lative provision serving as the basis for the adoption of administrative measures which are officially published, general in scope and capable of creating rights and obligations for individuals. In contrast, mere administrative practices, which by their nature may be changed at will by the authorities, do not constitute proper transposition.

2. This is an area where the faithful transposition of directives is particularly important, since a common heritage is at stake whose management is entrusted to the Member States as regards their respective territories. Consequently, any derogations made by the legislation of a Member State from the general prohibitions set out in Directive 79/409 in order to ensure the conservation of wild birds 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.

3. The fact that certain means of hunting or means of killing which are prohibited by Directive 79/409 on the conservation of wild birds are unknown in a Member State does not release that Member State from its obligation to adopt laws or administrative procedures 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.

REPORT FOR THE HEARING
delivered in Case C-339/87 *

I — Legal background

1. *Community provisions*

Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Official Journal 1979, L 103, p. 1), last amended by Council Directive 85/411/EEC of 25 July 1985 (Official Journal 1985, L 233, p. 33), is intended to establish a general system for the protection of wild birds and to regulate the hunting of and trade in species of wild birds.

Article 18(1) of the directive provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification and that they are to inform the Commission

* Language of the case: Dutch.

thereof forthwith. As the directive was notified on 6 April 1979, the time allowed for its transposition into national law expired on 6 April 1981.

The following provisions of the directive are at issue in this case:

'*Article 5*

Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 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.

...

Article 7

1. Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation. Member States shall ensure that the hunting of these species does not jeopardize conservation efforts in their distribution area.

2. The species referred to in Annex II/1 may be hunted in the geographical sea and land area where this directive applies.

3. The species referred to in Annex II/2 may be hunted only in the Member States in respect of which they are indicated.

4. Member States shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2. They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which

hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. Member States shall send the Commission all relevant information on the practical application of their hunting regulations.

Article 8

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).

Article 9

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

(a) (i) in the interests of public health and safety,

(ii) in the interests of air safety,

(iii) to prevent serious damage to crops, livestock, forests, fisheries and water,

(iv) 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 those 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 derogations must specify:

(i) the species which are subject to the derogations,

(ii) the means, arrangements or methods authorized for capture or killing,

(iii) the conditions of risk and the circumstances of time and place under which such derogations may be granted,

(iv) 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,

(v) the controls which will be carried out.

3. Each year the Member States shall send a report to the Commission on the implementation of this article.

4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of these derogations are not incompatible with this directive. It shall take appropriate steps to this end.'

2. *National legislation*

The provisions of Netherlands law at issue in this case set out to regulate hunting. In the Netherlands, hunting is regulated mainly by the Law of 3 November 1954 on hunting ('the Jachtwet'). That law was last amended by the Law of 17 March 1988.

Article 2 provides a series of definitions of the various sorts of game for the purposes of its application, to wit large game, small game and waterfowl.

Article 8(1) of the Jachtwet confers on the user of land the right to hunt on that land the wood pigeon, the carrion crow, the jackdaw, the jay and the magpie, without time-limit and using any appropriate means. Under paragraph 3 of the same article, that person may give written authorization for other persons to hunt the game referred to in the first paragraph on the land which he uses. Such authorization is valid for a maximum of one year.

Under Article 10(1) of the Jachtwet it is prohibited to seek, collect or possess the eggs of game birds and it also an offence to disturb their eggs unnecessarily. Paragraph 2 of the same provision allows an exception in the case of the seeking, collection or possession of the eggs of the game birds referred to in Article 8(1) by the owner of the hunting rights, those to whom he has issued permits, the user of the land and members of his family and staff, provided that the hunting season for the birds in question has started. With regard to the seeking, collection or possession of the eggs of game birds other than those referred to in Article 8(1) by the abovementioned persons, the prohibition laid down in the first paragraph is not applicable if those activities are intended to conserve the game.

Articles 19 to 27 of the Jachtwet concern the manner in which hunting is carried out. Article 19(1) provides that, unless the interests of agriculture conflict therewith, hunting by the owner of the hunting rights or by others is to be carried out in such a way that reasonable numbers of game are maintained or, in the event that the game is not present in reasonable numbers, in such a way that reasonable numbers of game are reached. Article 20, which regulates the opening and closing of the hunting season, provides as follows:

'1. The game referred to in Article 8(1) may be hunted all the year, except in so far as the Minister determines otherwise.

