JUDGMENT OF THE COURT
15 March 1990 *

In Case C-339/87

Commission of the European Communities, represented by Thomas van Rijn, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also a member of its Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by G. M. Borchardt and M. A. Fierstra, Assistant Legal Advisers at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5, rue C. M. Spoo,

defendant,

APPLICATION for a declaration that by failing to bring into force within the prescribed period all the laws, regulations and administrative provisions necessary to comply with the provisions of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Official Journal 1979, L 103, p. 1), the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of: C. N. Kakouris, President of Chamber acting as President of the Court, T. Koopmans, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, F. Grévisse and M. Díez de Velasco, Judges,

Advocate General: W. Van Gerven
Registrar: J. A. Pompe, Deputy Registrar

* Language of the case: Dutch.

having regard to the Report for the Hearing and further to the hearing on 14 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 16 January 1990,

gives the following

Judgment

1 By an application lodged at the Court Registry on 28 October 1987, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by failing to bring into force within the prescribed period all the laws, regulations and administrative provisions necessary to comply with the provisions of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Official Journal 1979, L 103, p. 1), the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty.

2 Article 18 of the directive provides that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of its notification'. Since the directive was notified on 6 April 1979, that period expired on 6 April 1981.

3 Finding that the Netherlands laws and administrative provisions on hunting were not entirely in conformity with the directive, the Commission commenced the procedure provided for in Article 169 of the Treaty. After giving formal notice to the Kingdom of the Netherlands to submit its observations, the Commission delivered a reasoned opinion on 11 February 1987 to which there was no response. The Commission then brought this action, submitting six complaints in respect of the Netherlands rules on the hunting of birds.

4 Reference is made to the Report for the Hearing for a fuller account of the background to the case, the relevant national provisions, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 Before examining the various complaints submitted by the Commission regarding the lack of conformity of the Netherlands provisions with the directive, it is necessary to consider the Commission's argument that the directive was not properly transposed into national law in so far as the combined provisions of Articles 2 and 20 of the Jachtwet (Hunting Law) authorize the competent Minister to adopt measures exceeding the limits laid down by the directive. The Commission argues that the directive introduces a general system of protection from which it is possible to derogate only in certain specific cases and in certain specific circumstances.

6 In this connection reference should be made to the third paragraph of Article 189 of the Treaty according to which a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. In its judgment of 23 May 1985 in Case 29/84 *Commission* v *Germany* [1985] ECR 1661, the Court stressed that it followed from that provision that the implementation of a directive does not necessarily require legislative action in each Member State. As far as Directive 79/409 is concerned, it appears from the Court's case-law, as confirmed in particular by the judgment of 27 April 1988 in Case 252/85 *Commission* v *France* [1988] ECR 2243, that the transposition of a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision, and that a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner.

7 It appears from the documents before the Court that certain of the rules relating to the hunting of birds in the Netherlands are contained in two measures of the competent Minister of 8 August 1977 and 24 February 1987. According to the explanations given at the hearing by the parties, the measures of the competent Minister referred to in the present case, which were adopted pursuant to the Jachtwet and published in the *Nederlandse Staatscourant* (Dutch official gazette), are of a general nature and capable of creating rights and obligations for individuals.

8 In view of the characteristics of those two ministerial measures, the fact that Directive 79/409/EEC has been transposed into Netherlands law by legal instruments of a different nature — namely the Jachtwet and the two measures in question — is not in itself contrary to the requirements of the third paragraph of Article 189 of the Treaty. It must, however, be stated that the national authority empowered by the Jachtwet to adopt measures implementing that law must — as that law itself must — comply with the provisions of the directive, in particular those relating to the possibility of hunting the various species and the conditions imposed on hunting them, and may not disregard them without bringing national law into conflict with Community law.

First complaint: species of birds which may be hunted

9 The Commission argues that a number of species which may be hunted under Articles 2 and 20 of the Jachtwet, are protected by Article 7 of the directive, since they are not listed in Annex II thereto. The species in question are the black grouse, several species of geese and ducks, the great snipe, the carrion crow and the hooded crow, the rook, the jackdaw, the jay and the magpie.

10 The Netherlands Government considers that the Jachtwet and its implementing provisions adequately transpose the prohibitions laid down in the directive. It stresses that the birds in respect of which hunting permits may be granted by the competent Minister belong to species which all the year round cause or may cause serious damage to agriculture throughout the territory of the Netherlands. Consequently, it considers that is only by maintaining open season for hunting those species that such damage may be avoided.

11 As regards the hunting of species which may not be hunted by virtue of Article 7 of the directive in conjunction with Annex II, it is appropriate to examine the Commission's complaint in respect of the species in question under separate heads as follows.

(i) *Black grouse, great snipe, hooded crow*

12 These three types of bird fall within the field of application of Article 20(2) of the Jachtwet, which provides that the hunting of those species is prohibited, in the absence of a measure of the competent Minister providing otherwise. It is, however, common ground that no measure of that kind has been adopted in this case. In those circumstances, that is to say in the current state of the applicable national rules, the birds in question are protected in conformity with the terms of the directive. This part of the first complaint must therefore be rejected.

