OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 19 May 1987 *

Mr President,
Members of the Court,

1. On this occasion it is the legislation of the Kingdom of the Netherlands which the Commission claims is not in conformity with Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds. [1]

2. I am already acquainted with that directive from the opinions which I have delivered in Cases 247/85 *Commission* v *Kingdom of Belgium* and 262/85 *Commission* v *Italy*.

3. The Netherlands legislation consists of the Vogelwet (Law on Birds) of 31 December 1936 (as most recently amended by the Law of 9 September 1970) and the measure implementing the Law on Birds, the Vogelbesluit (Decree on Birds) of 9 August 1937, which was most recently amended by the Royal Decree of 6 May 1985.

4. The Netherlands Government expressly acknowledges that from a formal point of view the legislation in force is not entirely in conformity with the directive, but contends that the administrative practice followed over a period of many years in applying that legislation fully satisfies the requirements of Community law.

5. The Court has consistently held that 'Member States are obliged to ensure the full and exact application of the provisions of any directive'; [2] similarly, the Court has held on more than one occasion as regards the implementation of directives by the Member States that 'mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty'. [3]

6. Consequently, the retention of legislation which is contrary to a Community rule and which may create an ambiguous state of affairs as regards the rights and obligations of persons affected by it constitutes a type of incompatibility which 'can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended'. [4]

7. On the other hand, since the draft of the new Law on Birds repealing the present law has not yet been approved by the Parliament of the Netherlands and the Commission's complaints concern only the legislation in force, I shall merely consider the compatibility of the latter with the Community directive, in spite of the fact that, in the Commission's opinion, the draft law in question to a great extent adequately implements the rules of the directive.

* Translated from the Portuguese.

1 — Official Journal 1979, L 103, p. 1.

2 — Judgments of 18 March 1980 in Cases 91 and 92/79 *Commission* v *Italy* [1980] ECR 1099 at p. 1105 and [1980] ECR 1115 at p. 1121.

3 — See judgment of 15 October 1986 in Case 168/85 *Commission* v *Italy* [1986] ECR 2945, paragraphs 13 to 15.

4 — *Idem*, paragraph 13.

First complaint: failure to transpose the concept of 'serious damage'

8. The Commission claims that Article 2 of the Law on Birds provides for exceptions to the rules for the protection of birds in order to prevent damage (for example, to agriculture), and thus does not comply with Article 9 (1) of the directive, which permits exceptions only to prevent *serious* damage, not damage of any kind.

9. The Government of the Netherlands contends that since the regulations of 1937, implementing Article 2 of the law, permanently or temporarily exclude from the category of protected birds only certain species which cause serious damage, the term 'damage' in the Netherlands legislation corresponds to the expression used in the directive.

10. I do not, however, consider it possible for the Kingdom of the Netherlands to answer the complaint made against it by the Commission in that way.

11. As I pointed out in my Opinion in Case 247/85, 'the power to derogate contained in Article 9 is of an exceptional nature and a restrictive interpretation must be adopted regarding recourse to it. That is the only way to prevent the system of protection established by the directive from being nullified'.

12. Even if it is accepted that the Law on Birds has so far been applied in a manner consistent with the requirements of the directive, the fact remains that the scope of the derogations permitted by Article 2 of that law is wider than that provided for by the directive.

13. Again, as regards the species listed in Articles 2 and 3 of the Law on Birds, the argument of the Netherlands Government does not seem to be wholly convincing.

14. As regards the house-sparrow, which is completely excluded by Article 2 from the category of protected birds, the Netherlands legislation, being excessively general, does not withdraw protection from it only in order to prevent serious damage but rather does so regardless of the degree of intensity of the damage to be prevented.

15. The same applies to the species included in the list contained in Article 3 of the Decree on Birds (as amended by the measure of 6 May 1985), since the fact that those species are only temporarily excluded from the list of protected birds does not prevent the Netherlands legislation from being incompatible with the scope of the protection provided for by the directive.

16. In other words, since it is impossible to state with certainty that the species of birds in question *always* cause serious damage, it is evident that the reference to the mere prevention of damage contained in Article 2 of the Law on Birds is less restrictive than the term 'serious damage' contained in the third indent of Article 9 (1) (a) of the directive, with the result that the aforesaid provision is not in conformity with Directive No 79/409. It was undoubtedly because that fact was recognized that Article 9 of the new draft law on birds adopts the term 'serious damage'.

Second complaint: the authorization provided for in Article 10 of the Law on Birds

17. According to the Commission, Article 10 of the Law on Birds does not make the authority granted to the owners or users of land or water to kill, capture or take other

measures with regard to protected birds conditional upon such birds' causing or being capable of causing *serious* damage, and that provision is therefore not consistent with the third indent of Article 9 (1) (a) of the directive.

