

Eurobrief

European Court of Justice Report

*Han Somsen**

Case C75/91, Commission v The Netherlands, (wild birds)
6 February 1992 (not yet reported)

Introduction

By adopting Directive 79/409 on the conservation of wild birds (OJ 1979, L103/1), on 2 April 1979 the Community for the first time presided over a comprehensive instrument aimed at the protection and management of wildlife. The Directive establishes a system of protection for "all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies" (Art 1, in regard to the scope of application see also case 247/85, *Commission v Belgium* [1987] ECR 3029). In general terms, the Directive relates to the protection, management and control of these species and provides rules for their exploitation. At the same time, eggs, nests and habitats are protected.

That the Directive is a wide-ranging and elaborate piece of legislation is perhaps evidenced most dramatically by the number of infringement procedures it has produced in the past and which, undoubtedly, it will continue to generate in the future (for a start, on 20 May, the Advocate General in case 155/90, *Commission v Ireland*, in his Opinion found that Ireland has not properly implemented the Directive). Germany, France, Belgium and Italy have already been found to be in violation of the Directive in the past. Problems relating to the implementation of Directive 79/409 have also had an impact on the fate of the proposed Habitat Directive, the final agreement on which has proved extremely troublesome.

The Netherlands alone has on three occasions been found to be in

violation of the Directive. In fact, in this latest case, the Commission's complaint was that by not implementing the Court's judgment of 13 October 1987 (Case 236/85, *Commission v Netherlands* [1987] ECR 3989) the Netherlands had failed to fulfil its obligations under Art 171 of the EEC Treaty.

One of the Directive's key provisions is Article 5 which provides: "Without prejudice to Arts 7 and 9, Member States shall take the requisite measures to establish a general system of protection of all species of birds referred to in Art 1, prohibiting in particular:

- (a) deliberate killing or capture by any method;
- (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
- (c) taking their eggs in the wild and keeping these eggs even if empty;
- (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
- (e) keeping birds of species the hunting and capture of which is prohibited."

The provision which has been most frequently disputed is Art 9, which spells out the possible derogations to these prohibitions. It provides that:

"1. Member States may derogate from the provisions of Arts 5, 6, 7 and 8, where there is no other satisfactory solution, for the following reasons:

- (a) . . . ,
 . . . ,
 to prevent serious damage to crops, livestock, forests, fisheries and water,
 for the protection of flora and fauna;
- (b) for the purposes of research and teaching, of repopulation, of reintroduction and for the breeding necessary for these purposes;
- (c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogation must specify: the species which are subject to the derogations,

the means, arrangements or methods authorised for capture or killing, the conditions of risk and the circumstances of time and place under which such derogations may be granted, the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom, the controls which will be carried out. 3. . . ."

In respect of the marketing of wild birds, Art 6(1) prohibits the sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognisable parts or derivatives of such birds. In Annex II of the Directive a number of birds are listed which may be marketed "provided that the birds have been legally killed or captured or otherwise legally acquired".

Regarding the latter, Art 8 stipulates that:

"1. In respect of the hunting, capture or killing of birds under this Directive, Member States shall prohibit the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV (a).

2. Moreover, Member States shall prohibit any hunting from the modes of transport and under the conditions mentioned in Annex IV (b)".

Background and Judgment

As was observed above, the Commission sought to ensure that the Netherlands would comply with the Court's judgment of 13 October 1987 in case 236/85. It would therefore seem useful to first recall briefly the legal issues which were at stake.

The Commission advanced five complaints. The first related to the failure to transpose literally the concept of "serious damage" of Art 9(1) (a) in to Art 2 of the *Vogelwet*, in conjunction with Art 2 and 3 of the *Vogelbesluit*. The importance of the

*School of Law, University of Warwick, England

requirement that damage should be "serious" in order to justify derogations of the kind spelled out in Art 9(1) had previously been stressed by the Court in Case 247/85, *Commission v Belgium* [1987] ECR 3029 at p 3071 para 56. The Dutch provision in question merely referred to "damage" and therefore *prima facie* did not properly transpose Art 9(1) of the Directive. It would seem that the Court at the time erred in ruling that the Commission had not "made any submissions that might establish that the Netherlands' legislation attributes to the permitted derogations greater scope that is given to them by the Directive as so interpreted". In a later case, the Court indeed corrected its mistake. (Case 339/87, *Commission v Netherlands* [1990] ECR I-08).

Secondly, the Commission held that Art 10 of the *Vogelwet*, providing that permits to kill or capture birds and to disturb their nests are to be granted at the request of the owners or users of land or water in cases where protected birds cause or are liable to cause damage or nuisance, was not in conformity with Art 9(1) of the Directive. In this instance the Court ruled that, by not making the grant of permits conditional upon the absence of any other satisfactory solution the Netherlands legislation was less restrictive than the Directive and that therefore the Commission's complaint should be upheld.

The third complaint related to caged birds and stuffed, protected birds. The Commission pointed out that the list of birds, which under Dutch legislation are not protected as far as capture for caging and hunting are concerned, did not coincide with the list of birds contained in Annex III. Moreover, the permit system operated under Arts 15, 15 bis and 16 of the *Vogelwet* was less restrictive than allowed by Art 9(1) of the Directive. The Court upheld this complaint, noting that the mere fact that Dutch administrative practice was in conformity with the provisions of the Directive was irrelevant.

The fourth complaint concerned the taking of eggs and the disturbing of nests. The Court noted that Arts 17, 18, 19 and 20 of the *Vogelwet* concerning the collection of eggs did

not contain any reference to the criteria for derogations laid down in Art 9 and therefore upheld the Commission's complaint.