2. The Minister shall determine . . . the start and end of the hunting season for game other than that referred to in Article 8(1). The aforesaid hunting season shall be closed between 16 February and 15 July except to the extent required by the interests of agriculture.'

On the basis of that provision the Minister for Agriculture and Fisheries issued a decree on 8 August 1977, which was last amended on 9 October 1987. That decision lays down the dates for the start and close of the hunting season for the following: partridges, cock-pheasants, hen-pheasants, woodcocks, greylag geese, white-fronted geese, bean geese, with the exception of small bean geese, mallards, shovelers, teals, widgeons, pintails, pochards, scaup ducks, gadwalls, tufted ducks, snipe, golden plovers, coots and jays.

Under the regulation of 24 February 1987, the Minister for Agriculture and Fisheries may grant a permit to hunt a certain number of species of birds listed in Annex II to the directive. Pursuant to Article 3 of the regulation such a permit may be issued only if, in the Minister's opinion, there is no other satisfactory way, in the interests of public health and safety, of preventing serious damage to crops, livestock, woodland, fisheries and rivers and lakes or of protecting flora and fauna. Such a permit is valid for a maximum of one year. Permits issued with a view to preventing serious damage may be granted only for a period of time within the period stated in the annex to the regulation against the species in question. A copy of the permit is to be sent to the head of the local police in the district in which the permit holder is authorized to hunt.

Article 22 of the Jachtwet, which lays down the rules relating to means of hunting, provides as follows:

'1. The following may be used for hunting:

(a) rifles satisfying the requirements laid down by the Minister;

(b) dogs, except for greyhounds;

(c) registered duck decoys;

(d) hunting birds, that is to say peregrines *(Falco peregrinus)* and hawks *(Accipter gentilis)*;

(e) decoy birds, provided they are not blind or maimed;

(f) birdcalls, provided they have not been banned by the Minister.

2. Apart from the means referred to in paragraph 1, the game referred to in Article 8(1) may be hunted using means which are suitable for digging out or killing the game, ferrets, nets and traps.

3. . . .

4. It is prohibited to hunt, or to be in the countryside for the purpose of hunting, using an unauthorized means.

5 to 8. . . .'

Article 26(1) prohibits the hunting of game in the closed season for the game in question. According to the same provision, it is prohibited in particular to hunt with

firearms from motor vehicles or from any other vehicle and from certain boats.

Article 27 of the Jachtwet gives the Minister the power to authorize derogations from the prohibition on hunting game in the closed season, in particular for the purposes of organizing hunting dog trials and the training of hunting dogs. Such authorizations may be subject to restrictions.

Articles 43 to 59 of the Jachtwet contain provisions relating to damage. Notwithstanding the provisions contained in or adopted pursuant to the Jachtwet, under Articles 53 and 54 the Minister may authorize hunting in order to prevent or limit damage. Such authorizations may be subject to conditions.

Under Article 60 of the Jachtwet it is prohibited to have in one's possession game, whether alive or dead, with a view to sale, to offer such game for sale or to sell or to supply such game where it has not been obtained in accordance with the law or the provisions adopted in implementation of that law between the start of the hunting season and the 10th day following the end of the hunting season for the game in question. Under that provision to possess, offer for sale, sell or supply dead or live game is prohibited from the 11th day after the end of the hunting season until the start of the hunting season for the game in question.

3. *Background to the case*

By letter of 28 October 1985 the Commission, considering that certain provisions of the Netherlands legislation relating to the hunting of birds did not comply with the directive, initiated against the Kingdom of the Netherlands the procedure provided for in Article 169 of the EEC Treaty.

On 18 February 1986 the Government of the Netherlands stated in reply to that letter that the law on hunting and administrative practice complied with the provisions of the directive. It also sent to the Commission a preliminary draft law amending the Jachtwet. The Commission was not satisfied by those explanations and on 11 February 1987 delivered a reasoned opinion under Article 169 of the EEC Treaty, to which no reply was given.

