

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 15 December 2005 ¹

I — Introduction

1. In these proceedings the parties are in dispute as to whether it is compatible with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereinafter: ‘the Habitats Directive’)² to permit fox hunting using stopped snares in certain hunting grounds.

2. The Habitats Directive prohibits inter alia the deliberate killing and deliberate trapping of otters (*Lutra lutra*). The Commission fears that the authorised snares will trap not only foxes — as intended — but also otters.

II — Legal framework

A — The provisions of the Habitats Directive

3. Article 12(1)(a) of the Habitats Directive reads as follows:

‘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:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

¹ — Original language: German.

² — OJ 1992 L 206, p. 7.

...’

4. Article 12(4) of the Habitats Directive extends this protection as follows:

'Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II. The following will in particular be prohibited for these species:

'Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.'

(a) all forms of deliberate capture and keeping and deliberate killing;

(b) the deliberate damage to or destruction of breeding or resting sites;

5. The otter is named in Annex IV(a) of the Habitats Directive, whereas the fox is not.

(c) the deliberate disturbance of wild fauna particularly during the period of breeding, rearing and hibernation, in so far as disturbance would be significant in relation to the objectives of this Convention;

B — *The Berne Convention*

6. Provisions similar to Article 12 of the Habitats Directive are contained in Article 6 of the Berne Convention on the conservation of European wildlife and natural habitats:³

...⁴

3 — Opened for signature on 19 September 1979, ETS No 104, ratified by the Community by Council Decision of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats, OJ 1982 L 38, p. 3.

4 — The Convention is only binding in the English and French languages. The English version uses the word '*deliberate*' for both '*absichtlich*' and '*mutwillig*', whilst the French version uses the term '*intentionnelle*'.

III — Facts, pre-litigation procedure and form of order sought in the application

7. The proceedings for failure to fulfil obligations under the Treaty are concerned with the authorisation of fox hunting using stopped snares. The permits concerned are those dated 10 January 2000 and 13 December 2002 relating to the SA-10.328 hunting ground in Aldeanueva de la Sierra in the province of Salamanca and dated 24 May 2001 in relation to the AV-10.198 hunting ground at Mediana de la Voltoya in the province of Avila. Both of these provinces form part of the region of Castilla y León.

8. The permits state that only foxes may be hunted. The stop device on the snare prevents the animals that are captured from being strangled. The snares have to be checked every day, preferably early in the morning.

9. The permit of 24 May 2001 regarding the AV-10.198 hunting ground at Mediana de la Voltoya ran from 3 May to 15 June 2001.

10. The permit of 10 January 2000 for the SA-10.328 hunting ground at Aldeanueva de la Sierra also provided that if animals other than foxes were captured they had to be set

free immediately. The snares could only be set up or moved in the presence of an 'Agente Forestal'.⁵ The permit of 13 December 2002 amends that permit and adds further conditions. The snares can now only be set up or moved by so-called hunting wardens ('guarda de caza').⁶ Snares must not be set up in areas near riverbanks. The location of the snares is to be notified to the hunting authority within ten days of the permit being granted.

11. As a result of complaints the Commission became aware of the permits and, on 19 April 2001 and 21 December 2001, asked the Spanish Government to state its views. A reasoned opinion followed on 3 April 2003.

12. By its application the Commission of the European Communities seeks a declaration from the Court that:

— in so far as the authorities in Castilla y León have authorised the setting of stopped snares in several private hunting areas, the Kingdom of Spain has failed to fulfil its obligations under Article 12(1) of and Annex VI to Council Directive 92/43/EEC of 21

5 — He would appear to be a civil servant.

6 — Hunting wardens would seem to be private individuals who provide security services and are specifically qualified with regard to hunting.

May 1992 on the conservation of natural habitats and of wild fauna and flora;

- the Kingdom of Spain should be ordered to pay the costs.

13. The Kingdom of Spain claims that the Court should:

- dismiss the action as inadmissible for want of certainty of the subject-matter of the action, for lack of evidence and for failure to identify the alleged infringements;
- alternatively, dismiss the action;
- order the Commission to pay the costs.