Finally, the Commission criticised the Netherlands for not mentioning in Art 23 of the *Vogelbesluit* all the methods of capture which are prohibited by virtue of Art 8 and Annex IV (a) to the Directive, and for granting exceptions, in Arts 15, 16, and 17 of the *Vogelbesluit* which were incompatible with Art 9(1) of the Directive. After the Commission had issued its reasoned opinion but before the judgment, Art 14 of the *Vogelbesluit* had been amended so as to bring it into line with the Directive. However, as the Commission had not withdrawn its complaint, the Court declared this final complaint well founded.

After no apparent measures had been taken to implement the Court's judgment, the Commission, on 24 April 1989, wrote a formal letter of compliance. The Dutch Government undertook to submit the necessary legislation for advice to the *Raad van State* as soon as possible. Judging this response to be insufficient, the Commission proceeded to issue a reasoned opinion on 27 February 1990. The Dutch Government, by letter of 2 May 1990, indicated that two proposals to amend the *Jachwet* and the *Vogelwet* would be submitted to Parliament within the shortest possible time. Not satisfied that any proposals were pending before Parliament, the Commission decided to bring the matter before the European Court.

The Netherlands Government, while recognising that it had yet to take the measures necessary to implement the judgment, noted that constraints inherent to the national legislative procedure in turn had repercussions on the deadlines for amending the above mentioned laws.

The Court ruled that, although Art 171 does not specify the time limit within which judgments of the Court should be implemented, the need for an immediate and uniform application of Community law dictates that compliance should take place with the shortest possible delay. Consequently, it ruled that by not taking the measures necessary to comply with its judgment of 13 October 1987, the Netherlands

had failed to fulfil its obligations under Art 171 of the Treaty.

Concluding Observations

Once more, the European Court has condemned a Member State for non-application of one of its judgments. The gradual increase in cases of this kind (see Ninth Annual Report on Commission Monitoring of the Application of Community Law, COM(92) 126 fin) is particularly disturbing in so far as it applies to Community environmental law. First because environmental damage is often irreversible as, for example, the disappearance of an animal species. Second because, especially in the case of the protection of (migratory) birds, Member States have an added responsibility to protect a common good.

Although in the present case – as was confirmed by the Commission – Dutch practice accords with the provisions of the Directive, in view of Member States' joint responsibility the importance that such practical implementation be accompanied by unambiguous and transparent legal incorporation is paramount. Indeed, the inappropriateness of implementing Directives by mere administrative practice has been underlined by the Court in a consistent line of cases.

The fact remains that Art 171 simply states that:

"If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty the State shall be required to take the measures to comply with the judgment of the Court of Justice".

Thus, although the Court insists that its judgments should be implemented with the shortest possible delay, the Treaty is silent on possible measures which any institution of the Community may take to enforce a judgment in cases where such speedy compliance remains illusory. The "implied powers" or "resulting powers" the Community enjoys cannot be advanced to construe Community competences to enforce Community law by imposing sanctions upon recalcitrant Member States, (Jakob, CT, *Sanktionen gegen vertragsbrückige Mitgliedstaaten der Europäischen Gemeinschaft*, Berlin 1988).

Eurobrief

Faced with the problem of non-application of judgments of the European Court in the field of the environment, the Commission has on occasion hinted that it would link Community financing for certain environmental projects to Member States' performance in terms of the application of EC environmental law. In the case of the Birds Directive, this would be an option as Community financing is available for the implementation of the Directive (ACE, ACNAT LIFE). However, since the Community has no powers to impose sanctions, such a decision in my view would constitute a misuse of powers and be open to annulment by the European Court. Thus, at present the Community would seem to possess very few real powers to ensure that judgments of the Court are adhered to.

Having arrived at this point, the question may be asked what, in practical terms, the legal significance of a judgment of the European Court consists of. Two brief observations may be appropriate in this respect. In the first place, it should be remembered that national authorities are prohibited from applying national provisions of environmental law which have been held incompatible with Community law in an action before the European Court of Justice (case 314-316/81, 83/82, considerations 14-16 [1982] ECR 2299). This obligation in many instances will produce the results envisaged by Community environmental Directives, irrespective of contradictory provisions of national law. Thus, Dutch authorities, after the Court's judgment of 13 October 1987, were prohibited from issuing any permits under conditions that differed from those laid down in Directive 79/409.

In addition, as indicated recently in the *Francovich* case, a judgment by the European Court under Arts 169 and 171 may at the same time provide the basis for invoking State liability for damage resulting from the State's default (see also case 39/72, *Commission v Italy*, consideration 11, [1973] ECR 112).

It is important to appreciate therefore, that the mere fact that the Community at present is not empowered to penalise Member States for the non-incorporation of a

judgment of the Court, does not imply that these judgments are devoid of any legal significance.

Case C2/90: Commission v Belgium, 9 July (not yet reported)

Because of public health problems resulting from the dumping of waste from Germany and the Netherlands, the Wallonia region of Belgium introduced a regional decree banning all waste from other Member States. Belgium was found to have breached Directive 84/631/EEC relating to cross-border transfers of dangerous waste by allowing Wallonia to bring in the absolute ban but in relation to such of the waste as was not dangerous the court found that, although waste was entitled to be categorised as "goods" and therefore to have freedom of movement, the need for environmental protection could justify exceptional safeguard measures and the Wallonian decree was justified in respect of non-hazardous waste.