II — Written procedure and conclusions of the parties

By application lodged at the Court Registry on 28 October 1987, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that the Kingdom of the Netherlands has failed to fulfil its obligations in respect of the conservation of wild birds.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry.

The Commission claims that the Court should:

(1) declare 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,

the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty;

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

The Kingdom of the Netherlands contends that the Court should:

(1) declare the application unfounded;

(2) order the Commission to pay the costs.

III — Submissions and arguments of the parties

The Commission argues that, since the directive established a general system for the protection of wild birds which may be derogated from only in specific circumstances, the Netherlands legislation on hunting fails to comply with the directive in six respects.

First complaint: species of birds which may be hunted

The Commission states that the following species, which may be hunted under Articles 2 and 20 of the Jachtwet, are protected by the provisions of the directive:

(a) the black grouse, a species which, under Articles 5(a) and 7(3) of the directive and Annex II/2 thereto, the Member States may not authorize to be hunted;

(b) all species of geese and ducks, whereas only certain species are covered by Article 7(3) of the directive and Annex II thereto;

(c) the great snipe, whereas this species appears in Annex I to the directive and must therefore be protected by special measures;

(d) the carrion crow and the hooded crow, the rook, the jackdaw, the jay and the magpie, whereas those species do not appear in Annex II of the directive.

The Commission considers that Articles 2 and 20 of the Jachtwet authorize the national authorities to take steps which exceed the limits established by the directive. The competent Minister may authorize the hunting of certain bird species which do not appear in Annex II to the directive, for example the black grouse and the great snipe. The Ministerial Decree of 8 August 1977 also authorizes the hunting of the jay, yet that species does not appear in Annex II to the directive. That legal situation may make it more difficult for interested parties to bring legal proceedings against a ministerial measure which does not comply with the directive.

The Government of the Kingdom of the Netherlands maintains that, having regard to the implementing texts based on Article 20, Articles 2 and 20 of the Jachtwet adequately implement the provisions of the directive.

It points out that Article 2 of the Jachtwet lists the species to which that law applies and that within the scope of that law it is possible to hunt only if the hunting season for the species in question has started. It

maintains that the fact that a species is referred to in Article 2 of the Jachtwet does not mean that that species may always be hunted, but that it may be hunted only if certain conditions are fulfilled.

The Netherlands Government emphasizes that Article 9 of the directive envisages the need for possible derogations, in particular in order to prevent serious damage to crops and to protect flora and fauna. It observes that if the particular circumstances do not make protection necessary, the Minister for Agriculture and Fisheries uses his power to adopt derogating measures. Consequently, Article 20(1) of the Jachtwet does not confer a power in excess of that which is permitted by the directive.

With regard to the jay, the Government points out that, although that species is also caught by the rules set out in the combined provisions of Articles 20(1) and 8(1) of the Jachtwet, the competent Minister, using his power to make exceptions, decided on 8 August 1977 that the hunting season is to be from 15 July to the following 30 April inclusive. Thus from 1 May to 15 July the jay may not be hunted.

According to the Netherlands Government, under Article 20(2) of the Jachtwet the hunting of species which are not referred to in Article 20(1) of that law is prohibited unless the Minister for Agriculture and Fisheries has adopted other measures. In two implementing decisions based on Article 20(2) of the law, that is to say a decree of 8 August 1977 and a regulation of 24 February 1987, the Minister established to what extent game other than the game referred to in Article 8(1) of the Jachtwet may be hunted.

The government maintains that the other birds caught by the rules set out in Article 20(1) of the Jachtwet belong to species which cause or may cause serious damage to agriculture all the year round and throughout the Netherlands. The only way to prevent or combat the serious damage to agriculture and to protect flora and other fauna is to continue hunting. The threat of serious damage to agriculture, particularly to seeds, seedlings, the buds of fruit trees, ornamental shrubs, fruit, green vegetables and bulbs, is present all year because of the varied nature of agriculture in the Netherlands and because the species in question are unselective in their choice of food. The means of defence and hunting widely used in the Netherlands, for example rifles and bird traps, enable damage to agriculture to be contained within reasonable limits while ensuring very good conservation of the bird species in question.