IV — Appraisal

A — *Admissibility*

14. The Spanish Government has lodged various objections as to admissibility.

15. The Spanish Government objects, first of all, to the application being extended to the permits of 24 May 2001 for the AV-10.198 hunting ground in Mediana de la Voltoya in the province of Avila and of 13 December 2002 for the SA-10.328 hunting ground in Aldeanueva de la Sierra in the province of Salamanca. The first permit was revoked by the competent authorities on 29 May 2001. The second permit was mentioned for the first time in the reasoned opinion.

16. As far as the permit of 24 May 2001 is concerned, it is immaterial whether it had already been revoked by 29 May 2001 — a fact of which the Commission claims to have no knowledge. According to the time-limit in paragraph 7 of the permit, it expired no later than 15 June 2001.

17. Under Article 226 EC, if the Member State concerned has not complied with the reasoned opinion within the time-limit laid down by the Commission, the Commission may bring the case before the Court. However, the permit of 24 May 2001 had ceased to be valid in law some considerable time before the reasoned opinion was delivered on 3 April 2003. Consequently, it was impossible for Spain to take any measures to comply with the reasoned opinion with regard to that permit. The

claim should therefore be ruled inadmissible in that respect.⁷

18. The Commission does admittedly initially argue in the application, with regard to the permit of 13 December 2002, that this permit was only given as an example in the reasoned opinion but it has nevertheless made it a specific part of the claim. The reason for this was that this permit simply extended the permit of 10 January 2000.

19. The Commission properly refers in this respect to case-law according to which it is permitted in an action for failure to fulfil obligations under the Treaty to object to circumstances that have not occurred until after the reasoned opinion is given but are of the same nature as those that were mentioned in that opinion and are based on the same conduct.⁸ It cannot be acceptable for a Member State to constantly delay these

proceedings further by making changes to the measures complained of during the pre-litigation procedure. Although the permit of 13 December 2002 amends and supplements the conditions applicable to hunting with snares in the territory concerned, it does not bring it to an end.

20. Although the statements about that permit made by the Commission in the application are not entirely consistent they do show clearly that the Commission is including this permit in the claim. As the permit was also mentioned at the earliest possible date — in the reasoned opinion — this allegation cannot have been any surprise to Spain.

21. In arguing in its rejoinder that the Commission cannot make individual permits the subject of proceedings for failure to fulfil obligations under the Treaty without also challenging the transposing legislation applied to those permits, the Spanish Government fails to acknowledge the Commission's discretion in bringing actions for failure to fulfil obligations under the Treaty. As guardian of the Treaty, the Commission may ask the Court to find that, in not having achieved, in a specific case, the result intended by the Directive, a Member State has failed to fulfil its obligations.⁹

7 — See the judgment in Case C-525/03 *Commission v Italy* [2005] ECR I-9405, paragraph 12 et seq. In that case the Court did not follow the Opinion of Advocate General Jacobs delivered on 2 June 2005 see paragraph 28 et seq. and the references stated in footnote 24, who had considered the claim to be admissible on the basis, in particular, of the judgment in Case 199/85 *Commission v Italy* [1987] ECR 1039, paragraph 7 et seq. In the latter judgment the Court had ruled, exceptionally, that despite the infringement having been remedied the application was admissible because the Member State concerned had persisted in its view of the law. Cases of this kind are certainly better appreciated by reference to evidence of practice in a Member State, which the Commission can also base on the infringements remedied see the judgment in Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, paragraph 32. The Commission made a few remarks in this respect at the hearing but does not formally allege that there was such a practice.

8 — Judgments in Case 42/82 *Commission v France* [1983] ECR 1013, paragraph 20, and in Case 113/86 *Commission v Italy* [1988] ECR 607, paragraph 11. See also regarding statutory measures the judgments in Case C-105/91 *Commission v Greece* [1992] ECR I-5871, paragraph 13, and in Case 45/64 *Commission v Italy* [1965] ECR 857, at 865 et seq.

9 — Judgment in Case C-365/97 *Commission v Italy* [1999] ECR I-7773, 'San Rocco', paragraph 60.

22. The Spanish Government also objects to the fact that during the pre-litigation procedure the Commission made allegations regarding the conformity of Spanish law with the Habitats Directive, the jeopardisation of other species of fauna apart from the otter and hunting with steel jaw traps, but then restricted the application to the jeopardisation of the otter as a result of permitting hunting with snares. Those objections cannot call into question the admissibility of the application, however. The need for the pre-litigation procedure and the application to be the same does not preclude the imposition of limits on the subject-matter of the proceedings.¹⁰

23. From the whole of the objections to the permits concerned and the allegations no longer pursued, the Spanish Government infers, however, that the pre-litigation procedure was materially deficient in its entirety. Instead of setting out the subject-matter of the proceedings in the letter of formal notice, the Commission used the pre-litigation procedure to determine the subject-matter of the application on a step-by-step basis.