(ii) *Geese and ducks*

13 These birds likewise fall within the field of application of Article 20(2) of the Jachtwet, mentioned above. In accordance with the Ministerial Decree of 8 August 1977, the greylag goose, the white-fronted goose and the bean goose, together with the mallard, the shoveler, the widgeon, the pintail and the gadwall, may be hunted during a certain period of the year. That decree is in conformity with Annex II to the directive, which authorizes the hunting of those birds in all the Member States and in particular in the Netherlands. Accordingly, that part of the first complaint must also be rejected.

(iii) *Carrion crow, jackdaw, magpie, jay*

14 The first three species may be hunted throughout the year under Articles 8(1) and 20(1) of the Jachtwet. As for the jay, the Ministerial Decree of 8 August 1977 provides for only a partial closure of the season from 1 May to 14 July. However, under Article 7 of the directive none of those species may be hunted.

15 As regards the Netherlands Government's argument that the hunting of those species is justified in order to limit serious damage, it should be pointed out that, as the Court held in its judgment of 17 September 1987 in Case 412/85 *Commission* v *Germany* [1987] 3503, such a derogation must be based on at least one of the reasons listed exhaustively in Article 9(1) of the directive and must meet the criteria laid down in Article 9(2), the purpose of which is to limit derogations to what is strictly necessary and to enable the Commission to supervise them. However, the national provisions at issue do not meet those requirements. To that extent the first complaint must therefore be regarded as well founded.

(iv) *Rook*

16 The hunting of the rook, which is subject to the same rules as govern the hunting of the black grouse, the great snipe and the hooded crow, was authorized by a regulation dated 24 February 1987 adopted by the competent Minister by virtue of the power conferred on him by Article 20(2) of the Jachtwet. However, it must be held that the provisions of that regulation comply with the various requirements for derogations authorized by Article 9 of the directive for the purpose of preventing serious damage. Consequently, the complaint made in that respect must be rejected.

17 It appears from all of the foregoing considerations that the first complaint is well founded only as regards the hunting of the carrion crow, the jackdaw, the jay and the magpie.

Second complaint: derogations in respect of certain species of birds

18 The Commission points out that Article 8(1) of the Jachtwet allows the user of land to hunt certain species of protected birds without any limitation as to time and with the aid of any appropriate means of flushing out or killing the game, and also by using ferrets, nets and traps. It considers that although the hunting of certain species, namely the wood pigeon, the carrion crow, the jackdaw, the jay and the magpie, may be authorized under Article 9 of the directive in order to avoid serious damage, the Netherlands legislation does not satisfy the requirements laid down in that provision.

19 The Netherlands Government observes that under Article 20(1) of the Jachtwet the Minister may prohibit the hunting of the species in question for a particular period or in certain parts of the country and that he has made use of that power to prohibit the hunting of the jay for a particular period. It adds that the hunting of the other species covered by the Jachtwet has not been prohibited in view of the damage they cause and the extremely small risk of their being hunted where no serious damage is caused. Finally, it states that the means of hunting prohibited by Annex IV to the directive, such as traps, are not used in the Netherlands.

20 As regards the Netherlands Government's argument which seeks to justify those possibilities for hunting on the ground of the damage caused by the birds in question, it should be recalled that, according to the aforementioned case-law of the Court, any derogations from the prohibitions prescribed by the directive must meet the requirements laid down in Article 9 thereof. However, the Netherlands legislation contains no particulars in that regard.

21 As regards that part of the complaint relating to the means used for hunting the abovementioned species which are permitted under Article 22(2) of the Jachtwet, the Netherlands Government's argument that the means of hunting prohibited by Annex IV to the directive, such as traps, are not used in the Netherlands must likewise be rejected.

22 In that connection, it should be emphasized that the prohibitions of means of capture which are laid down in the directive must be laid down in legislative provisions. The fact that a practice incompatible with the directive is not carried on does not release the Member State in question from its obligation to adopt laws or administrative provisions in order to ensure that the provisions of the directive are adequately transposed. In view of the principle of legal certainty the relevant prohibitions must be reproduced in mandatory legal provisions. The second complaint must therefore be upheld.

Third complaint: the seeking, collection and possession of the eggs of certain species of birds

23 The Commission also maintains that the Jachtwet authorizes the seeking, collection and possession of eggs of the species listed in Article 8(1) of the Jachtwet, even though under Article 6(2) of the directive and Annex III/1 thereto such authorization may be granted only in respect of the wood pigeon.

24 The Netherlands Government states in reply that in fact eggs of the species mentioned in Article 8(1) of the Jachtwet are not sought or collected.

