

JUDGMENT OF THE COURT (Fourth Chamber)

9 June 2011 (*)

(Failure of a Member State to fulfil obligations – Habitats Directive – Inadequacy of measures taken to protect the species *Cricetus cricetus* (European hamster) – Deterioration of habitats)

In Case C-383/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 25 September 2009,

European Commission, represented by O. Beynet and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and S. Menez, acting as Agents,

defendant,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen (Rapporteur), A. Prechal and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 21 October 2010,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2011,

gives the following

Judgment

- 1 By its application, the European Commission requests the Court to declare that, by failing to establish a programme of measures to ensure strict protection of the species *Cricetus cricetus* (the European hamster), the French Republic has failed to fulfil its obligations under Article 12(1)(d) of 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), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368) ('the Habitats Directive').

Legal context

- 2 The main aim of the Habitats Directive, as stated in the third recital in the preamble thereto, is to promote the maintenance of biodiversity.

- 3 Article 1(a) to (i) of the directive provides:

'For the purpose of this Directive:

- (a) conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

...

- (g) species of Community interest means species which, within the territory referred to in Article 2, are:

- (i) endangered, except those species whose natural range is marginal in that territory and which are not endangered or vulnerable in the western palearctic region; or

- (ii) vulnerable, i.e. believed likely to move into the endangered category in the near future if the causal factors continue operating; or

- (iii) rare, i.e. with small populations that are not at present endangered or vulnerable, but are at

risk. The species are located within restricted geographical areas or are thinly scattered over a more extensive range; or

- (iv) endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.

Such species are listed or may be listed in Annex II and/or Annex IV or V;

...

- (i) conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The conservation status will be taken as "favourable" when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.'

4 Article 2(2) of the Habitats Directive states that measures taken pursuant to that directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

5 The European hamster (*Cricetus cricetus*) is one of the species listed in Annex IV(a) to the Habitats Directive. That annex concerns, inter alia, animal species 'of Community interest in need of strict protection'.

6 Article 12(1) of the Habitats Directive provides:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
- (c) deliberate destruction or taking of eggs from the wild;
- (d) deterioration or destruction of breeding sites or resting places.'

The facts of the dispute and the pre-litigation procedure

7 The Commission was alerted to the conservation status of the European hamster in Alsace by a complaint, of which it informed the French authorities at a meeting held on 15 January 2007.

8 The French authorities submitted their observations thereon by notes of 15 February and 14 September 2007, by which they informed the Commission of the measures adopted in the context of the action plan for the conservation of the species concerned for 2007 to 2011.

9 By letter of formal notice of 23 October 2007 the Commission, firstly, stated that the results of the count of the European hamster made it clear that that species was threatened with complete extinction in the very near future and, secondly, requested the French Republic to submit its observations in that regard.

10 By letters of 24 December 2007 and 11 March 2008, the French authorities gave details of the protection measures already taken and those which were to be taken in order to safeguard that species.

11 By letter of 5 June 2008, the Commission sent a reasoned opinion to the French Republic, in which it stated that, by not

adopting a programme of measures enabling strict protection of the European hamster, that Member State had failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive. As a consequence, the Commission requested the French Republic to take the measures necessary to comply with that reasoned opinion within two months of its notification.

- 12 The French Republic replied to the reasoned opinion by referring to the geographical constraints restricting opportunities to protect the European hamster, but also stating that it had been observed in part of the territory of Alsace that the stock of that species had ceased to fall in 2008. In addition, that Member State informed the Commission of the progress of measures implemented in the context of the action plan for 2007 to 2011 for the conservation of that species.
- 13 Taking the view that the methods for conservation of the species implemented by the French Republic remained unsatisfactory, the Commission brought the present action.

The action

Arguments of the parties

- 14 The Commission submits that the species of European hamster is threatened with extinction in Alsace. The result of the stock counts shows a significant decrease in the species between 2001 and 2007. The causes of that deterioration are urbanisation and the changes in agricultural practices.
- 15 The measures adopted by the French Republic are inadequate and have not prevented the deterioration of the breeding sites or resting places of the species. One of the basic reasons for that inadequacy, which concerns both urbanisation and agricultural measures, is the over-restricted nature of the territory, in particular of the priority action areas ('PAAs') and the 'repopulation areas' subject to those measures. In addition, the latter are themselves inadequate. Thus, the objective of 22% of crops favourable to the European hamster within the PAAs has been achieved only in one of the three existing PAAs. Furthermore, the action plan for limiting pollution caused by nitrates for 2008 to 2010 is inadequate. Finally, urbanisation in the 'repopulation area' is not sufficiently restricted.