24. In making that allegation, however, the Spanish Government is misjudging the function and mode of operation of the pre-litigation procedure under Article 226 EC.

The invitation to submit observations — the 'letter of formal notice' — should admittedly delimit the subject-matter of the dispute.¹¹

The Commission is also obliged to specify precisely in the reasoned opinion the grounds of complaint which it has already raised more generally in the letter of formal notice and is alleging against the Member State concerned, after taking cognisance of any observations submitted by it under the first paragraph of Article 226 EC.¹² As already stated, however, this does not rule out any restriction on the subject-matter of the dispute or its expansion to cover later measures that are essentially the same as the measure which is the subject of the complaint. Indeed, one of the main functions of the pre-litigation procedure is to put in concrete terms those allegations that were of a relatively general nature when the procedure was commenced and to identify the matters that no longer need to be followed up.

25. The Spanish Government also claims that the application does not meet the requirements of Article 44(1)(c) of the Rules of Procedure. By this it presumably means Article 38(1)(c) of the Rules of Procedure of the Court of Justice, according to which an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.¹³ That statement must be sufficiently clear and precise to enable the defendant to prepare its

10 — Judgments in Case C-279/94 *Commission v Italy* [1997] ECR I-4743, paragraph 25, in Case C-139/00 *Commission v Spain* [2002] ECR I-6407, paragraph 19, and in Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 28.

11 — Judgment in Case C-230/99 *Commission v France* [2001] ECR I-1169, paragraph 31.

12 — Judgment in Case C-350/02 *Commission v Netherlands* [2004] ECR I-6213, paragraph 21.

13 — The same rule is to be found in Article 44(1)(c) of the Rules of Procedure of the Court of First Instance and the Spanish Government cites its case-law in this context.

defence and the Court to rule on the application. It is therefore necessary for the basic legal and factual particulars on which a case is based to be indicated coherently and intelligibly in the application itself.¹⁴

28. To sum up, it must be concluded that the application is inadmissible in so far as it takes issue with the permit of 24 May 2001 for hunting ground AV-10.198 at Mediana de la Voltoya in the province of Avila. The rest of it is admissible.

B — *Substance of the case*

26. The application in this case meets those requirements. The Commission takes issue with three precisely identified permits because, in its opinion, they are in breach of Article 12(1) of and Annex VI to the Habitats Directive because the otter is jeopardised.

29. It is therefore necessary to examine whether the permit for fox hunting with snares in the SA-10.328 hunting area in Aldeanueva de la Sierra in the province of Salamanca is in breach of Article 12(1) of and Annex VI to the Habitats Directive.

27. Lastly, the Spanish Government argues that the claim is inadmissible for lack of substance. That objection would be justified if the Commission were not alleging any breach of Community law. Here, however, the Commission is claiming that Spain is in breach of Article 12(1) of and Annex VI to the Habitats Directive — that is to say, provisions of Community law. The Spanish Government is actually taking issue with the substance of the claim. However, this does not go to any issue of admissibility but to the substance of the case. This objection must therefore also be dismissed.

1. Annex VI to the Habitats Directive

30. Annex VI to the Habitats Directive contains a list of prohibited methods and means of capture and killing and modes of transport. For mammals, the 10th indent of subparagraph (a) stipulates traps which are non-selective according to their principle or their conditions of use.

31. The methods and means listed are nevertheless not necessarily prohibited in all cases but only in accordance with Article

¹⁴ — Judgment in Case C-178/00 *Italy v Commission* [2003] ECR I-303, paragraph 6.

15 of the Habitats Directive. This is the only provision in the Habitats Directive that refers to Annex VI. It prohibits the use of all indiscriminate means (particularly those stated in Annex VI) in respect of the capture or killing of species of wild fauna listed in Annex V(a) 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). Even in those cases non-selective means are only prohibited if they are capable of causing local disappearance of, or serious disturbance to, populations of such species.

listed in Annex IV(a) in their natural range. Under Article 12(1)(a) this should prohibit all forms of deliberate capture or killing of specimens of these species in the wild and, under subparagraph (b), the deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.

