

2. If the Court answers Question 1 in the affirmative:

- (a) Is it precluded to classify assets as being for independent commercial use if they are made available to the contractor by the contracting authority solely for their use and responsibility for maintaining those assets, including the associated costs, is borne by the contracting authority?
- (b) Is there independent commercial use by the contractor when, for the purpose of conducting airport security checks, it uses the walk-through metal detectors, hand-held metal detectors and X-ray equipment supplied by the contracting authority?

⁽¹⁾ OJ L 82 of 22.3.2001, p. 16.

Action brought on 8 June 2004 by the Commission of the European Communities against the Portuguese Republic

(Case C-239/04)

(2004/C 228/39)

An action against the Portuguese Republic was brought before the Court of Justice of the European Communities on 8 June 2004 by the Commission of the European Communities, represented by Michel Van Beek and António Caeiros, acting as Agents, with an address for service in Luxembourg.

The applicant claims that the Court should:

- declare that, by implementing a project for a motorway, whose route crosses the special protection area (SPA) of Castro Verde, notwithstanding the negative environmental impact assessment and notwithstanding the existence of alternative solutions for the route concerned, the Portuguese Republic failed to fulfil its obligations under Article 6(4) of Council Directive 92/43/EEC ⁽¹⁾ of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 97/62/EC of 27 October 1997 ⁽²⁾;
- order the Portuguese Republic to pay the costs.

Pleas in law and main arguments:

The Portuguese authorities implemented a project for a motorway, whose route (the stretch between Aljustrel and Castro Verde) crosses the special protection area (SPA) of Castro Verde even though:

- the environmental impact assessment of the project in relation to implementation of the plan for the abovementioned stretch of motorway clearly shows that the route concerned does in fact have a very significant negative impact on 17 species of wild birds referred to in Annex I to Directive 79/409/EEC; and
- there were in fact alternative routes for that stretch of motorway, which were situated both outside the Castro Verde SPA and outside the residential areas in the places mentioned by the Portuguese authorities. Since those alternatives are to be found in a corridor to the west of the Castro Verde SPA between the edge of that area and the 'IC 1' road, they are located in flat country with a very low population density, with the result that the Portuguese authorities could have selected one of those alternatives without there being either significant technical difficulties or unreasonable additional costs.

Consequently, the Portuguese Republic did not comply with Article 6(4) of Directive 92/43/EC. That provision allows a Member State to carry out a plan or a project in respect of which there has been a negative environmental impact assessment only where there are no alternative solutions.

⁽¹⁾ OJ L 206 of 22.7.1992, p. 7.

⁽²⁾ OJ L 305 of 8.11.1997, p. 42.

Action brought on 8 June 2004 by the Commission of the European Communities against the Federal Republic of Germany

(Case C-244/04)

(2004/C 228/40)

An action against the Federal Republic of Germany was brought before the Court of Justice of the European Communities on 8 June 2004 by the Commission of the European Communities, represented by Gerald Braun and Enrico Traversa of its Legal Service, with an address for service in Luxembourg.

The applicant claims that the Court should:

- 1) declare the Federal Republic of Germany in breach of its obligations under Article 49 EC in that by its practice based on administrative circulars, it has consistently and disproportionately restricted the posting of non-member-country workers to Germany for the provision of services;
- 2) order the Federal Republic of Germany to pay the costs.