- 16 The French Republic contends that the measures which it has adopted constitute a coherent whole, which is proportionate and appropriate to the objective of strict protection of the European hamster, in accordance with the requirements of the Habitats Directive. In particular, the action plan for 2007 to 2011 enabled the particular habitat of that species to be precisely defined and three separate territories to be designated, namely the three PAAs, where all changes of use of land, other than those connected with agriculture, were abandoned, the 'repopulation area' to be delineated, in which, for any project covering an area of a hectare or more, there will be a requirement to prove its lack of harmful effect on the species by way of a specific study and the historic range to be determined, where all municipalities must, when renewing their town and country planning measures, provide for a specific study on the European hamster.
- 17 The French Republic states that, since the implementation of that action plan, the trend of the abundance index of the stock of the species in question in the 'main areas' is likely to show that the fall in stock numbers has ceased, and even that there is a slight increase therein. However, it is necessary to wait a number of years before it is possible to assess, with a sufficient degree of certainty, the impact of the measures taken by the French Republic on the conservation status of populations of that species. In any event, the Commission does not establish that the habitat of that species continued to deteriorate in the PAAs after 2007, nor does it show that pollution caused by nitrates is harmful to the species. Finally, the French Republic submits that, in the 'repopulation area', the requirement to submit any project for its impact on specimens, breeding sites or resting places of the European hamster to be checked is supplemented by the need to carry out a specific study, which must be done for all projects involving an area greater than a hectare, with a view to ascertaining any damage caused to that species by such a project.

Findings of the Court

- 18 It must be borne in mind that Article 12(1)(d) of the Habitats Directive requires Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range, prohibiting deterioration or destruction of breeding sites or resting places.

- 19 The transposition of that provision requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (see, to that effect, Case C-183/05 *Commission v Ireland* [2007] ECR I-137, paragraph 29).
- 20 Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (judgment of 16 March 2006 in Case C-518/04 *Commission v Greece*, paragraph 16, and *Commission v Ireland*, paragraph 30).
- 21 Such a system of strict protection must therefore enable the effective avoidance of deterioration or destruction of breeding sites or resting places of the animal species listed in Annex IV(a) to the Habitats Directive (see, to that effect, Case C-103/00 *Commission v Greece* [2002] ECR I-1147, paragraph 39).
- 22 Finally, it must be recalled that it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-103/00 *Commission v Greece*, paragraph 23, and Case C-531/06 *Commission v Italy* [2009] ECR I-4103, paragraph 98).
- 23 It is established that the time-limit of two months set by the Commission in the reasoned opinion to enable the French Republic to comply therewith expired on 5 August 2008.
- 24 In that regard, it is apparent from the file that, between 2001 and 2007, the number of burrows of the European hamster in the 'main areas' which served as a reference for observation of the population of that species fell from more than 1 160 to less than 180. Furthermore, according to the result of the counts for 2009, drawn up by the Office national de la chasse et de la faune sauvage (National Authority for Hunting and Wildlife), the content of which is not disputed by the French Republic, there were no populations of the species in Alsace which reached its minimum viable population threshold, which is estimated at 1 500 individuals spread over an area of contiguous suitable land of 600 hectares.
- 25 In a letter of 28 August 2009, sent by the Secretary of State

for Ecology to the Prefect of the Region of Alsace ('the letter of 28 August 2009'), it is stated that 'despite the application of the measures set out in the [European hamster] recovery plan (2007-2011) and the mutual obligations of the parties involved in the safeguarding of the species, the biological results obtained to date are insufficient to safeguard that species in France' and that, accordingly, 'it is vital that the measures in favour of the European hamster are markedly and rapidly improved so as to obtain biological results in the short term which show the recovery of the species'.

26 The French Republic accepts that the development of maize crops, which has been carried out to the detriment of crop diversity, has been harmful to the European hamster, which depends on artificial grasslands, particularly those planted with lucerne, and has constituted one of the significant factors behind the decline in the population of that species. It is established that, even during recent years, such development has not been entirely halted in Alsace which is, in France, the only region where the species is present.

27 The measures intended to remedy this situation include, inter alia, the creation of three PAAs, which are areas where any changes of use of land, other than those connected with agriculture, have been abandoned and for which an objective of 22% of crops favourable to the European hamster, namely 2% of lucerne and 20% of standing cereals, has been established with a view to achieving, eventually, a viable population of approximately 1 200 to 1 500 specimens per area.