32. The permit at issue relates to the fox, which is not included in either Annex IV(a) or Annex V to the Habitats Directive. The prohibition on non-selective means does not therefore apply. No infringement of Annex VI to the Habitats Directive can therefore be established.

2. Article 12(1) of the Habitats Directive

33. It is therefore necessary to examine whether the permit infringes Article 12(1) of the Habitats Directive. Under that provision Member States are obliged to take the requisite measures to establish a system of strict protection for the species of fauna

34. It should be made clear, with regard to the scope of the prohibition in Article 12(1)(a), that the word 'deliberate' used there refers both to the capture and the killing of protected animals. This does admittedly conflict with the French version, in which the term '*intentionnelle*' is used in the singular and only relates to killing, but it is consistent with the other language versions in which the Directive has been adopted. In Spanish, German, Greek and Portuguese the word 'deliberate' undoubtedly refers to both actions. In the English, Dutch and Danish the word 'deliberate' could be taken to refer either only to capture or to both actions. It is only the Italian version that could be construed in the same way as the French version, although it is also possible in the Italian to relate the word 'deliberate' to both actions. Furthermore, it is also in accordance with the Berne Convention, which has been transposed by the Habitats Directive and the Birds Directive¹⁵ within the Commu-

¹⁵ — Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ 1979 L 103, p. 1.

nity,¹⁶ to relate the word ‘deliberate’, grammatically speaking, to both actions.

35. It is for that reason necessary to verify whether the permit is compatible with the system of strict protection required by Article 12(1) of the Habitats Directive, which is supposed to prohibit the deliberate capture and the deliberate killing of otters.

(a) The ‘deliberate’ harm to otters

36. The permit would be immediately incompatible with Article 12(1) of the Habitats Directive if any deliberate¹⁷ harm to otters were to occur in the exercise of the permit.

37. In German criminal law *deliberateness* would require that the killing or capture of a

protected species of animal be the *aim* of the action. The French *intentionnelle* and the English *deliberate* have a similar tendency. These two language versions are particularly relevant for the purposes of interpretation here, as the Berne Convention coincides with the directive in that respect. The French *intentionnelle* corresponds to *intention*, the equivalent of deliberateness in French criminal law.¹⁸ Under French law deliberateness requires both the knowledge and the desire to carry out a deed. Conditional intent, on the other hand — *dolus eventualis* or *dol éventuel*, awareness of the commission of the deed and the favourable acceptance of its consequences — is not to be equated with deliberateness in the absence of an express legislative provision.¹⁹ The English word *deliberate* does not occupy a comparable position in legal terminology. The English term that corresponds to the German word ‘Vorsatz’ is *intention*. Nevertheless the word *deliberate* also implies elements of awareness and desire.

38. According to this linguistic interpretation of Article 12(1)(a) of the Habitats Directive — which is principally based on how the term is applied in criminal law — actions should only be banned if they are committed in the knowledge of and with the desire to cause harm to a protected species.

16 — Report on the Convention on the Conservation of European Wildlife and Natural Habitats (1997-1998) (Article 9(2)) (presented by the European Commission), SEC (2001) 515 final. See also the Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States meeting within the Council of 19 October 1987 on the continuation and implementation of the European Community policy and action programme on the environment (1987-1992), OJ 1987 C 328, paragraph 5.1.6. The judgment in Case C-75/01 *Commission v Luxembourg* [2003] ECR I-1585, paragraph 57, does not preclude reference being made to this Convention, as the Court only held there that implementation of the Convention did not constitute implementation of the Habitats Directive, in so far as the Convention does not go as far as the Directive.

17 — The word ‘deliberate’ is not only significant in the context of actions in relation to fauna protected under Annex IV(a), which are prohibited under Article 12(1)(a) to (c) of the Habitats Directive. Article V of the Birds Directive also requires, in relation to birds naturally occurring in Europe, the prohibition of deliberate killing or capture (subparagraph (a)) or the deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of the Birds Directive (subparagraph (d)) and the deliberate destruction of, or damage to, their nests and eggs or removal of their nests (subparagraph (b)).

18 — See the first paragraph of Article 121-3 of the French *Code pénal* (Criminal Code).

