

OPINION OF MR ADVOCATE GENERAL
DA CRUZ VILAÇA

delivered on 2 December 1986 *

*Mr President,
Members of the Court,*

1. The Italian Republic is alleged to have failed to fulfil its obligations under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the provisions of which have not, apparently, been transposed fully and correctly into Italian law within the prescribed period.

The transposition of that directive into Member States' internal law is the subject of a number of other cases pending before this Court. One of those is Case 247/85 *Commission v Belgium*; in my Opinion in that case I gave a brief description of the provisions of the directive so that it is not necessary for me now to do so again. I also discussed some general points regarding the interpretation of the directive.

2. The Italian Government does not deny that the national legislation relating to the transposition of the provisions of the directive is in some respects defective. However, it considers that the allegations are for the most part unjustified in view of the fact that, as it stated in its defence, 'a draft law designed to implement the directive in full is now before Parliament'.

Although that is evidence of a laudable intention to comply with Community requirements it is not, as everyone is aware, sufficient to justify a failure to fulfil obligations.

The failure will persist for as long as there remains a discrepancy between the national legislation in force and the requirements of Community law, and is not to be remedied by merely declaring that legislative amendments are forthcoming.

The delay in adopting the legislative measures necessary to comply with the directive may well be the result of the complexity of the procedure in Italy for adopting legislation. That was made clear in the oral explanations provided by the representative of the Italian Republic at the hearing on 17 September 1986.

Nevertheless, the Court has consistently held that 'Member States may not plead provisions, practices or circumstances existing in their internal legal systems in order to justify a failure to comply with obligations and time-limits resulting from Community directives'.¹

3. The substance of the Commission's allegations is that the Italian legislation fails to comply with Directive 79/409/EEC in six respects, which I shall consider in turn:

First complaint: the list of birds which may be hunted

Article 7 and Annex II of the directive list the species of birds which may be hunted.

¹ — See, for example, the judgments of 2 December 1980 in Cases 42/80 and 43/80 *Commission v Italian Republic* [1980] ECR 3635, at p. 3640, and 3643, at p. 3648.

* Translated from the Portuguese.

The Italian legislation (Article 11 of Law No 968 of 27 December 1977) refers, however, *inter alia* to 11 species which may be hunted but which do not appear in the list in the directive and which, therefore, ought to be protected.

The Italian Government does not dispute that complaint, but observes that jays (*Garrulus glandaius*) and magpies (*Pica pica*) — and, apparently, the hooded crow (*Corvus corone cornix*) — were included, according to Article 4 of the Decree of 4 June 1982, owing to the ‘potentially harmful character of those species’ and that therefore their inclusion could be justified in accordance with the third indent of Article 9 (1) (a) of the directive.

It does not appear, however, that the Italian Government is seeking to rely formally on a derogation from the provisions of Article 7 and Annex II of the directive in order to counter the allegation that it has failed to fulfil its obligations in this respect.

It appears rather, according to the explanations given in the rejoinder, that the Italian Government merely seeks to justify the conduct of its legislature without going so far as to challenge the well-foundedness of the first complaint. Thus it was at pains to inform us in its defence that ‘the draft law laid before Parliament will ensure that the list of the wild birds which may be hunted conforms strictly to the directive’.

In addition, it would seem that in this case the conditions for permitting a derogation under the third indent of Article 9 (1) (a) of the directive are not fulfilled.

Not only does the Italian legislation fail to specify, as required by the directive, in what

respect the birds in question are harmful (‘to crops, livestock, forests, fisheries [or] water’?), but it relies on the vague assertion that the birds in question are ‘potentially harmful’, whereas the directive permits derogations solely in order ‘to prevent serious damage’.

Derogations constitute exceptions to the rule and as such must be interpreted strictly; they are not compatible with such a wide application as to make them cease to be exceptional.

