,**
- **the whole of Directive 92/43 beyond its territorial waters,**

the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;

- 2. Dismisses the action as to the remainder;**
- 3. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

[Signatures]