19 — See paragraph 2 of Article 121-3 of the French *Code pénal*. The conscious jeopardisation of other persons legislated for there is deemed codification of the principle of conditional intent.

In practice, those bans would prevent only a few actions directly aimed at protected species of fauna, e.g. hunting, culling of animals as pests or cruelty to animals.

39. On the other hand, Resolution 1/89 of 9 June 1989²⁰ adopted by the Standing Committee of the Berne Convention advocates, in certain circumstances, the wider interpretation of at least the terms *intentionelle/deliberate* in that Convention. As far as the breeding or resting sites under Article 6 (b) of the Convention are concerned, those terms are to be interpreted in such a way that they also encompass actions that are not carried out with the aim of damaging breeding or resting sites but simply in the knowledge that they will probably lead to such damage.

40. Systematically speaking, account should be taken of the fact that the system of strict protection under Article 12(1) of the Habitats Directive is supplemented by Article 12(4) of the Habitats Directive and by Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage²¹ — particularly Article 5.

41. Article 12(4) of the Habitats Directive provides that Member States are to monitor the incidental capture and the incidental killing of specimens of the protected species of fauna and, where appropriate, are to take special protective measures.²²

42. Under Article 5 of Directive 2004/35 foreseeable damage to protected species must be prevented if it has significant adverse effects on reaching or maintaining their favourable conservation status. Consequently, these must generally be incidents that relate to a large number of individual specimens. This obligation applies, in principle, to occupational activities where there is intent or negligence or, in the case of certain — mostly industrial — activities, even irrespective of the same.

43. The Court has concerned itself with the concept of deliberateness in the context of Article 12(1) of the Habitats Directive in proceedings for failure to fulfil obligations under the Treaty in relation to the protected sea turtle *Caretta caretta*.²³ This species, which has to be afforded strict protection,

20 — Accessible via the European Council website at <http://www.coe.int>.

21 — OJ 2004 L 143, p. 56.

22 — One example of such protective measures attributable exceptionally to the Community is 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 (amended version: OJ 2004 L 185, p. 4). The Community had to bring in this rule as it has exclusive jurisdiction in the fisheries field.

23 — Judgment in Case C-103/00 *Commission v Greece* [2002] ECR I-1147 (*Caretta caretta*). See also the judgment in Case 412/85 *Commission v Germany* [1987] ECR 3503, at paragraph 14 et seq: the intentional use of the land, e.g. in agriculture, does not rule out the deliberate killing or capture of birds, the deliberate damage to or destruction of their nests and eggs and their deliberate disturbance within the meaning of Article 5 of the Birds Directive.

uses only a very few beaches in the Mediterranean in order to breed. The most important beaches are to be found in Laganas Bay on the Greek island of Zakynthos. The use of those beaches as a breeding site for turtles is adversely affected if mopeds are used on the beach, if sunbeds and umbrellas are to be found on the beach, if illegal buildings are constructed and if pedalos and other small boats are present in the sea around that area. All of these activities were therefore prohibited by way of warning signs.

44. When the Commission established, on visiting the island, that major disturbance of this kind was taking place it brought an action for a declaration that Greece had failed to fulfil its obligations under Article 12(1) of the Habitats Directive.

45. In his Opinion in that case Advocate General Léger took into account the fact that the use of mopeds, sunbeds and umbrellas and the construction of illegal buildings were deliberate acts such as might disturb the species during a period when, in accordance with Community law, it must especially be protected.²⁴ He therefore primarily related the deliberateness of the perpetrators concerned to their particular conduct and not to the harm caused to the animals.

46. However, this approach is not convincing. The concept of deliberateness in Article 12(1)(a) and (b) of the Habitats Directive relates to the harm to protected species that is to be prohibited. It would serve very little purpose if it were to be sufficient for harm to only occur in the course of an act committed with an intention of a different nature. Furthermore, the additional protective provisions in Article 12(4) of the Habitats Directive and Article 5 of Directive 2004/35 would also be robbed of almost all their practical effect if *every* harm covered by Article 12(1)(a) and (b) of the Habitats Directive were to be prohibited only if it were caused by deliberate conduct.

