

To the attention of Dr. Julio Garcia Burges,  
Dear Sir,

To phrase it politely, we are rather disappointed by your reaction concerning the request of my client to intervene the non-compliance regarding Community legislation by the Dutch government and like to elaborate on the points mentioned in your letter.

We agree with you that since 79/409/EEG and 92/34/EEG are directives differences in actual implementation may result due to specific peculiarities in memberstate legal frameworks. If however, measures are tailored to the obligations demanded by the Directives and are based on solid scientific knowledge, one could truly speak of harmonized community legislation resulting in a "level-playing-field" for those affected. In our opinion this is not the situation in the Netherlands.

Over the past years we (INCAconsult) have brought several documents to the attention of the Commission (although not as a formal request to intervene), indicating that the implementation of the Directives in the Netherlands was incorrect. In response to your letter we have asked the '*Foundation Institute Quatro*' for an analysis of the shortcomings in the implementation by way of a comparison between the Habitats Directive and the Natuurbeschermingwet.

Even a quick glance at the results of the forementioned comparison (added as annex) will demonstrate the profoundness of non-compliance. Therefore, we hope that in the future the Commission will refrain from furthering the Dutch myth that the articles and requirements of the Habitats Directive have been implemented in a 1-on-1 fashion. In addition we would like to stress that none of the relevant articles of the Birds Directive have been implemented in the Natuurbeschermingswet.

Consequently we expect the Commission to take action because to state matters bluntly: *all the elements from the Directives that would allow citizens to exercise their legal rights or otherwise hold the Dutch government accountable for its actions are absent from this so-called implementation.*

In this respect we would like to refer to the Decision of the Court (C-6/04) where it is stated:

- (26) It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by Articles 11, 12(4) and 14(2) of the directive.

and to the Conclusion of the A-G in the same case:

- (10) The Court recently summarised its case-law on the necessary faithfulness of a directive's transposition as follows:  
'While it is ... essential that the legal situation resulting from national implementing measures is sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations, it is none the less the case that, according to the very words of the third paragraph of Article 249 EC, Member States may choose the form and methods for implementing directives which best ensure the result to be achieved by the directives, and that provision shows that the transposition of a directive into national law does not necessarily require legislative action in each Member State. The Court has thus repeatedly held that it is not always necessary formally to enact the requirements of a directive in a specific express legal provision, since the general legal context may be sufficient for implementation of a directive, depending on its content.' (6)
- (11) The Court has, however, held specifically with regard to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (7) ('the Wild Birds Directive') that faithful transposition becomes particularly important where

management of the common heritage is entrusted to the Member States in their respective territories. (8) This consideration equally applies to the Habitats Directive. (9)

- (12) The general clause can therefore be recognised as an adequate implementing measure only if there is no possible room for doubt as to the requirements of the Habitats Directive on the part of the national authorities applying the law and the persons affected. It cannot be determined in the abstract whether that is the case, but only on the basis of the individual implementing provisions.

This Decision and Conclusion as to the status of the Directives, supports our opinion that they should be considered as "*lex specialis*" rather than as mere directives, since their definitions, selection-procedures and requirements are very specific.

There are several important questions to be answered, which apparently you have failed to identify from the material submitted.

- 1- If it is not acceptable to the Commission that measures are proposed for elements with the population-qualification D in the SDF, why would it be acceptable Directive-wise to introduce measures for elements that are not even present at the sites?

From the material submitted it can be concluded that in the Netherlands for the majority of D-elements and for a large number of non-present elements measures are proposed. Moreover, in the Netherlands, these are brought under the obligations of articles 6:2 and 6:3 !!

It is our opinion that the directive does not allow for addition of natural habitats from annex I or habitats of species from annex II after the list of sites of community interest has been established by the Commission, without proper scientific research and consultations with the Commission.

- 2- The second question concerns the relation between the articles 6:1 and 6:2 and is of fundamental importance since it affects the status of measures taken.

Article 6:1 of the directive calls:

For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

Article 6:2 of the directive requires that:

Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

In our opinion the phrase "for which the areas have been designated" only refers to the qualifying elements. Let us give you an example:

If it were not for habitatype H6230 (B; conserve on SDF), the area "*Havelte-Oost*" would not have been on the list of the sites of community interest. Therefore, this habitatype is the qualifying element that falls under the provisions of articles 6:1 and 6:2. In addition habitatypes H2310 (B), H2320 (B), H4010 (C), H7150 (C) and species H1166 (A) have been listed on the SDF as present and are subject to the provisions of article 6:1, plus H2330 (D) and H9190 (D) which do not require measures taken. In excess of the listing on the SDF, the Dutch gouvernement has added H3160, H4030, H7110 and (most interestingly for a Habitats Directive SCI) A277.

All these elements (eleven instead of one) are treated by the Dutch gouvernement as qualifying, causing something like a disaster in the socio-economic environment of the region; not in the last place because the conservation status of all elements have

currently been evaluated as either insufficient or deplorable. The importance of a (legal) ruling on this subject may be obvious.

- 3- The Habitats Directive does not cover the status of the '*Atlantic seminars*'. Nevertheless, the outcome of these seminars have an impact that exceeds the consequences of the Directive itself. It can be best illustrated with another example: For habitat type H4010, 6 areas selected as qualifying under the Directive, with a surface area for the type of appr. 950 ha. Based on 'insufficient coverage' 50 areas(!) were added as outcome of the Atlantic seminars resulting in a total surface area for the type of appr. 4820ha out of which 11 areas contribute together not more than 37ha.

We wonder where this leaves the proportionality that the Directives call for.

We hope that the Commission will decide to seek answer to the questions through the European Court of Justice.

We do not contest the fact that Memberstates have the freedom to do more than a directive requires. However, in doing so they should clarify it in legislation and policy and not, like the Dutch government practices, abuse European legislation.

Proper implementation of Directives ensures the rights of citizens and the Commission has a responsibility to see to it. The violation of citizens rights that occurs in the Netherlands under the pretext of European obligations most seriously erodes the support for both Natura2000 and the 'European-thought' in general. And it should not be taken too lightly because Natura2000 has a very profound impact on society.

As a finisher we would like to present you with yet another of the many examples of the 'oblique' fashion the Directive is executed in the Netherlands. On both the north and south side of the SCI "*Haringvliet*", farmers are driven out of their property in the *Polder Zuidoord* and *Polder Zuiderdiep* under the pretext that their land is necessary for the protection of the Noordse woelmuis (*H1340: Microtus oeconomus*). The conservation status of this species was indicated on the SDF as B, which means that there were - and most likely is (proper data are not available) - no compelling reasons to transform agricultural land. Maps of the polders are included with this letter and indicate that the *Polder Zuiderdiep* has been included in the SCI after the list of sites had been established by the Commission. The management of the "new nature" will be delegated to the organization that owns the adjacent terrain.

Again, the growing aversion against Natura2000 (and Europe) should not be taken lightly so for this reason we decided to send this letter and documents in copy directly to the President of the Commission and to the Commissioner of Environment.

Vila Viçosa (Portugal)  
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dr. N.M. Gerrits  
director of **INCAconsult**