25 The Netherlands Government's argument cannot be upheld. In fact, it is common ground that the seeking, the collection and the possession of eggs of the wood pigeon, the carrion crow, the jackdaw, the jay and the magpie, which are authorized under the national legislation, are contrary to Article 5(c) of the directive. As has been emphasized above, the fact that a number of activities incompatible with the prohibitions contained in the directive are unknown in a particular Member State cannot justify the absence of appropriate legal provisions. In order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question. The third complaint must therefore be regarded as well founded.

Fourth complaint: derogations concerning the prevention of damage

26 The Commission maintains that the provisions of the Jachtwet relating to the prevention of damage do not correspond with the wording of Article 9 of the directive. It considers that it is very important that the conditions of derogation set out in that article should be reproduced accurately in the national legislation and that they should be the subject of specific assessment in which a distinction is drawn *inter alia* between the need for hunting as such, on the one hand, and the need to use a particular means of hunting, on the other.

27 The Netherlands Government argues that the hunting permits provided for in Articles 53 and 54 of the Jachtwet are granted only for the purpose of preventing and combating serious damage by certain species which under Annex II of the directive may be hunted in the Netherlands and in respect of which hunting is permitted for all or part of the year. It adds that such permits, which are subject to a number of conditions, are issued only if there is no other satisfactory solution.

28 That argument put forward by the Netherlands Government must be rejected. It must be observed that neither serious damage nor any of the other reasons on which derogations may be based that are set out in Article 9 of the directive appear in Articles 53 and 54 of the Jachtwet. As has been pointed out above, it appears from the case-law of the Court on the conservation of wild birds (see the judgment in *Commission* v *Germany*, cited above), that the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the directive must be reproduced in specific national provisions, since a faithful transposition becomes particularly important in a case where the management of

the common heritage is entrusted to the Member States in their respective territories.

29 The explanation that the requirements as to protection set out in Article 9 of the directive are observed in fact by ministerial practice with regard to the use of hunting permits cannot be accepted, since, as the Court reiterated in the judgment of 23 February 1988 in Case 429/85 *Commission* v *Italy* [1988] ECR 843, mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation on Member States to which a directive is addressed, pursuant to Article 189 of the Treaty. The fourth complaint is therefore well founded.

Fifth complaint: hunting from aircraft

30 The Commission maintains that Article 22 of the Jachtwet does not prohibit the hunting of birds from aircraft, although the combined provisions of Article 8(2) of the directive and Annex IV(b) thereto impose an obligation on the Member States to prohibit this type of hunting.

31 The Netherlands Government replies that in the Netherlands aircraft are not used to pursue game. It therefore considers it superfluous to include such a prohibition in the national legislation.

32 In that connection, it must be observed that, as has already been stated, the fact that in a Member State a particular means of hunting is unknown does not constitute a reason for not transposing that prohibition into the national legal order. Consequently, the fifth complaint must be upheld.

Sixth complaint: derogations for hunting dog trials

33 The Commission points out that the authorities may, in pursuance of the power conferred on them by the Jachtwet, derogate from that law in order to authorize the organization of hunting dog trials or the training of hunting dogs even though the directive does not provide for such a derogation. It considers that the relevant

national provisions are couched in terms so general that it is unclear whether the requirements laid down in that respect in the directive are observed.

34 The Netherlands Government observes that, when a ministerial permit for the training of hunting dogs is issued, it covers only the training of the dogs and the tracking of game. Such permits are issued in order to provide the holders with an opportunity to give their dogs experience of tracking game, but do not, however, authorize the capture or killing of birds which may not be hunted.

35 That argument of the Netherlands Government cannot be upheld in so far as it is tantamount to arguing that the organization of hunting dog trials or the training of hunting dogs does not give rise to infringements of the provisions of the directive. Under Article 5 of the directive Member States must take the requisite measures to establish a general system of protection for birds whereby in particular it is prohibited to kill, capture or disturb them.

36 As the Court made clear in its judgment of 13 October 1987 in Case 236/85 *Commission* v *Netherlands* [1987] ECR 3989, irrespective of the fact that an administrative practice may be in conformity with the requirements of protection laid down in the directive, the circumstances in which permits relating to hunting dog trials or the training of hunting dogs may be granted must be laid down in legislative provisions. In view of the absence of a precise legal framework laid down by law or administrative provision governing the abovementioned activities, the sixth complaint must therefore be regarded as well founded.

37 It must therefore be held that by failing to bring into force within the prescribed period all the laws, regulations and administrative provisions necessary to comply with the provisions of Council Directive 79/409 of 2 April 1979 on the conservation of wild birds, the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty.

Costs

38 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the defendant has failed in its main submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by failing to bring into force within the prescribed period all the laws, regulations and administrative provisions necessary to comply with the provisions of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty;

(2) Orders the Kingdom of the Netherlands to pay the costs.

Kakouris Koopmans Mancini

O'Higgins Moitinho de Almeida Grévisse Díez de Velasco.

Delivered in open court in Luxembourg on 15 March 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of Chamber
acting as President of the Court