47. That judgment was based on a different concept of deliberateness. As mopeds and sunbeds were used on the beach *despite* the warning signs the Court considered this to be deliberate disturbance of the sea turtles during their breeding period within the meaning of Article 12(1)(b) of the Habitats Directive.²⁵

48. This conclusion could be understood to mean that deliberateness exists if, in the circumstances of a particular case, the perpetrator should have known that his conduct was jeopardising a protected species. This means that mere negligence would

²⁴ — Opinion in *Caretta caretta*, cited in footnote 23, paragraph 57.

²⁵ — *Caretta caretta* judgment, cited in footnote 23, paragraph 36.

constitute deliberateness within the meaning of Article 12(1) of the Habitats Directive.

permits the risk of harm to those species being consciously accepted in the case of many other actions cannot be termed 'strict'.

49. However, it cannot be assumed that the Court of Justice was intending to expand the concept of deliberateness to such an extent that deliberateness may exist irrespective of the will of the perpetrator. In all three language versions examined the concept of deliberateness includes a very strong element of will. Hence, the presentation of the facts must be understood to mean that the moped and boat users' knowledge of the risk to the turtles was to be assumed from the existence of warning signs. It also had to be inferred from that knowledge that they did at least accept the possibility of harm being caused to the protected turtles. The criterion for deliberateness is therefore whether the risk to the protected species was realised and nevertheless accepted.

50. A further restriction of the concept of deliberateness to its meaning in criminal law would conflict with the concept of a 'system of strict protection' that is to be established as a result of the prohibitions stated in Article 12(1) of the Habitats Directive. A system of protection that prohibits the killing, capture or disturbance of species of Community interest only in the case of a few actions directly aimed at those species but

51. In contrast to the interpretation proposed by Advocate General Léger, the interpretation favoured by the Court of Justice does not supplant Article 12(4) of the Habitats Directive or Directive 2004/35.

52. On this interpretation of the concept of deliberateness Article 12(4) of the Habitats Directive covers those cases in which danger to a protected species is not accepted. The necessary protective measures might consist, in particular, of the creation of consciousness of such danger by way of warnings or explanations.

53. As far as Directive 2004/35 is concerned, the protection in Article 5 against damage that is to be prevented is couched in narrower terms, with the necessary subjective elements being further clarified. It is only significant adverse effects on reaching or maintaining favourable conservation status that are to be prevented, whereas the prohibitions in Article 12(1) also extend to harm that has less intensive effects because they only relate to individual specimens. The duty to take preventive measures in Directive 2004/35 nevertheless also applies in principle to negligent conduct and, in the case of certain — particularly industrial — activities,

even irrespective of intent or negligence. The Court's interpretation of the concept of deliberateness therefore prevents any gap between the protection afforded to individual specimens under Article 12 of the Habitats Directive and the protection of populations under Directive 2004/35, but still allows Directive 2004/35 its own scope of application.

54. Deliberate harm to protected species of fauna is therefore to be assumed if the harm is the result of an act whereby the perpetrator was aware of the risk to the protected species and also accepted that risk.

55. The Commission's arguments also fall within this concept of deliberateness. It considers that hunting using non-selective means in an area where the otter is proven to exist cannot be considered non-deliberate hunting of a protected species. The reference to the fox was a mere formality.

56. The Commission is therefore basing its case on the objective risk associated with the use of non-selective hunting methods. It

infers from this that the possibility of a danger to protected species of fauna is impliedly accepted. However, this conclusion is only permissible if the hunters knew that specimens of that species existed in the area affected by that particular method of hunting.

57. In the present case, however, there is insufficient indication that the hunters knew, when they were setting up snares, that there was a risk to otters. Whereas it is common knowledge that the beaches in Zakynthos are one of the few breeding sites in the Mediterranean for the sea turtle *Caretta caretta*, it is still a matter of dispute between the parties here as to whether otters are present at all in the hunting region concerned. During the administrative procedure the Commission only mentioned the otter as one other species affected and laid particular emphasis on the Iberian lynx (*Lynx pardinus*). In the absence of evidence, therefore, it cannot be assumed that the hunters were aware of the existence of otters in their hunting grounds and therefore of the risk to them.

58. What is more, there were warning signs on the beach in Zakynthos specifically prohibiting the conduct in question. The setting of snares, however, was even the subject of a permit in this case. The hunters were therefore entitled to assume that no breach of the law was to be expected.

