

JUDGMENT OF THE COURT (Second Chamber)

23 March 2006 *

In Case C-209/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 May 2004,

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

applicant,

v

Republic of Austria, represented by E. Riedl, J. Müller and K. Humer, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

THE COURT (Second Chamber),

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

Advocate General: J. Kokott,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2005,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2005,

gives the following

Judgment

¹ By its application, the Commission of the European Communities asks the Court for a declaration that:

- by failing to include in the area of the Lauteracher Ried national nature reserve ('the Lauteracher Ried') that is classified as a special protection area ('SPA') the Soren and Gleggen-Köblern sites which, according to scientific criteria, are,

together with that SPA, among the most suitable territories in number and size for the purposes of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended by Commission Directive 97/49/EC of 29 July 1997 (OJ 1997 L 223, p. 9) ('the Birds Directive'), and

- by failing, when authorising the planned construction of the federal S 18 Lake Constance dual carriageway ('the S 18 carriageway'), to comply properly and fully with the requirements laid down in Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive') in the case of execution of a project despite a negative assessment of the environmental implications for the site,

the Federal Republic of Austria has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive and Article 6(4), in conjunction with Article 7, of the Habitats Directive.

Legal framework

The Act of Accession of the Republic of Austria to the European Union

- ² The Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('the Act of Accession') was signed on 24 June 1994 and entered into force on 1 January 1995.

- 3 According to Article 2 of the Act of Accession, ‘from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act’.

- 4 Article 168 of the Act of Accession provides:

‘The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives and decisions within the meaning of Article 189 of the EC Treaty and of Article 161 of the Euratom Treaty, and with recommendations and decisions within the meaning of Article 14 of the ECSC Treaty, unless a time-limit is provided for in the list of Annex XIX or in any other provisions of this Act.’

The Birds Directive

- 5 According to Article 1(1), the Birds Directive ‘relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation’.
- 6 The corncrake (*Crex crex*) is a species added to Annex I to the Birds Directive (‘Annex I’) by Commission Directive 85/411/EEC of 25 July 1985 amending Directive 79/409 (OJ 1985 L 233, p. 33).

7 Article 4 of the Birds Directive provides:

‘1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

- (a) species in danger of extinction;
- (b) species vulnerable to specific changes in their habitat;
- (c) species considered rare because of small populations or restricted local distribution;
- (d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. ...

...

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

The Habitats Directive

8 Article 6(3) and the first paragraph of Article 6(4) of the Habitats Directive provide:

'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.'

9 Article 7 of the directive provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

Background to the dispute

10 The Lauteracher Ried is situated in the Province of Vorarlberg. After the Republic of Austria acceded to the European Union, the Austrian Government notified the

Commission for the first time of the classification of that nature reserve as an SPA on 7 June 1995 and it subsequently submitted certain additional documents. The Soren and Gleggen-Köblern sites are not included within the boundaries of that SPA.

- 11 As regards the construction project for the S 18 carriageway, the procedure for determining the road line was commenced in 1992. Following a discussion held on 29 April 1992 with the administration of the district of Dornbirn, the project was completely revised in order to take account of the report drawn up by the Province of Vorarlberg's official expert for the protection of nature and landscapes. The procedure for presenting the project and hearing the parties concerned with a view to determining the road line began on 8 March 1994 pursuant to the 1971 Law on federal roads. It ended with the determination of the road line by order of 8 April 1997 of the Federal Minister for Economic Affairs. At that stage of the project, the Austrian authorities reached the conclusion that there were no alternative routes for the S 18 carriageway.
- 12 On 27 January 1999, the procedure for authorisation of the construction of the carriageway began. By decision of 6 July 2001, the project for construction of the carriageway was authorised by the administrations of the districts of Bregenz and Dornbirn, pursuant to the legislation of the Province of Vorarlberg. Given the abovementioned order of the Federal Minister for Economic Affairs, that decision could not adopt a road line other than the one which had been chosen.
- 13 That decision was the subject of an appeal to the government of the Province of Vorarlberg. On 21 February 2003, the government adopted a decision confirming the decision, but the execution of the government's decision was suspended on 29 August 2003 by the Verwaltungsgerichtshof (Administrative Court). The project for the construction of the S 18 carriageway is currently blocked and cannot proceed.