Moreover — quite apart from the fact that it has not been demonstrated that ‘there is no other satisfactory solution’ (Article 9 (1) of the directive) — it is doubtful whether the Italian decree in question complies with all the formal requirements laid down in Article 9 (2) of the directive and it is certain that the Italian Government has failed to comply with the requirement in Article 9 (3), which requires that an annual report be sent to the Commission so that it can then check the lawfulness of the derogations.

I must therefore conclude that the first complaint is well founded.

Second complaint: the marketing of birds

The Commission alleges that the Italian legislation (Article 11 of Law No 968 of 27 December 1977) permits the marketing of any species of bird which may be hunted, in breach of Article 6 and Annex III of the directive.

The Italian Government does not deny that its national legislation is not wholly in line with the prohibition on marketing birds laid down in the directive. However, it contests the allegation that it has failed entirely to implement the directive.

Its argument is that Article 20 (t) of Law No 968 considerably restricts marketing by prohibiting 'the sale of woodcock in any form whatsoever, and of dead birds smaller than song-thrushes except starlings, sparrows and skylarks during the period when hunting is permitted.'

As the Commission pointed out in its reply, however, Article 6 of the directive prohibits the marketing of all birds, whether alive or dead, whole or otherwise, other than the species listed in Annex III, and therefore the Italian legislation is unsatisfactory inasmuch as:

- (a) it does not prohibit the marketing of live birds other than woodcock;
- (b) it does not prohibit the marketing of dead song-thrushes or of dead birds larger than song-thrushes or, for that matter, as far as birds smaller than song-thrushes are concerned, of starlings, sparrows and skylarks (which are not listed in Annex III to the directive).

Furthermore, the exceptions to the general prohibition on marketing which are provided for by Article 6 and Annex III of the directive are permitted subject to proof of fulfilment of the requirements referred to in Article 6 (2), (3) and (4): the species referred to in Annex III/1 may be marketed 'provided that the birds have been legally killed or captured or otherwise legally acquired' (Article 6 (2)); Member States may permit the marketing of the species listed in Annex III/2, subject to the condition just mentioned and after consulting the Commission (Article 6 (3)); as far as the species listed in Annex III/3 are concerned, and pending a decision to be adopted by the Commission after carrying out the appropriate studies, the Member

States may apply existing national rules without prejudice to Article 6 (3) (Article 6 (4)).

As the Commission points out, the Italian legislation contains no reference to those rules or restrictions.

Be that as it may, even if the Italian legislation does not entirely fail to restrict marketing, in view of the limitations imposed by Article 20 (t), its scope is certainly greater than that permitted by the directive.

That is a sufficient reason for concluding that the Italian legislation is not wholly in conformity with the provisions of Article 6 and Annex III of the directive.

Third complaint: hunting seasons

The Commission alleges that the Italian legislation, that is, Article 11 of Law No 968, fixes the dates for the opening of the hunting season without taking account of the rearing season, the various stages of reproduction and dependency and, in the case of migratory species, their return to their rearing grounds, as provided for in Article 7 (4) of the directive.

In response to the Italian Government's rejection of this complaint the Commission stated in its reply that even if the fact is disregarded that the Italian legislation does not expressly prohibit hunting at those times, the dates it refers to do not correspond to the actual periods of rearing, reproduction and return of migratory species to their rearing grounds. The hunting season opens on 18 August, a time

when, according to the Commission, various species of nesting birds are still in Italy and when bird species which are the most important from the ornithological point of view are traversing the Italian peninsula; and the season ends on 10 March, whereas, again according to the Commission, migratory birds start travelling to their rearing grounds early in February. The position was made even worse by Law No 968, because before its adoption the hunting season opened officially on the last Sunday in August.

On that issue, the Italian Government raised a preliminary objection of inadmissibility regarding the question of the suitability of the dates selected for the opening and closing of the hunting season, since both during the procedure prior to the application and in the application itself the Commission merely raised the point, in a general fashion, that the national legislation failed to take into account the matters referred to in Article 7(4) of the directive; it did not state any view as to the appropriateness of the dates chosen. As far as the Italian Government is concerned this represents an unacceptable extension of the initial complaint in so far as it contains new complaints incompatible with observance of the Italian Republic's rights of defence.