59. Consequently, harm to otters as a result of hunting with snares could not be categorised as deliberate.

(b) Permit requirements

60. What is also questionable, however, is whether a state permit is compatible with the system of strict protection under Article 12(1) of the Habitats Directive if the acts permitted do not necessarily conflict with the express prohibitions in subparagraphs (a) to (d).

61. The judgment on sea turtles *Caretta caretta* also provides valuable pointers in this context. According to that judgment Greece was also in breach of Article 12 of the Habitats Directive because the protective provisions in place in Zakynthos were not adequate to guarantee the effective protection of turtles when breeding.²⁶ The Court also found against Greece because it had not effectively implemented existing legislation protecting turtles when faced with constant infringements.²⁷

62. Consequently, the Member States cannot confine themselves to bringing in general prohibitions along the lines of the wording of Article 12(1) of the Habitats Directive. In certain circumstances they must even adopt and enforce specific regulations affording protection to a protected species in particular sites if these sites are of outstanding significance for the conservation of the species and the species is exposed to a particular risk.²⁸

63. Admittedly, the Commission is not demanding in this case that site-related protective provisions of this kind should be brought in or enforced for the protection of the otter; it is objecting to the authorisation of hunting with snares.

64. However, if Member States can even be obliged to actively adopt and implement specific site-related protective provisions for protected species of fauna they must first take into account, in the course of their authorisation procedure, whether the approved measures harm the protected species of fauna.

65. When applying Article 12(1) of the Habitats Directive in such a preventive

26 — *Caretta caretta* judgment, cited in footnote 23, paragraph 27 et seq..

27 — *Caretta caretta* judgment, cited in footnote 23, paragraph 39.

28 — The Court of Justice will have to deal with this interpretation of the *Caretta caretta* judgment cited in footnote 23 in Case C-518/04 *Commission v Greece* ('*Vipera schweizeri*'), notice in OJ 2005 C 57, p. 15.

context it cannot be relevant whether the particular individuals concerned deliberately harm the protected fauna. Indeed, the criterion is whether the competent authorities have to assume that the authorised conduct will cause the damage that is to be prohibited under Article 12(1) of the Habitats Directive. If that should be the case the permit concerned may then only be granted in accordance with the derogations provided for in Article 16 of the Habitats Directive. Otherwise the competent authorities would be in indirect breach of the prohibitions in Article 12(1) of the Habitats Directive.

66. That obligation on the competent authorities does not require deliberateness in the criminal-law sense. The subjective element of deliberateness does not apply to a public authority. Those authorities must use the best scientific knowledge available.²⁹ In certain circumstances it may be necessary to obtain further information in order to apply the general level of awareness to a particular case.

67. It is therefore necessary to examine whether, when authorising hunting using

snares, the Spanish authorities were entitled to assume without further measures of enquiry that otters would not be harmed.

68. When determining this issue the whole of the material produced to the Court of Justice has to be taken into account. The Spanish Government expressly argues for the first time in the rejoinder that the streams shown on the map inside the SA-10.328 hunting ground in Aldeanueva de la Sierra often contained no water, but that assertion does not constitute new evidence the delay in producing which requires justification under Article 42(1) of the Rules of Procedure. Indeed, the Spanish Government had already said in its answer to the first letter of formal notice that the existence of otters was unlikely because of the nature of the site. The reference to the waters drying up supports this assertion. The Commission also mentioned the streams in question for the first time in the reply.

69. The publications that the Spanish Government produced with the rejoinder and that the Commission produced after the written procedure had come to a close do not constitute evidence in the true sense. They are just references to publicly known facts, which are intended to support the views of the parties.

²⁹ — See judgments in Case C-157/89 *Commission v Italy* (hunting periods) [1991] ECR I-57, paragraph 15, in Case C-3/96 *Commission v Netherlands* (IBA list) [1998] ECR I-3031, paragraph 69 et seq., and in Case C-79/03 *Commission v Spain* (numbers hunted) [2004] ECR I-11619, paragraph 41.