Pre-litigation procedure

- 14 Following a complaint, on 12 November 2001 the Commission sent a letter to the Austrian authorities concerning the insufficient classification, from an ornithological point of view, of the Lauteracher Ried SPA, the feared negative implications of the S 18 carriageway construction project for the corncrake and the other bird populations to be safeguarded within that area, and also other issues relating to the protection of that area.
- 15 After examining the Austrian Government's response, sent to the Commission on 1 February 2002, on 27 June 2002 the Commission sent the Republic of Austria a letter of formal notice. Not satisfied with the explanations provided by the Austrian Government, on 11 July 2003 the Commission issued a reasoned opinion calling upon the Republic of Austria to take the measures necessary to comply therewith within two months of its notification.
- 16 Taking the view that the arguments relied on by the Republic of Austria in its response of 26 September 2003 to the reasoned opinion were not convincing and considering that the infringement alleged was continuing, the Commission decided to bring the present action.

The action

- 17 The Commission puts forward two complaints in support of its action. First, it criticises the Republic of Austria for not having complied with the provisions of Article 4(1) and (2) of the Birds Directive concerning the procedure for selection and classification of an SPA. Second, it pleads that the requirements laid down in Article 6(4) of the Habitats Directive were not complied with when the project for the construction of the S 18 carriageway was authorised.

The first complaint: failure to comply with Article 4(1) and (2) of the Birds Directive

Arguments of the parties

- ¹⁸ By its first complaint, the Commission maintains that the current classification, and definition of the boundaries, of the Lauteracher Ried SPA do not comply with the requirements of protection and sustainable conservation of the bird species present in that area, particularly the corncrake and other migratory grassland-nesting species. According to the Commission, in order to meet the requirements of Article 4(1) and (2) of the Birds Directive, the surface area of that SPA must be expanded to include the Soren and Gleggen-Köblern sites.
- ¹⁹ In support of that complaint, the Commission submits, first, that the decisive factor for defining the boundaries of the SPA is the presence of bird species to be protected. According to the scientific information and the results of monitoring carried out between 2000 and 2002, those sites are not only habitats but also form part of the principal breeding ground for the corncrake and other migratory grassland-nesting species. The Commission also states that the meadows situated inside and around the Lauteracher Ried site offer, in terms of bird protection, a uniform natural habitat that is particularly appropriate structurally and they are used by the same bird populations. It adds that the corncrakes present in the Rhine Valley, in the territory of the Province of Vorarlberg, are a closely-knit group of birds.
- ²⁰ Next, the Commission maintains that the obligation to designate as an SPA all areas which seem most suitable on the basis of ornithological criteria does not come to an end with the first declaration made. The objective of conservation of endangered

species requires re-examination of a declaration in the light of more recent scientific knowledge and a possible re-definition of the boundaries of an existing SPA.

- 21 Lastly, the fact that the Republic of Austria classified as protection areas the sites of Bangs and Matschels, which are also situated in the Province of Vorarlberg, as part of a conservation effort for the corncrake, in no way affects that Member State's obligation to do likewise for the Soren and Gleggen-Köblern sites, which are adjacent to the declared SPA.
- 22 The Republic of Austria states that the currently-defined boundaries of the Lauteracher Ried SPA constitute the best possible means of complying with the requirements of the Birds Directive for the protection and conservation of the corncrake and regularly-occurring migratory bird species in the Rhine Valley in the Province of Vorarlberg.
- 23 It submits that it has fulfilled its obligations under the Birds Directive by defining the boundaries for that SPA together with the Bangs and Matschels protection area for fauna, flora, habitats and birds, having thereby classified as an SPA and recognised as such the territories of the Rhine Valley situated in the Province of Vorarlberg which are the most suitable in number and size for the conservation of the corncrake referred to in Annex I and of regularly-occurring migratory species.
- 24 The Republic of Austria states that the boundaries of the SPA were defined on the basis of scientific evidence available at the time of the choice and classification of that area; that evidence is recognised as being reliable in the case-law of the Court of Justice and it led to the classification of that area alone as being the most important breeding ground for meadow birds in the Province of Vorarlberg.