In my view, that objection can be upheld only in part.

It is true that the notification of the complaint of failure to fulfil obligations, the reasoned opinion and the application all refer to the fact that Article 11 of the Italian law fixes dates for the *opening* of the hunting season without taking due account of the rearing season, the various stages of reproduction and dependency and, in the case of migratory species, their return to their rearing grounds, in breach of Article 7 (4) of the directive.

Nothing is said, however, of the dates for the *closing* of the season, and hence it could

not be presumed that the Commission considered them incompatible with the directive.

After it had explained in the reply, as we have seen, that migratory birds start travelling to their rearing grounds early in February, and thus before the close of the hunting season (that is, 10 March), the Commission, in reply to a question put by the Court, named 20 species of migratory birds which pass through Italy in January, February and March on the return journey to their rearing grounds, when the hunting season is still open.

Its information came from a publication which, according to the Commission, is of considerable scientific repute and whose credibility has not been challenged by the Italian Government.

Put simply, the case-law of the Court is consistent to the effect that the subject-matter of the dispute is defined in the application (Article 38 (1) (c) of the Rules of Procedure) and may not be altered by the parties during the proceedings.² That is not in any way incompatible with Article 42 of the Rules of Procedure, which permits fresh issues to be raised in the course of proceedings only if they are 'based on matters of law or of fact which have come to light in the course of the written procedure'.

In addition, the Court has already established³ that in actions brought under Article

2 — See, for example, the judgment of 25 September 1979 in Case 232/78 *Commission v France* [1979] ECR 2729; the judgment of 9 December 1981 in Case 193/80 *Commission v Italy* [1981] ECR 3019; and the judgment of 8 February 1983 in Case 124/81 *Commission v United Kingdom of Great Britain and Northern Ireland* [1983] ECR 203.

3 — See the judgments cited in the preceding note and also the judgment of 22 March 1983 in Case 42/82 *Commission v France* [1983] ECR 1013; the judgment of 27 March 1984 in Case 50/83 *Commission v Italy* [1984] ECR 1633, at p. 1633; and the judgment of 15 January 1986 in Case 121/84 *Commission v Italy* [1986] ECR 107, 111.

169 of the Treaty for failure to fulfil obligations, the subject-matter of the action is fixed as from the notification of the failure and the reasoned opinion and cannot be extended after that.

That is the only way in which the rights of the defendant Member State can be fully guaranteed, ensuring that from the start of the procedure prior to the action it will have not only the opportunity to adopt measures to comply with Community law, but also the possibility of presenting its observations and gathering all the necessary material for its defence. Even if the Member State decides not to avail itself of that opportunity (as was the case here), the opportunity for it to do so is a fundamental guarantee provided by Article 169 of the EEC Treaty.⁴

Since the Commission referred in the procedure prior to the action and in the application itself only to the dates for the *opening* of the hunting season, and did not speak of the dates for the *opening* and the *closing* of the season until the reply, it is not surprising that in the rejoinder Italy adduced argument only to challenge, so far as necessary, the Commission's complaint regarding the *opening* of the hunting season.

I am therefore of the opinion that there is no need to examine the part of the complaint against the Italian Government — appearing only in the reply — which relates to the unsuitability of the dates for the close of the hunting season, since it is inadmissible.

As regards the reference to the dates for the opening of the hunting season, the defendant would appear to be in the wrong.

It is clear that the wording used by the Commission — in the notification, in the reasoned opinion and in the application — for the third complaint ('Article 11 fixes the dates for the opening of the hunting season without taking account of the rearing season... as provided for in Article 7 (4) of the directive') does not contain merely, as Italy appears to assume in its defence, a hypothetical reference to the possible failure to fix different dates for different species — in which respect the Italian law is manifestly deficient.