The Government of the Netherlands points out that pursuant to the Ministerial Decree of 8 August 1977 only those species of birds listed in Annex II to the directive may be hunted, with the exception of the jay. It emphasizes that the decree refers to the jay only to prohibit during the nesting season the hunting of that species, which may otherwise be hunted all year pursuant to Article 20(1) of the Jachtwet.

The Netherlands Government states that as far as the species of birds which may not be hunted in the Netherlands are concerned, only the hunting permits referred to in the regulation of 24 February 1987 are still issued. Such a permit does not confer the power to derogate from the provisions laid down in or pursuant to the law. The regulation is not a mere administrative practice, but a ministerial measure based on the Jachtwet from which derogations may not be made. Thus, the hunting of the black grouse, the great snipe and the hooded crow is prohibited all the year under the combined provisions of Article 8(1) and Article 20(2) of the Jachtwet since there is no mention of those birds in the regulation of 24 February 1987.

Finally, the Government of the Netherlands states that in principle hunting is prohibited in the nesting and breeding season, that is to say between 16 February and 15 July. Derogations are allowed from the regulation of 24 February 1987 concerning the carrion crow, the jackdaw, the magpie and the jay only if hunting is necessary in order to prevent or combat serious damage to agriculture. In its opinion that therefore constitutes protection of special interests, as provided for by Article 9 of the directive.

Second complaint: derogations in respect of certain species of birds

The Commission considers that the Netherlands legislation, and in particular Article 8 of the Jachtwet, allows the user of land to hunt the wood pigeon, the carrion crow, the jackdaw, the jay and the magpie without any time-limit and using any appropriate means of driving out or killing the game, using ferrets, nets and traps. However, under the combined provisions of Articles 5 and 7 of the directive and Annex II thereto those species, with the exception of the wood pigeon, may not be hunted. Under Article 7(4) of the directive the hunting of the wood pigeon may not be authorized without any time-limit. Moreover, the combined provisions of Article 8 and Annex IV prohibit the use of traps.

The Commission observes that even though the hunting of the abovementioned species of birds may be authorized under Article 9 of the directive in order to prevent serious damage to crops or to protect fauna, the method adopted by the Netherlands legislation is inappropriate. A provision such as the one in question does not enable the circumstances of time and place peculiar to each case to be assessed, as is required under Article 9 of the directive.

The Netherlands Government observes that the competent minister may prohibit the hunting of the species in question for a particular period of time or in certain parts of the Netherlands and that he has used that power only in respect of the jay. It adds that the hunting of the other species of birds referred to in the Jachtwet has not been prohibited in view of the damage which those birds have caused and are likely to cause. In view of the fact that none of those birds are considered as attractive game there is very little risk that they will be hunted if they do not cause serious damage. With regard to the use of traps, the Government of the Netherlands emphasizes that they are not used for birds.

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

The Commission maintains that Article 10(2) of the Jachtwet authorizes the seeking, collection and possession of eggs of the species of birds listed in Article 8(1) even though under Article 6(2) of the directive and Annex III/1 such authorization may be granted only in respect of the wood pigeon. The fact that according to the Government of the Netherlands those activities do not occur in practice cannot release the Netherlands from its obligation to bring the law into line with the directive.

The Netherlands Government states in reply that seeking and collecting eggs of species of birds listed in Article 8(1) of the Jachtwet does not occur.

Fourth complaint: derogations concerning the prevention of damage

The Commission claims that Articles 20(2) and 53 and 54 of the Jachtwet do not comply with Article 9 of the directive. Article 9 of the directive authorizes derogations from the general prohibition only on certain conditions, in this case in order to prevent serious damage. According to the Commission, it is very important that those conditions should be reproduced accurately in the Netherlands legislation. It points to the need for specific assessment of those conditions which distinguishes in particular between, on the one hand, the need for hunting as such and, on the other, the need to use a particular means of hunting. The Commission considers that imprecise and incomplete general definitions, such as those which appear in Article 53 of the Jachtwet, make it more difficult for interested parties to contest decisions derogating from the general prohibition. For example, under Article 53 hunting permits may be issued in respect of species which under the directive may not be hunted in the Netherlands, such as the great snipe, the black grouse and the brent goose.

