

JUDGMENT OF THE COURT (Second Chamber)

13 January 2005 *

In Case C-117/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by order of 17 December 2002, received at the Court on 18 March 2003, in the proceedings

Società Italiana Dragaggi SpA and Others

v

Ministero delle Infrastrutture e dei Trasporti,

Regione Autonoma del Friuli-Venezia Giulia,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), J.-P. Puissochet, N. Colneric and J.N. Cunha Rodrigues, Judges,

* Language of the case: Italian.

Advocate General: J. Kokott,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 June 2004,

after considering the observations submitted on behalf of:

- Società Italiana Dragaggi SpA, acting in its own name and as agent of Associazione Temporanea di Imprese Mantovani SpA and HAM BV, by R. Titomanlio, avvocato,

- Regione Autonoma del Friuli-Venezia Giulia, by G. Marzi, avvocato,

- the French Republic, by C. Mercier, acting as Agent,

- the Kingdom of Sweden, by A. Kruse, acting as Agent,

- the Commission of the European Communities, by M. van Beek and L. Cimaglia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2004,

gives the following

Judgment

- 1 The reference for a preliminary ruling relates to the interpretation of Articles 4(5), 6(3) and 21 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 Directive').

- 2 The reference was submitted in proceedings between, first, Società Italiana Dragaggi SpA ('Dragaggi') amongst others and, second, the Ministero delle Infrastrutture e dei Trasporti (Ministry for Infrastructure and Transport) and the Regione Autonoma Friuli-Venezia Giulia (Autonomous Region of Friuli-Venezia Giulia) concerning the annulment, by the contracting authority, of a tender procedure relating to dredging works and the dumping of sediment on reclaimed land in the port of Monfalcone.

Legal context

Community law

- 3 The sixth recital in the preamble to the Directive states that, 'in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable'.

4 According to Article 3(1) of the Directive, 'a coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.'

5 Article 4 of the Directive is worded as follows:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. ...

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. ...

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most ...

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

6. Under paragraph 1 of Annex III (Stage 2) to the Directive, 'all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance'.

7 Article 6 of the Directive states:

‘ ...

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

- 8 Article 21 of the Directive provides that measures envisaged are to be adopted in accordance with a committee procedure.

- 9 Under Article 23, the Member States had to transpose the Directive into national law within two years of notification thereof. Notification took place on 10 June 1992.

National legislation

- 10 The Directive was transposed into Italian law by Decree No 357 of the President of the Republic of 8 September 1997 entitled 'Regulation implementing Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora' (GURI No 248, 'supplemento ordinario No 219/L', of 23 October 1997; 'Decree No 357/97').

- 11 Article 4 of Decree No 357/97 ties conservation measures for sites to establishment by the Commission of the list of sites of Community importance.

The main proceedings and the question referred for a preliminary ruling

- 12 On 14 May 2001 Dragaggi was awarded a contract relating to dredging works and the dumping of the sediment on reclaimed land in the port of Monfalcone.
- 13 Four months later the contracting authority annulled the entire tender procedure on the ground that the reclaimed land on which the sediment resulting from the works was intended to be deposited was classified as a site of Community interest, requiring an impact assessment under the relevant national legislation. According to the authority, such an assessment could not have a positive outcome.
- 14 Dragaggi challenged the legality of the decision annulling the tender procedure before the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia (Regional Administrative Court of Friuli-Venezia Giulia, Italy). It contended in particular that the procedure for classifying as a site of Community importance the 'mouth of the Timavo' site where the reclaimed land in question was situated had not yet been completed. Although the Italian authorities had proposed a list of sites, including the site at the mouth of the Timavo, to the Commission, the latter had not yet adopted

the Community list under the third subparagraph of Article 4(2) of the Directive. Therefore, the obligation to carry out a prior assessment of projects that had significant implications for the site was not yet applicable.

- 15 In its judgment, the court rejected the argument alleging that the impact assessment procedure was not applicable to the project. According to the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia, where a Member State has, as in the present instance, identified a site hosting a priority species and has included it in the list proposed to the Commission, that site must, under paragraph 1 of Schedule III (Stage 2) to the Directive, be considered to be of Community importance. Accordingly it is subject, pursuant to Article 4(5) of the Directive, to the protective measures referred to in Article 6(2), (3) and (4) thereof, and in particular to the impact assessment which is provided for in Article 6(3).
- 16 According to that court, this approach is the only one capable of giving logical meaning to the Directive which, inasmuch as it seeks to protect habitats or species in danger of disappearance and extinction, must be capable of applying directly, if only in order to provide a safeguard. Furthermore, the measures proposing the classification of the mouth of the Timavo as a priority site, in particular the decree of the Minister for the Environment of 3 April 2000, were not challenged.
- 17 Holding that an impact assessment was necessary, the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia upheld Dragaggi's other complaints alleging that the persons concerned by the carrying out of the project had not been consulted, that alternative solutions to those defined in the project had not been considered before the tender procedure was annulled and that the competent authority had not considered the possibility of giving a positive assessment accompanied by conditions.