It quite clearly also contains the allegation that the dates fixed by the Italian legislation for the opening of the hunting season are wholly or partially coincidental with the periods in which the birds are rearing, reproducing, still dependent or returning to their rearing grounds.

That is precisely what the Commission endeavoured to explain in its reply (that is to say, during the exchange of pleadings), when it stated that the date on which the hunting season opened coincided with 'a time when various species of nesting birds are still in Italy and when bird species which are the most important from the ornithological point of view are traversing the Italian peninsula'. In any case the content of this complaint was further explained subsequently in reply to a question put by the Court.

That does not amount to a fresh allegation in addition to that formulated in the original application. In the application, as in the previous documents emanating from the Commission, all the elements — albeit in summary form — necessary for understanding the scope of the complaint had

⁴ — See, for example, the judgment of 8 February 1983 in Case 124/81, *supra*, [1983] ECR 203; the judgment of 31 January 1984 in Case 74/82 *Commission v Ireland* [1984] ECR 317; and the judgment of 11 July 1984 in Case 51/83 *Commission v Italy* [1984] ECR 2793.

already been supplied: the provision which had been breached, the provision of Italian law considered to be in breach of it and the basis of the complaint (the fixing of dates for the opening of the hunting season without taking into account the proper requirements).

The Italian Government thus had, even in the procedure prior to the application, every opportunity to submit its observations and, after consulting the Commission, to obtain a better understanding of the import of the complaints.

It did not do so. I do not consider it proper for the Italian Government to seek now to take advantage of its failure to cooperate at that time so as to evade an analysis of the substance of the complaint levelled against it.

I therefore conclude that, in that part of the complaint, the subject-matter of the application or, if you like, its essential import, is the same, since neither in the reply nor at any other stage of the proceedings was it altered — there was merely clarification of its exact purport.

Consequently, the objection of inadmissibility raised against it (regarding the dates for the opening of the hunting season) by the Italian Government must be dismissed.

I will therefore proceed to examine the substance of this complaint. The question here is a simple one.

Contrary to the defendant's contention in the rejoinder that the birds nesting in Italy in August are only sedentary species for which hunting is authorized only after the third Sunday in September, the Commission, in reply to a question put by the Court, named four species of birds whose period of reproduction and dependency extended beyond the date for the opening of the hunting season for those species (18 August).

That fact was not challenged by Italy at the hearing.

For that reason, even if it was not proved that the dates for the opening of the hunting season did not take into account the return of migratory species to their rearing grounds (Italy claimed that in August migrating birds are in the early stages of migration or are leaving their places of origin), it must be concluded that Article 11 of Law No 968 does not implement the provisions of Article 7 (4) of the directive which provides that the aforementioned birds must not be hunted during their period of reproduction and dependency.

The reference to the Paris Convention of 18 October 1950 made by the defendant in its defence is irrelevant to these proceedings.

On the other hand, there is no ground for the complaint — made only in the reply and in any case only implicitly — that the Italian legislation does not contain an express prohibition of hunting during the periods of rearing, reproduction and dependency. As the defendant pointed out in the rejoinder, Article 11 (1) of Law No 968 of 1977 contains a general express prohibition of hunting, subject to the exceptions set out in Article 11 (2), for the species and periods named therein. Hence the complaint is both out of time and unfounded.

Fourth complaint: the use of repeating and semi-automatic rifles

The Commission maintains that Article 9 of Law No 968 of 27 December 1977 of the Italian Republic permits the use of repeating and semi-automatic rifles capable of firing three shots, in breach of Article 8 (1) and Annex IV of the directive, which prohibit the use of such weapons with a magazine capable of holding more than two rounds of ammunition. The Commission maintains that the provisions of the directive must be

interpreted strictly and in the light of its aim, which is that of protection, and that such an interpretation means that in the case of repeating and semi-automatic rifles the only shots to be counted are those which the magazine is capable of containing, that is, two shots.