70. Any doubts that might linger after this evidence has been examined must be to the detriment of the Commission as it is for the Commission to prove an infringement of Community law in infringement proceedings.³⁰

71. The parties are in dispute as to whether there are otters in hunting ground SA-10.328. The Commission bases its argument on a standard data sheet drawn up by Spanish authorities for a Spanish site proposal for the Natura 2000 network, the 'Quilamas' area. According to that, the otter is supposed to exist in the proposed area. 'Quilamas' measures an area of over 10 000 hectares. The hunting ground is admittedly situated directly adjacent to the north west of the area but most of the running water within 'Quilamas' e.g. the 'Arroyo de las Quilamas' appears to drain to the south east. Between that running water and the hunting ground there are mountain ranges with differences in height of several hundred metres.³¹ It is therefore unlikely that otters from the population in those water systems will visit the hunting ground.

72. The Commission nevertheless also refers to the fact that the river Mina crosses the hunting ground and that the Zarzosa and

Media streams run near the hunting ground. These streams appear to belong to water systems to the west of Quilamas, where otters are also proven to exist.³² The Spanish Government nevertheless counters the Commission's argument with the undisputed assertion that those streams regularly dry up. It is apparent from the studies produced in this context that although otters might occasionally use streams that only periodically contain water, in principle they scarcely use them.³³

73. Hence, from the information available, the existence of otters in the hunting ground, whilst it cannot be excluded, is rather unlikely.

74. When determining the risks associated with authorising hunting with snares account also had to be taken, in addition to the probability of the existence of otters, of

30 — Cf. the judgment in Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, paragraph 75 and the case-law cited there.

31 — See the map at <http://www.dipsanet.es/provin/MapaSalamanca2003.pdf>.

32 — Lizana inter alia, in: Ruiz-Olmo and Delibes, *La nutria en España*, 1998, p. 118.

33 — Lizana inter alia, in: Ruiz-Olmo and Delibes, *La nutria en España*, 1998, p. 118. Ruiz-Olmo and Delibes, *ibid.*, p. 215, stress, however, that the use by otters of waters that dry up is increasingly to be found in many parts of Spain.

the objective risk of the hunting method and the seriousness of any damage.

past, are now increasing again or are at least stabilising.³⁷

75. Contrary to the assertion of the Spanish Government, there is indeed a risk of otters being caught in snares and being critically injured.³⁴ The Spanish Government, however, has made reference to a publication which permits the conclusion that the capture of otters in traps on land is relatively unlikely.³⁵ Otters would appear to be much more often run over, or drowned in fish-traps or similar fishing equipment.³⁶ The setting of snares using expert personnel and the prohibition on setting snares in riverbank regions reduce the risk resulting from snares still further.

77. In brief, it must therefore be concluded that the existence of otters in hunting ground SA-10.328 is unlikely. What is more, the risk to any otter that might visit the hunting ground must be categorised as slim. If otters should ultimately be captured this would admittedly be regrettable but in view of the conservation status of the population of otters in Salamanca it would not represent significant damage.³⁸ Consequently, according to the information available to the Court, it must be concluded that the hunting authorities were entitled to assume, without further measures of enquiry, that the authorisation of hunting using snares would not endanger the otter.

(c) Conclusion

76. It would also seem to be accepted that the numbers of otters in Salamanca — as in most other regions of Spain and other parts of Europe — following a sharp drop in the

78. No infringement of Article 12(1) of the Habitats Directive by Spain can thus be established. It follows that the action must be dismissed.

34 — See the BBC report of 3 May 2005 on the death of an otter in a snare, <http://news.bbc.co.uk/1/hi/england/cornwall/4511053.stm>, and the report by the International Otter Survival Fund of 3 May 2003, <http://www.otter.org/Update.html>, on the death of an otter due to cardiac enlargement after hours of struggling in a snare.

35 — Palazón and Ruiz-Olmo, in: *II Jornadas SECEM 1995*, p. 67.

36 — See Saavedra inter alia, in: *V Jornadas SECEM 2001*, p. 125.

37 — Ruiz-Olmo and Delibes, in: Ruiz-Olmo and Delibes, *La nutria en España*, 1998, p. 212 et seq.

38 — The case of the otter is therefore different from that of the sea turtle *Caretta caretta*, which only uses a very few beaches in the Mediterranean in order to breed, and from the extremely rare Iberian lynx, which only exists in Spain.

V — Costs

79. 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 been unsuccessful, it must be ordered to pay the costs in accordance with the application made by the Spanish Government.

VI — Conclusion

80. I therefore propose that the Court should:

(1) dismiss the application;

(2) order the Commission to pay the costs.