- 25 It adds that, in classifying that area, it relied solely on the ornithological or ecological aspects which may be inferred from Article 4(1) and (2) of the Birds Directive. In that context, it maintains that an untouched natural setting essential for the development of the corncrake is concentrated only in the Lauteracher Ried SPA, and that that setting does not include the litter meadows situated in the Soren and Gleggen-Köblern sites.
- 26 According to the Republic of Austria, several criteria must be considered in order to determine the most suitable territories, in particular the fact that two species of birds occur in a given area or part of that area. However, that criterion alone is not decisive for compliance with the requirements of the Birds Directive. To be included in the most suitable territories within the meaning of that directive, the area must also satisfy each of a number of other ornithological or ecological criteria. It is also necessary to consider and assess whether the area is suitable in size and from a quantitative point of view, and whether the condition it is in and its environment are suitable. This aspect includes existing harm to the area due to recreational activities, management of the area or other factors, and the deterioration of the habitat resulting therefrom. According to the Republic of Austria, because of the existing pollution and constraints and the current quality of the two sites of Soren and Gleggen-Köblern, they do not meet the relevant criteria to be classified as an SPA under the Birds Directive.
- 27 In that context, the Republic of Austria states that the taking into account, if only indirectly, of socio-economic interests may play a role in the assessment of whether an area is suitable in size and adds that this is the case for interference with the legal rights of individuals.
- 28 According to the Republic of Austria, the complaint that it was obliged to amend subsequently and make constant adaptations to the Lauteracher Ried SPA has no legal basis. Such an obligation could be difficult to reconcile with the principle of legality of administrative actions and contrary to the Court of Justice's case-law.

29 The Republic of Austria adds that although the Soren and Gleggen-Köblern sites are not among the most suitable territories within the meaning of the fourth subparagraph of Article 4(1) of the Birds Directive, they are not entirely unprotected. In fact, during the appeal procedure relating to the project for the construction of the S 18 carriageway, they were subject to the protection scheme provided for in the second sentence of Article 4(4).

Findings of the Court

30 In order to decide the present dispute, it is appropriate to begin by recalling the principles governing the Member States' obligations concerning the choice and classification of SPAs as imposed by the Birds Directive.

31 It follows from the fourth subparagraph of Article 4(1) of that directive that the Member States must classify as SPAs the most suitable territories in number and size for the conservation of the protected species listed in Annex I. In doing so, they must take into account those species' protection requirements in the geographical sea and land area where that directive applies. Under Article 4(2), Member States must take similar measures for regularly-occurring migratory species not listed in Annex I as regards their breeding, moulting and wintering areas and staging posts along their migration routes.

32 According to the settled case-law of the Court, Article 4(1) and (2) of the Birds Directive requires the Member States to provide SPAs with a legal status protecting them that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I and the breeding, moulting and wintering of regularly-occurring migratory species not listed in Annex I (see Case C-166/97 *Commission v France* [1999] ECR I-1719, paragraph 21, and case-law cited).

- 33 The Court has also held that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs concerns not the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I (see, *inter alia*, Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031, paragraph 61).
- 34 It should also be borne in mind that, according to the results of scientific studies and a monitoring exercise which were submitted by the Commission during the procedure and have not been contested by the Austrian Government, in the years 2000 to 2002, respectively four or five, four and three singing male corncrakes were observed within the 580-hectare Lauteracher Ried SPA. The sightings concerning the Soren and Gleggen-Köblern sites, covering 64 and 352 hectares, were only slightly lower, the birds observed numbering four, two and three, respectively.
- 35 Moreover, as the Commission has maintained, without being contradicted on this point either, in 2001 there were likewise large numbers of migratory common snipe (*Gallinago gallinago*), Northern lapwings (*Vanellus vanellus*) and Eurasian curlews (*Numenius arquata*) breeding in the two sites not designated as SPAs by the Austrian authorities. Within the Lauteracher Ried SPA there were three to five pairs of common snipe nesting, 11 or 12 pairs of Northern lapwings and three pairs of Eurasian curlews. In the Soren and Gleggen-Köblern sites, respectively, there were three and three or four pairs of common snipe, six and nine pairs of Northern lapwings and one (probably) and eight pairs of Eurasian curlews.
- 36 It follows, as observed by the Advocate General in point 32 of her Opinion, that the Soren and Gleggen-Köblern sites are of at least comparable importance to the Lauteracher Ried SPA for both the corncrake and migratory bird species not listed in Annex I, such as the common snipe, Northern lapwing and Eurasian curlew. Moreover, the figures provided by the Austrian Government in the standard data

form relating to those last three species are reached only if account is taken also of the land situated outside that SPA.

37 As regards the Austrian Government's argument that the Soren and Gleggen-Köblern sites are not the most suitable ones for protecting the abovementioned bird species due to the existing pollution and constraints, as well as the condition and current quality of those sites, it should be borne in mind that, as just mentioned in paragraphs 34 and 35 of this judgment, those sites host, in a smaller area than the Lauteracher Ried SPA, a similar number of nesting birds to that observed in the SPA.