The Italian Government adopts a different interpretation of that provision of the directive, namely that it refers only to the maximum number of rounds of ammunition in the magazine. Accordingly, since the third round may be introduced directly into the firing chamber, it is permissible to use weapons capable of firing three shots.

What is the legal position?

I have no doubt that a literal interpretation of the directive would, on this point, support the Italian Government's argument.

Also in its favour is the consideration that if the aim had been to confer the maximum protection possible under the directive, the use of repeating or semi-automatic weapons would have been either prohibited altogether or restricted to weapons firing one or two shots.

However, that was not done by the Community legislature: it merely prohibited, *ipsis verbis*, the use of weapons with a magazine capable of containing more than two rounds of ammunition.

The intention of the Community legislature may be inferred from the elements relied upon by it in drafting the directive.

One of those was the Convention on the Conservation of European Wildlife and Natural Habitats, of the Council of Europe

(the Bern Convention), whose similarity in a number of respects to the Community directive is clearly apparent. There is an obvious parallel between Appendix IV to the Convention, entitled 'Prohibited means and methods of killing, capture and other forms of exploitation', and Annex IV to Directive 79/409/EEC. The expression used in both texts is exactly the same: 'semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition'.

Note 84 of the Explanatory Notes on the Bern Convention states that 'for the purposes of the Convention, "weapons with a magazine capable of holding more than two rounds of ammunition" means weapons capable of firing more than three shots without being reloaded'.

Thus there is every indication that the intention of the Community legislature was, likewise, solely to prohibit the use of weapons with more than three shots; had it been otherwise, it would instead have restricted the prohibition to the introduction of more than two rounds of ammunition into the magazine.

Article 9 of Law No 968 of 27 December 1977 only permits the use of 'automatic or semi-automatic [weapons] with a device preventing more than three shots from being fired', and therefore it is not possible to say that the Italian legislation is in that respect incompatible with the Community directive; accordingly, the fourth complaint has not been duly proven.

Fifth complaint: the powers given to regions to permit the capture and sale of migratory birds

The Commission maintains that Article 18 (2) of the Italian law is incompatible with Articles 7 and 8 of the directive inasmuch as

it confers on the regions the power to authorize the capture by any method and the sale of migratory birds even in the close season.

Article 18 (2) of the Italian law provides as follows:

'After consulting the Istituto Nazionale di Biologia della Selvaggina, the regions may operate, or authorize the operation, by means of specific regulations, of arrangements for capturing and selling, even outside the periods mentioned in Article 11, migratory birds of species to be specified from among those listed in Article 11 with a view to their being kept for use as live decoys in cover-shooting or for the purposes of bird fanciers at traditional fairs and markets. Such species may be trapped in limited numbers previously fixed for each species.'

Discussing this complaint further in the reply, the Commission stated that, in its view, the possibility thus conferred by the Italian law was not only manifestly inconsistent with what the defendant State stated in relation to the third complaint, but would amount, if it were found that no derogation was available under Article 9 of the directive, to an unequivocal breach of Article 7 (4) of the directive.

Moreover, since the opinion of the Istituto Nazionale di Biologia della Selvaggina is not binding, Article 7 (1) of the directive is deprived of all effect, given the margin of discretion thus conferred on the regions. The examples cited at the hearing by the Commission (and not contested by the Italian Government) would seem to confirm that contention.

In addition, as regards the authorization to capture the migratory species referred to in

Article 11 of the law, that is to say, the species which may be hunted under Italian law, it would, as we have seen with regard to the third complaint, permit the regions to authorize the capture of a number of species which, according to the directive, must be protected. There would thus be a breach of the combined provisions of Article 5, Article 7 (1) and Annex II of the directive.

The Commission also maintains that conferring on the regions the power to authorize the use of 'arrangements for capturing', without any other qualification, opens the way to the use of trapping methods which are prohibited by Article 8 and Annex IV of the directive. In that connection, the Commission even cited as an example — which was not challenged — the Friuli-Venezia-Giulia region, in which the use of snares and viscous substances is permitted.