18. In that connection, I have already stated that the concept of damage is not as restrictive as the concept of serious damage, so that in this respect also Article 10 of the Law on Birds is not compatible with the directive.

19. Furthermore, the Commission considers that Article 10 of the Law on Birds does not provide the competent authorities with an opportunity of assessing whether the authorization requested is justified in each individual case and that it is therefore incompatible with Article 9 (1) of the directive, which permits derogations only where there is no other satisfactory solution.

20. The Netherlands Government maintains that authorizations are granted only in respect of damage which can be proved and only in so far as it is not contrary to the interests of the protection of nature, and thus in practice the competent authorities adopt a restrictive policy with regard to the grant of authorizations, in accordance with Article 9 of the directive and with the objectives of the Law on Birds, and that policy is reinforced by a system of compensation for damage caused by protected birds.

21. However, it is the text of the contested legislative provision that is at issue and that provision does not in fact satisfy all the requirements of the directive; as we have seen, if a provision which is incompatible with the directive remains in force, the administrative practice adopted cannot remedy the failure to fulfil the obligations arising out of the directive.

Third complaint: cage birds and dead and stuffed protected birds

22. The Commission claims that Articles 11 and 12 of the Law on Birds concerning protected birds intended to be caged and to be used for hunting, together with Articles 15, 15 bis and 16 thereof concerning dead and stuffed protected birds, are incompatible with the directive.

23. With regard to Articles 11 and 12, the Commission's view must be considered justified, since Article 6 (2) and (3) of the directive authorizes the sale and capture of the species referred to in Annex III only subject to certain conditions and, in particular, after consultation with the Commission. However, the species listed in Articles 9 and 10 of the Decree on Birds, implementing Articles 11 and 12 of the Law on Birds, do not appear in Annex III to the directive.

24. In addition, those provisions of the Netherlands legislation do not satisfy the conditions laid down in Article 9 of the directive for derogations to be made from Articles 5 to 8, in particular as regards the reasons for derogation and the absence of any other satisfactory solution.

25. The same applies to the other contested provisions of the Law on Birds (Articles 15, 15 bis and 16), which do not take account of the requirements laid down in Article 9.

26. The Netherlands Government nevertheless claims that the practice adopted in this area is entirely in conformity with the directive.

27. Firstly, no authorizations have been granted for the capture of cage birds since 1940 or for the marketing of such birds since 1942, and authorizations have been granted only for the keeping or transport of

birds bred in captivity, which are not covered by the directive.

28. Secondly, the Netherlands Government maintains that under Articles 15, 15 bis and 16 of the Law on Birds, the only birds which may be stuffed are those which can be proved to have died of natural causes or were killed in a manner unknown to the applicant for authorization and without his being responsible for the death, and if there is any doubt as to the cause of death, the birds must be confiscated and subjected to a supplementary examination.

29. Although the practice described by the applicant is, as the Commission itself acknowledges, quite proper, it must be recognized that it is not clearly and unequivocally provided for in the contested legislative provisions, so that those provisions fail to comply with the directive.

Fourth complaint: the taking of eggs

30. According to the Commission, Articles 17 to 20 of the Law on Birds are formulated too generally to ensure effective compliance with Article 5 (b) and (c) of the directive, and in addition do not refer to any of the reasons for derogation listed in Article 9 (1) of the directive.

31. The Netherlands Government maintains that in effect only the eggs of the lapwing may be sought, taken or marketed, since no period has been fixed for the collection of eggs of other species.

32. However, that does not alter the fact that Article 17 of the Law on Birds permits the collection of eggs not only of the lapwing but also, according to Article 17 (2), of other species.

33. The practice followed with regard to Article 17 does not remove the latter's incompatibility with the directive, which could only be corrected by an amendment of the legislative provision in question.

34. Specifically with regard to the lapwing, the Netherlands Government considers that it is justified to search for and take eggs in view of certain practical benefits relating to the protection of field birds. The prohibition of the taking of such eggs would impair understanding of the behaviour of field birds and would therefore interfere with the protection of them.

35. In those circumstances, the collecting of lapwing eggs is in its view justified on the basis of the power to derogate contained in the last indent of Article 9 (1) (a) of the directive.

36. The Commission considers, on the other hand, that the measure is not sufficiently justified by its objectives, in so far as there is no permanent relationship between the persons who collect the eggs and those who protect the nests, and there is no reason to suppose that the ability to provide for the protection of field birds would disappear as soon as eggs ceased to be collected.

37. In any event the protection sought to be assured by means of the collection of eggs appears to be limited to the province of Friesland, and does not extend to the remainder of the Netherlands. Thus it does not seem that in the remainder of the territory the conditions for derogation laid down in Article 9 of the directive are fulfilled and consequently the provisions of that article have not been correctly transposed into national law.