The Commission argues that Article 54 of the Jachtwet does not comply with the directive in so far as Article 9 requires that derogations should be for the purpose of preventing serious damage.

The Netherlands Government maintains, with regard to permits issued under Article 53 of the Jachtwet, that such permits are now granted only to prevent or combat serious damage caused by certain species which under Annex II to the directive may be hunted in the Netherlands and in respect of which the hunting season is open all or part of the year in the Netherlands. Such permits are issued only if there is no other satisfactory way of preventing or combating serious damage within the meaning of the directive. As for the Commission's argument to the effect that under Article 9 of the directive the need to use certain means of hunting should be assessed separately from the need to hunt *per se*, the Netherlands Government observes that under Article 7 of the directive the species of birds listed in Annex II of the directive may be hunted under national legislation. As far as means of hunting are concerned, the prohibitions laid down in Article 8 of the directive and Annex IV are complied with in the Netherlands.

With regard to the authorization which may be granted by the Minister for Agriculture and Fisheries pursuant to Article 54 of the Jachtwet in order to limit the numbers of one or more named species, the Netherlands Government points out that such authorization, which moreover is subject to strict conditions, may be issued only to combat damage. Persons to whom the authorization is issued must limit the numbers of the species named in the authorization on the land which is specified therein. Moreover, the authorization in question is granted only if there is no other satisfactory way of combating or preventing the damage in question. In the opinion of the Netherlands Government, the system thus satisfies the conditions laid down by Article 9 of the directive. Finally, authorizations pursuant to Article 54 of the Jachtwet are generally granted only in respect of pigeons and foreign species of animals which have returned to the wild.

As for the claim that it is more difficult for interested parties to contest conduct which they consider to infringe the directive, the Netherlands Government states that there is no direct remedy available against the Jachtwet since neither the directive nor the other provisions of Community law impose such an obligation. The national courts may, however, review the actual application of the law in the light of the relevant provisions of the directive in individual cases.

Fifth complaint: hunting from aircraft

In the Commission's view, the Jachtwet does not prohibit hunting from aircraft even though the combined provisions of Article 8(2) of the directive and Annex IV thereto impose an obligation on the Member States to prohibit all hunting ('achtervolging' — pursuit) from aircraft. The fact that in practice aircraft are not used for that purpose at present in the Netherlands cannot release the Netherlands from its obligation to transpose the provisions of the directive into national law.

The Netherlands Government states in reply that aircraft are not used in the Netherlands to hunt game. Moreover, as a consequence of Article 26(1) of the Jachtwet it is prohibited to hunt game from aircraft. Consequently, it is also prohibited to pursue — or track — game by that means.

Sixth complaint: derogations for hunting dog trials

The Commission states that under Article 27 of the Jachtwet the Minister may authorize derogations from the law for purposes of organizing hunting dog trials or the training of hunting dogs even though the directive does not provide for such a derogation. The provision is couched in such general terms that no restrictions are apparent.

The Netherlands Government observes that when a permit is issued for the training of hunting dogs, it relates only to the training of the dogs and the tracking of game. Such permits are issued in order to give the holder the opportunity to give his dog the experience of tracking game and do not authorize the capture or killing of animals which may not be hunted at that time.

Under Article 23 of the Jachtwet persons in charge of dogs have a duty to stop them from seeking, pursuing, capturing or killing game on land on which they are not authorized to hunt.

IV — Replies of the parties to written questions put by the Court

At the request of the Court, the Netherlands Government produced all the laws and regulations in force at present in the Netherlands relating to hunting of birds.

As the defendant had given notice in its submissions of certain amendments to the disputed provisions, the Court asked the Commission which of those provisions it considered still did not comply with the provisions of Directive 79/409. The Commission informed the Court that none of those amendments had been adopted. The Commission stated that it therefore intended to adhere to all the complaints raised with regard to the Netherlands legislation on the hunting of birds.

Díez de Velasco
Judge-Rapporteur