Finally, the Commission claims that use for the purposes of bird fanciers at traditional fairs and markets, as referred to in the legislation at issue, is a reason for capture which does not appear in any of the provisions of the directive.

Italy denies that Article 18 (2) of Law No 968 confers on the regions a wide margin of discretion or what might be described as a general and indiscriminate authorization.

In fact the law states expressly that the powers conferred on the regions to authorize such activities must be exercised under 'specific regulations', and obviously those regulations cannot depart from the terms of the law itself or of the relevant Community directives.

The restrictive nature of the regulations is reinforced by the closing words of Article

18 (2) of the Italian law, by virtue of which the species of birds to which it refers may only be 'trapped in limited numbers previously fixed for each species'.

If it is also borne in mind that the fact that the power conferred on the regions is further restricted by the opinion (obligatory, although not binding) to be issued by the Istituto Nazionale di Biologia della Selvaggina, it is apparent that the conditions which must be satisfied in order to qualify for the exception laid down in Article 9 (1) (c) of the directive are met.

In any case, the possibility of using birds 'for the purposes of bird fanciers at traditional fairs and markets' is covered by Article 2 of the directive, which states that account may be taken of 'economic and recreational requirements'.

Those arguments call for the following observations.

According to the strict letter of the law, Article 18 of Law No 968 might be regarded as potentially containing the necessary elements to qualify, within the ambit of that article, as an exception of the kind provided for in Article 9 (1) (c) of the directive (but not also of the kind envisaged in Article 9 (1) (b), as the Italian Government contends, that subparagraph being, in my view, entirely irrelevant to the case).

I also consider that it is theoretically possible to rely on the mention of economic and *recreational* requirements in Article 2 of the directive.

Nevertheless, it must not be forgotten that in cases like this (and in view of the fact

that derogating provisions are exceptions to the rule, which must be strictly interpreted, as I said earlier) the regulations and the application of the general rules relating to the possibility of derogations under Article 9 are essential for ensuring their compatibility with the requirements of that article (both the general principles laid down in Article 9 (1) and the requirements mentioned in Article 9 (2)).

The position here is that, in the first place, the Italian State, in contravention of Article 9 (3) of the directive, never provided the Commission with any report which would have enabled it to verify, pursuant to Article 9 (4), the consequences of the derogations and their compatibility with the directive.

Even if that fact cannot be relied upon to found a declaration of failure to fulfil obligations (since it was not raised during the procedure prior to the action), it must seriously influence the way in which the content of and the mode of implementing the national legislation are assessed in the light of the requirements of Community law.

In the second place, it must be borne in mind that, with respect to various matters including hunting, Article 117 of the Constitution of the Italian Republic provides that 'it is for the regions to adopt... legislation within the limits of the fundamental principles established by the laws of the State, provided that such legislation does not conflict with the national interest or that of other regions'. In addition, Article 6 of Presidential Decree No 616 of 24 July 1977 provides that 'the administrative functions relating both to the application of European Economic Community regulations and to the implementation of directives transposed into national law by the State by means of a law which expressly sets out the basic prin-

ciples are likewise transferred to the regions with respect to each of the matters defined in this decree', including hunting.

However, I do not know what regulations, if any, have been adopted by the Italian regions to circumscribe the use of the powers which were conferred on them. I consider that a full analysis of the compatibility of the Italian legislation with the directive (in particular Articles 7, 8 and 9) should not be restricted to the text of Article 18 of Law No 968; any rules which supplement it and the actual circumstances in which it is applied must also be considered.

Thus, details would be required of the list of birds to which Article 18 is to apply, chosen from among those which are mentioned in Article 11 of Law No 968 (11 of which, as we know, are not to be hunted according to the directive); details would also be required concerning the arrangements for capturing birds authorized by the 'specific regulations', in order to ascertain whether they include any of those prohibited by the directive.