38. Even in the case of Friesland, and notwithstanding the conditions laid down in Article 17 (2), (3) and (4), it does not seem

possible unequivocally to conclude that the position there constitutes 'judicious use of certain birds in small numbers', since the Law on Birds does not lay down any restriction on the number of persons authorized to collect eggs or the number of eggs which may be collected, provisions permitting the control in respect of derogations, and thus does not satisfy the requirements of Article 9 (2) and (3) of the directive.

39. As regards Article 18, the Netherlands Government maintains that the rules laid down therein have been applied only to gulls, and claims that that is justified by the power to derogate contained in Article 9 (1) (a) of the directive, in view of the need to prevent gulls from causing damage in areas still in their natural state.

40. That argument does not seem to me to be justified.

41. Firstly, it is too general and thus is incompatible with the exceptional nature of derogatory rules.

42. Secondly, the justification is not conclusive as regards the other species of birds contained in the article in question. The fact that that provision has not been applied to them since 1978 cannot, for reasons which I have already explained, alter the fact that it is incompatible with the directive.

43. In addition, Article 19 of the Law on Birds permits the marketing of lapwing and gull eggs, and makes no reference to the grounds for derogations provided for in Article 9 of the directive.

44. With regard to Article 20 of the Law on Birds, which permits the occupiers of buildings and courtyards and their representatives to remove nests built in or against such buildings or courtyards, the Netherlands Government states that such measures are permitted only if the nests or broods cause inconvenience or damage. The Netherlands Government claims that that provision is therefore covered by the power to derogate on the grounds contained in the first indent of Article 9 (1) (a) of the directive.

45. It seems to me, however, that the provision in question is too general and goes beyond the specific cases of danger to public safety in which the directive confers the power to derogate, since it may be applied to situations in which, there being no 'inconvenience' or 'damage', there is no danger to public health and safety.

46. In that regard, I refer to my opinion in Case 247/85, in which I criticized a similar provision of Belgian legislation.

47. Here again, it must therefore be concluded that Article 20 of the Law on Birds, which does not satisfy the conditions for derogation contained in Article 9 of the directive, is contrary to the prohibition laid down in Article 5 (b) thereof.

Fifth complaint: means of capture

48. The Commission claims that Article 23 of the Law on Birds and Articles 14 to 17 of the Decree on Birds do not cite all the means of capture or killing listed in Annex 4 to the directive which are prohibited by Article 8 thereof. Furthermore, Articles 15 to 17 contain exceptions to the prohibition laid down in Article 14 which are formulated too generally to be capable of justification under Article 9 (1) of the directive.

49. In the light of the explanations contained in the defence, the Commission has taken the view that the amendment to Article 14 of the Decree on Birds adopted

on 6 May 1985 enables that provision, read in conjunction with Articles 5 and 23 of the Law on Birds, to be considered compatible with the directive, (although, as regards the prohibited hunting methods, it would be desirable for the forthcoming new legislation to make the law clearer).

50. With regard to the derogations from the prohibition contained in Article 14 of the Decree on Birds, the Netherlands Government maintains that, since no authorization for the capture of protected birds for caging or for hunting has been granted, that also implies that no authorization will be granted under Article 15 of the Order.

51. However, for the same reason as that which gave rise to the conclusion that the third complaint was justified, here again it must be concluded that the text of the law is incompatible with the provision laid down in the directive.

52. As regards Article 16 of the Decree on Birds, the Netherlands Government contends that the authorization referred to therein is granted solely for the purpose of examining rings or for scientific research and that that exception is therefore justified under Article 9 (1) of the directive.

53. Nevertheless, here again the excessively vague and general terms of Article 16 are not consistent with the exceptional nature of the power to derogate provided for in Article 9 of the directive.

54. Lastly, as regards Article 17 of the Decree on Birds, the Netherlands Government contends that the authorization provided for therein applies only to the capture and killing of birds declared not to be protected under Article 2 of the decree. However, as I have shown in my analysis of the first complaint, the scope of Article 2 is excessively general, and, consequently, cannot be regarded as covered by the power to derogate contained in Article 9 of the directive; it must therefore be concluded that the scope of Article 17 is wider than that permitted by the directive.

55. Furthermore, as regards both Article 16 and Article 17 of the Decree on Birds, although the directive authorizes the capture and killing of protected birds for scientific purposes or in order to prevent serious damage to crops, that does not imply, as the Commission emphasizes in its reply, that the use of *all* possible means of capture is authorized in any circumstances.

56. Accordingly, I propose that the Court should declare that the Kingdom of the Netherlands has failed to adopt, within the period prescribed, the provisions needed to fulfil all of its obligations under Council Directive No 79/409/EEC of 2 April 1979 and has therefore failed to fulfil an obligation under the EEC Treaty.

57. In accordance with Article 69 (2) of the Rules of Procedure the unsuccessful party should be ordered to pay the costs.