28 In that regard, according to the scientific data used to define the objective of 22% of favourable crops in the PAAs which have been submitted by the French Republic, 'during a study carried out in 1997 by the [National Authority for Hunting and Wildlife], on 12 sample squares of 25 hectares in loess terrain, ... it was observed that the three squares on which more than 2 to 4% of lucerne and 20 to 30% of standing cereals was grown had the most significant populations of the European hamster. An increase in the number of burrows had been seen there between spring and summer, which permits the assumption that the environment was favourable to the maintenance and reproduction of the species. That was not the case of the remaining nine squares, in which there was little or no lucerne and standing cereals were very scarce'.

29 Although the Commission does not dispute that the so-called

agro-environmental measures adopted with a view to achieving the objective of 22% of crops favourable to the species in question, in particular the financial support given to farmers to encourage the cultivation of lucerne and winter cereals, are such as to guide agricultural practices in a way favourable to the species, it is apparent from the file that, on 5 August 2008, that objective of 22% of crops favourable to the species had been achieved in only one of the three PAAs, which represent, moreover, only 2% of all the land favourable to the European hamster.

30 Furthermore, it must be noted in that respect that the French authorities were aware of the inadequacy of those measures since, firstly, in the letter of 28 August 2009, the Secretary of State for Ecology requested the Prefect of the Region of Alsace to prepare, for the following month of September, a proposal for changes to the perimeters of the PAAs, in particular to cover the sectors located near thereto which contained hamsters.

31 Secondly, with regard to the 'repopulation area', the French authorities stated, in letters sent to the Commission following notification of the reasoned opinion, that the dynamic of change to agricultural practices, which has contributed to the positive stabilisation of the numbers of the European hamster in the municipalities where its historical presence was abundant, was to be extended and widened, particularly by the implementation of localised agro-environmental measures intended to achieve, during 2011, 22% of crops favourable to the species over its entire living area.

32 The French Republic also accepts that the development of urbanisation and the infrastructures inherent thereto, by causing the disappearance and partition of agricultural land, constituted another decisive factor behind the decline in the population of the European hamster.

33 As regards the measures adopted by that Member State in the field of urbanisation with a view to halting the deterioration or destruction of the breeding sites or resting places of that species, it must be stated, firstly, that the prohibition of all new urbanisation in PAAs, even if it is truly binding, affects only 2% of all the land favourable to the European hamster, as pointed out in paragraph 29 of this judgment.

34 Secondly, it must be noted that although, in the

'repopulation area' which covers, according to the French Republic, 49% of the land favourable to the species, any urbanisation project of a hectare or more must prove its lack of harmful effect on that species by a specific study and, if that evidence is not adduced, can be carried out only provided a ministerial exemption is obtained, the documents in the file do not permit contradiction of the assertions of the Commission that, firstly, the conditions for the grant of such an exemption are not precisely specified and, secondly, there is no requirement for compensatory measures where such an exemption is granted.

35 Thirdly, it is common ground that, on 5 August 2008, urbanisation projects covering an area of less than a hectare were not subject to any formalities enabling their lack of impact on the conservation of the species in question to be ascertained. In any event, it is apparent from the letter of 28 August 2009 that the Secretary of State for Ecology requested the Prefect of the Region of Alsace to institute a system enabling the comprehensive monitoring and analysis of those projects with a view to confirming that they do not have such an impact. He also ordered that it be borne in mind that the presence of the hamsters in the sites covered by those projects 'justifies avoidance or an application for an exemption', whatever the surface area covered by the project.

36 Moreover, in that letter, it was stated that a supplementary decree concerning the conditions for making an application for an exemption to the strict protection of the European hamster and repeating the terms of the framework agreement on the management of the particular habitat of the species was being finalised and was to be published during September 2009.

37 It follows from the foregoing that the measures implemented on expiry of the period set in the reasoned opinion were not adequate to enable effective avoidance of deterioration or destruction of the breeding sites or resting places of the European hamster.

38 That being said, with regard to the alleged inadequacy of the action programme for 2008 to 2010 concerning the limitation of pollution caused by nitrates, the Commission has not, in any event, demonstrated to the requisite legal standard that there is a link between the use of nitrates in agriculture and the deterioration or destruction of the breeding sites or

resting places of that species.

39 Having regard to the foregoing, the Commission's action must be upheld, subject to the reservation made in the preceding paragraph of this judgment.

40 Consequently, it must be held that, by failing to establish a programme of measures to ensure strict protection of the European hamster (*Cricetus cricetus*), the French Republic has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive.

Costs

41 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been essentially unsuccessful, the latter must be ordered to pay the costs.

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

- 1. Declares that, by failing to establish a programme of measures to ensure strict protection of the European hamster (*Cricetus cricetus*), the French Republic has failed to fulfil its obligations under Article 12(1)(d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006;**
- 2. Orders the French Republic to pay the costs.**

[Signatures]