We have already seen that in one case at least (the Friuli-Venezia-Giulia region) the use of snares and viscous substances is authorized whereas the directive prohibits them. At the hearing, the Commission supplemented the information already provided by reporting that in the same region the capture of two million birds was authorized in 1982 under Article 18; similarly, another region permitted the hunting of 900 000 birds.

That means either that certain regional regulations are clearly contrary to the

Community legislation or that it is the absence of regional regulations implementing Article 18 of Law No 968 which has brought about those results which are incompatible with the directive in question.

In either case it is incumbent on the Italian Republic to adopt the measures necessary to bring to an end the failure to fulfil the requirements of Directive 79/409/EEC in those regions.

That possibility is expressly foreseen in Article 6 of the aforementioned Decree No 616 of 24 July 1977, which stipulates that 'the Government of the Republic, in the event of a proven failure to act on the part of the regional authorities resulting in failure to fulfil Community obligations, may, by resolution of the Council of Ministers based on an opinion of the Parliamentary Commission for Regional Matters and after hearing the authorities in question, fix an appropriate time-limit for compliance. If the regional authorities fail to act within that time-limit, the Council of Ministers may adopt the measures necessary in lieu of the regional administration.'

Even so, I do not think that it is possible to declare that the Italian Republic has failed to fulfil its obligations on the basis of the omissions of the regional authorities or of the government in relation to them, since such a declaration clearly must have a proper basis not only in the complaints notified during the procedure prior to the action but also in the terms of the application itself. In the former the Commission merely challenged, directly and expressly, Article 18 of Law No 968 and in the latter, after restating exactly the terms of the reasoned opinion, it never actually

gave precise details of the omissions or breaches committed by the regions in relation to their obligations under Article 18 and the provisions of the directive.

There remains, however, another aspect to be considered and on that point I think that the conclusion should be different.

It must be admitted that the Article 18, which is challenged by the Commission, is not abundantly clear and its wording suffers from a number of inadequacies which are likely to impede the attainment of its objective, viewed in the light of the aims of Directive 79/409/EEC.

In particular, in conferring powers and duties on the regions in this matter, Article 18 (2) fails to mention many of the general principles to which the exercise by the regions of those powers and the fulfilment of their duties should be subject.

Apart from the reference to the 'limited numbers previously fixed no indications are given as to the species of birds which may be captured, the permissible arrangements for capture, the use of live decoys, or the use of birds in fairs and markets—indications which would serve as a guide to the regions as to how they might unequivocally meet the requirements of Directive 79/409/EEC and achieve its aims.

As we have seen, according to the division of powers under Italian law (Decree No 616 of 1977) between the central State and the regional authorities as regards the implementation of Community directives, it is the duty of the State to adopt 'a law which expressly indicates the basic principles'. In exercising their legislative or

administrative powers of implementation the regions are thus to act within a clearly defined general framework, since 'in the absence of a regional law the provisions of the State law shall be observed in their entirety' (Decree No 616, Article 6 (2)).

In those circumstances, I consider that Article 18 (2) of Law No 968 is a rather ineffective instrument for achieving the protection contemplated by the directive, in particular if it is to serve as the general framework within which the regulatory and administrative powers of the regions are to be exercised.

These proceedings have brought to light a number of practices in some regions which are patently incompatible with the directive (as regards the use of prohibited hunting methods and the numbers of birds captured) and the vague and unduly temperate terms of Article 18 are not conducive to its being regarded as a sufficient deterrent to the pursuance of such practices.

To summarize, I am of the opinion that Article 18 of Law No 968 is not adequate to achieve the level of protection envisaged by Directive 79/409 for the purpose of serving both as a suitable framework for regional powers and as a clear-cut basis for any derogations under Article 9 of the directive.

Sixth complaint: the use of migratory birds as live decoys

In the notification of failure to fulfil obligations, in the reasoned opinion and in the application the Commission alleged that Article 18 of the Italian law permitted the use of migratory birds 'as live decoys in hunting, in breach of Article 8 of the directive'.