38 Accordingly, the Court finds that, on the basis of ornithological criteria, the Soren and Gleggen-Köblern sites, in the same way as the Lauteracher Ried SPA, are among the most suitable territories in number and size for classification as SPAs for the purposes of Article 4(1) and (2) of the Birds Directive.

39 This finding cannot be affected by the argument relied on by the Austrian Government to the effect that it is appropriate to take account, if only indirectly, of economic and social criteria in the necessary assessment of the characteristics of the area to be classified as an SPA.

40 According to the settled case-law of the Court, a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of the Birds Directive or as constituting imperative reasons of overriding public interest of the kind referred to in the first subparagraph of Article 6(4) of the Habitats Directive (see, in particular, Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraphs 31 and 42).

- 41 Regarding the Austrian Government's argument that the results of the on-site monitoring do not lead to the conclusion that the Soren and Gleggen-Köblern sites are suitable for the conservation of the bird species to be protected, the Court finds that that argument is not such as to provide scientific justification for excluding those sites from the SPA. On the contrary, the classification of those sites as SPAs should safeguard the conservation status of the corncrake, a species listed in Annex I, and other regularly-occurring migratory bird species, in accordance with the objectives of the Birds Directive.
- 42 Nor does the Court accept the Austrian Government's argument that the Commission is incorrect in maintaining that the Lauteracher Ried SPA must continually be amended and adapted, since such a requirement has no legal basis.
- 43 Although it is common ground that the obligation to classify the most suitable territories for establishing an SPA entered fully into force with respect to the Republic of Austria on 1 January 1995, the date of its accession to the European Union, such an obligation does not end on that date. Neither the Birds Directive nor the wording of Article 4 thereof contains the slightest indication that the effects of the obligation to transpose that directive were exhausted on that date. Moreover, as noted by the Advocate General in point 39 of her Opinion, it would hardly be compatible with the objective of effective protection of birds if outstanding areas for the conservation of the species to be protected were not brought under protection merely because the outstanding nature of a site came to light only after transposition of the Birds Directive.
- 44 As to the Austrian Government's argument that it relied on the study carried out in 1995 by the Federal Environment Agency in collaboration with BirdLife, entitled *Important Bird Areas in Österreich*, because it was the only reliable inventory and scientific assessment existing at the time the Lauteracher Ried site was selected and

classified as an SPA, it need merely be stated that, as rightly pointed out by the Commission, the obligation to classify is not limited by the state of scientific knowledge at any given time.

45 The case-file shows that other scientific ornithological studies and expert reports, as well as the results of monitoring more recent than that on which the classification of the Lauteracher Ried SPA was based, are available. Accordingly, it is on the basis of that evidence, the accuracy of which is not disputed by the Republic of Austria, that the classification of the SPA had to be reconsidered.

46 Nor can the Republic of Austria maintain that, having classified the Bangs and Matschels sites, where the corncrake is also present, as protection areas, it no longer has to classify the Soren and Gleggen-Köblern sites as SPAs.

47 As the Court has already held, Member States are obliged to classify as SPAs all the sites which, applying ornithological criteria, appear to be the most suitable for conservation of the species in question (see, inter alia, *Commission v Netherlands*, paragraph 62).

48 Lastly, regarding the Austrian Government's argument that the Soren and Gleggen-Köblern are not left entirely unprotected, suffice it to recall that Article 4(1) of the Directive requires Member States to classify as SPAs the most suitable territories in number and size for the conservation of the species mentioned in Annex I, an obligation which it is not possible to avoid by adopting other special conservation methods (*Commission v Netherlands*, paragraph 55).

49 In the light of the foregoing, the Court finds that first complaint put forward by the Commission is well founded.

The second complaint: failure to comply with the requirements of Article 6(4) of the Habitats Directive

50 By its second complaint, the Commission maintains that the Republic of Austria did not comply with its obligations under Article 6(4), in conjunction with Article 7, of the Habitats Directive when the project for the construction of the S 18 carriageway was authorised, having regard to the requirements for biotope and habitat protection set for the Lauteracher Ried SPA.