- 18 Dragaggi brought an appeal against the judgment of the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia before the Consiglio di Stato (Council of State). In particular, it repeated before the Consiglio di Stato the argument that Article 4(5) of the Directive requires the protective measures envisaged in Article 6 of the Directive to be applied only once the Community list has been established. In its submission, this view is confirmed by Article 4 of Decree No 357/97 which provides that the protective measures must be adopted within three months following the inclusion of the site on the list established by the Commission.
- 19 The Consiglio di Stato observed that, inasmuch as the listing of sites of Community importance hosting priority habitats appeared to be a purely declaratory act that did not require the exercise of any discretion by the Community authority, the interpretation placed on Article 4(5) of the Directive by the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia could not be considered to be manifestly unfounded.
- 20 In those circumstances the Consiglio di Stato decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 4(5) of Directive 92/43 of 21 May 1992 to be interpreted as meaning that the measures under Article 6 and, in particular, under Article 6(3) of that directive are mandatory for the Member States only after final approval at Community level of the list of sites under Article 21 or, alternatively, in addition to determination of the ordinary commencement date of conservation measures, must a distinction be drawn between declaratory listing and determinative listing (including in the first category the listing of priority sites) with the result that, in order to ensure the

effectiveness of the directive, where a Member State identifies a site of Community importance sustaining priority natural habitat types or species, there must be considered to be an obligation to carry out an assessment of plans and projects with a significant effect on the site even before the Commission draws up the draft list of sites or the adoption of the final version of that list pursuant to Article 21 of the directive and, in fact, with effect from the drawing up of the national list?

Consideration of the question referred

- 21 Pursuant to Article 4(5) of the Directive, the regime for the protection of special areas of conservation that is laid down in Article 6(2), (3) and (4) thereof applies to a site once it is placed, in accordance with the third subparagraph of Article 4(2), on the list of sites selected as sites of Community importance as adopted by the Commission under the procedure laid down in Article 21.
- 22 The fact that, according to paragraph 1 of Annex III (Stage 2) to the Directive, all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance cannot render the protection regime prescribed in Article 6(2), (3) and (4) of the Directive applicable to them before they appear, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission.

23 The contrary proposition referred to by the Consiglio di Stato, that where a Member State has, as in the main proceedings, identified a site as hosting a priority habitat and has included it in the list proposed to the Commission pursuant to Article 4(1) of the Directive, that site must, in view of paragraph 1 of Annex III (Stage 2) to the Directive, be considered to be of Community importance and is therefore subject, pursuant to Article 4(5), to the protective measures referred to in Article 6(2), (3) and (4), cannot succeed.

24 First, this proposition clashes with the wording of Article 4(5) of the Directive, which expressly links application of those protective measures to the fact that the site concerned has been placed, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission. Second, the proposition presupposes that, where a site has been identified by a Member State as hosting priority natural habitat types or priority species and has been referred to on the list proposed to the Commission pursuant to Article 4(1) of the Directive, the Commission is required to place it on the list of sites of Community importance which it adopts in accordance with the procedure laid down in Article 21 of the Directive and is mentioned in the third subparagraph of Article 4(2). If that were the case, the Commission would be precluded, when establishing, in agreement with each Member State, a draft list of sites of Community importance within the meaning of the first subparagraph of Article 4(2), from contemplating not including on the draft list any site proposed by a Member State as hosting priority natural habitat types or priority species, even if it were to consider, notwithstanding the contrary opinion of the Member State concerned, that a given site did not host priority natural habitat types and/or species as referred to in paragraph 1 of Annex III (Stage 2) to the Directive. Such a situation would be contrary, in particular, to the first subparagraph of Article 4(2) of the Directive, read in conjunction with paragraph 1 of Annex III (Stage 2).

- 25 It thus follows from the foregoing that, on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive.
- 26 This does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission.
- 27 If those sites are not appropriately protected from that moment, achievement of the objectives seeking the conservation of natural habitats and wild fauna and flora, as set out in particular in the sixth recital in the preamble to the Directive and Article 3(1) thereof, could well be jeopardised. Such a situation would be particularly serious as priority natural habitat types or priority species would be affected, for which, because of the threats to them, early implementation of conservation measures would be appropriate, as recommended in the fifth recital in the preamble to the Directive.
- 28 In the present instance, it should be remembered that the national lists of sites eligible for identification as sites of Community importance must contain sites which, at national level, have an ecological interest that is relevant from the point of view of the Directive's objective of conservation of natural habitats and wild fauna and flora (see Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 22).

29 It is apparent, therefore, that in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures appropriate for the purpose of safeguarding that ecological interest.

30 The answer to the question referred must therefore be that:

- on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive;

- in the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.

Costs

- 31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

On a proper construction of Article 4(5) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the protective measures prescribed in Article 6(2), (3) and (4) of that directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the directive, are on the list of sites selected as sites of Community importance adopted by the Commission of the European Communities in accordance with the procedure laid down in Article 21 of the directive.

In the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of Directive 92/43, required to take protective measures that are appropriate, from the point of view of the directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.

Signatures.