In its reply the Commission went on to explain, in its own words, that the Italian law did not correctly transpose into national law the provisions of Article 8 and Annex IV of the directive, since the law 'does not prohibit the use of live decoys which are not only "blind" but also "mutilated"'.

The Italian Government questioned the admissibility of this 'explanation', maintaining that it constituted an unacceptable extension of the complaint made against it in the original application and in the procedure prior to the action.

In my view the objection raised by the Italian Government should be upheld.

Despite the fact that the original complaint refers to Article 8 of the directive which in turn refers to Annex IV, that complaint identifies a specific provision of the Italian law (Article 18) which wrongly permits the use of live decoys, whereas in the reply, without reference being made to any legal provision in particular, it is alleged that the Italian legislation fails to prohibit the use of decoys which are not only blind but also mutilated. In my view, although the complaint is correctly formulated, it ought to refer to Article 20 (o) of Law No 968, which prohibits solely the use of live blind decoys, when it ought to prohibit the use of such decoys which are not only blind but also mutilated.

Thus there has been not merely an enlargement or amplification of the original complaint — a separate one has been added which cannot be regarded as having the same subject-matter as the first. The arguments relied upon by the Italian Government in its defence would certainly have been different had the initial complaint been the same as that formulated in the reply; it might have sought to rely not on

the arguments which it did put forward but rather on the derogation provided for in Article 9 of the directive.

Consequently, since the reply contained a modification of the original complaint incompatible with the defendant State's rights of defence, the complaint as formulated therein is inadmissible, and the Commission's complaint in that respect must be viewed in the terms in which it was formulated in the procedure prior to the action and in the application.

In that connection, I do not consider that Article 18 of the Italian law is incompatible with Article 8 of the directive inasmuch as it permits the use of live birds as decoys.

What Article 8 and Annex IV of the directive prohibit is the use as decoys of live birds which are blind or mutilated.

Thus what the prohibition actually relates to is not in fact the use of live birds as decoys but the blinding and mutilating of them. Article 18 of the Italian law does not permit migratory birds to be blinded and mutilated but merely allows them to be used as decoys.

Hence, in my view, the sixth complaint must fail.

4. To summarize, in these proceedings there are two perfectly documented instances of insufficiency.

On the one hand, a Member State decided — as it was entitled to — not to participate in the procedure prior to the action initiated pursuant to Article 169 of

the Treaty. It thus had no opportunity at that stage to obtain a more detailed explanation by the Commission of the complaints and thus, by submitting observations, to avoid some of the difficulties of interpretation which did not arise until the matter was brought before the Court.

On the other hand, it must be stated that some of the Commission's complaints were formulated in vague terms and even carelessly, thus giving rise to doubts and ambiguities which, if not so serious as to make them inadmissible, obstructed the speedy and efficient administration of justice.

5. In the light of all the foregoing considerations, I am of the opinion that the first and the fifth complaints should be upheld, the second and third complaints should be partially upheld, and the fourth and sixth complaints should be dismissed.

Those are the terms in which I suggest that the Court should declare that the Italian State failed to adopt within the prescribed period the provisions necessary to comply fully with its obligations under Council Directive 79/409/EEC of 2 April 1979, and therefore has failed to fulfil its obligations under the EEC Treaty.

Since both parties have failed in some of their submissions, I suggest that their costs should be apportioned in accordance with Article 69 (3) of the Rules of Procedure, as the Court has already had occasion to do in similar circumstances.⁵

⁵ — See, for example, the judgment of 15 April 1970 in Case 28/69 *Commission v Italy* [1979] ECR 196 and 197; the judgment of 25 October 1979 in Case 159/78 *Commission v Italy* [1979] ECR 3265; and the judgment of 8 January 1980 in Case 21/79 *Commission v Italy* [1980] ECR 16.