51 The Commission states, first, that no specific and detailed assessment in accordance with the objectives of the Birds Directive was carried out before May 2000. It maintains that, when the environmental study led to a negative opinion from the Province of Vorarlberg's official expert in May 2000, due to the implications of the project for the construction of the S 18 carriageway on the SPA, no study was undertaken to ascertain whether alternative solutions could be envisaged for the road line. Next, the Commission states that, after the decision authorising construction, taken on 6 July 2001, it was not directly informed of the compensatory measures taken to counter the adverse impact of construction. Lastly, the Commission states that it has not been established that all necessary compensatory measures have actually been taken to ensure that the overall coherence of Natura 2000 is protected.

52 The Republic of Austria contests all of the submissions put forward by the Commission in support of the second complaint.

The temporal applicability of the Habitats Directive

- 53 Since it follows from paragraph 11 of this judgment that certain events pertaining to the project for the construction of the S 18 carriageway occurred before the date on which the Republic of Austria acceded to the European Union, it is appropriate, before ruling on the alleged infringement of the Habitats Directive, to consider whether it is applicable to the facts of the dispute which gave rise to the Commission's action.
- 54 It is common ground that the project for the construction of the S 18 carriageway began in 1992. The procedure was suspended and then resumed on 8 March 1994, the date on which it was formally presented and made subject to an assessment procedure pursuant to the 1971 Law on federal roads.
- 55 The case-file also shows that the overall federal expert report was made public in the same year, that is, prior to 1 January 1995, when the Republic of Austria acceded to the European Union.
- 56 According to the Court's settled case-law, the principle that projects likely to have significant effects on the environment must be subjected to an environmental assessment does not apply where the application for authorisation for a project was formally lodged before the expiry of the time-limit for transposition of a directive (see, with respect to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraphs 29 and 32, and Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23).

- 57 The Court has held that that formal criterion is the only one which accords with the principle of legal certainty and preserves a directive's effectiveness. The reason for that is that a directive such as the Habitats Directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time-consuming by the specific requirements imposed by the directive and for situations already established to be affected by it (see, by analogy, *Gedeputeerde Staten van Noord-Holland*, paragraphs 23 and 24).
- 58 Both Directive 85/337 and the Habitats Directive pertain to the assessment of the effects of certain public and private projects on the environment. In both cases, the assessment procedure takes place before the project is finally decided upon. The results of that assessment must be taken into consideration when the decision on the project is made, and the decision may be amended depending on the results. The various phases of examination of a project are so closely connected that they represent a complex operation. The fact that the content of some requirements differs does not affect this assessment. It follows that this complaint must be considered as at the date on which the project was formally presented, namely the date referred to in paragraph 54 of this judgment.
- 59 Next, it should be borne in mind that, in accordance with the provisions of acts of accession, the rights and obligations resulting from Community law are, save where otherwise provided, immediately applicable in the new Member States (see, to that effect, Case C-179/00 *Weidacher* [2002] ECR I-501, paragraph 18).
- 60 It follows from the Act of Accession that the obligations under the Birds Directive and the Habitats Directive entered into force with respect to the Republic of Austria on 1 January 1995 and that no derogation or transitional period was granted to it.

61 Accordingly, the procedure for authorisation of the project for the construction of the S 18 carriageway was formally initiated prior to the date of accession of the Republic of Austria to the European Union.

62 It follows that, in the present case, in accordance with the case-law referred to in paragraph 56 of this judgment, the obligations under the Habitats Directive did not bind the Republic of Austria and that the project for the construction of the S 18 carriageway was not subject to the requirements laid down in that directive.

63 In the light of the foregoing, the Commission's second complaint is not well founded.

64 Consequently, the Court finds that, by failing to include in the Lauteracher Ried SPA the Soren and Gleggen-Köblern sites which, according to scientific criteria, are, together with that SPA, among the most suitable territories in number and size for the purposes of Article 4(1) and (2) of the Birds Directive, the Republic of Austria has failed to fulfil its obligations under those provisions of that directive.

Costs

65 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. Under the first subparagraph of Article 69(3) of the same rules, the Court may nevertheless order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads, or where the

circumstances are exceptional. Since the Commission and the Republic of Austria have each been partially unsuccessful in this case, they should bear their own costs.

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

- 1. Declares that, by failing to include in the special protection area at the Lauteracher Ried national nature reserve the Soren and Gleggen-Köblern sites which, according to scientific criteria, are, together with that special protection area, among the most suitable territories in number and size for the purposes of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as amended by Commission Directive 97/49/EC of 29 July 1997, the Republic of Austria has failed to fulfil its obligations under those provisions of that directive;**
- 2. Dismisses the remainder of the action;**
- 3. Orders the Commission of the European Communities and the Republic of Austria to bear their own costs.**

[Signatures]