

Questionnaire EUFJE Conference 2010 – Enforcement of European Biodiversity Law at national level

Netherlands report by mr Th.G. Drupsteen

I. Natural habitats and their fauna and flora

A. Habitat protection

Questions

I.A.1. Are there general habitat protection measures, applicable to all special areas of conservation and special protection areas in your country, or are they site specific, or is there a combination of general and site specific measures?

In the Netherlands two formal acts cover the subject nature protection. The Nature protection act 1998 regulates the planning of the nature protection policy, the designation of protected areas, the legal consequences of designation, the possibility of financial compensation, the possibilities of appeal, the procedure for licence granting and enforcement. So area-protection in the Netherlands is regulated in the Nature protection act 1998 (Np act).

Species protection is regulated in the Flora and fauna act 1998 (F and f act). The act regulates the designation of protected species, general prohibitions, the designation of protected habitats and there consequences, financial compensation, hunting, exemptions and licences and enforcement.

The Nature protection act contains general provisions to protect conservation areas. According to the act two kinds of areas may be designated as protected areas:

- a. protected nature monuments,
- b. areas designated to execute the directives 79/409/EEG and 92/43/EEG. One may say that the protected nature monuments are designated based on national law, while the areas designated to execute the two directives are designated based on European law; these are the Nature 2000 areas.

According to art. 16 Np act it is forbidden to act in a protected nature monument in a way that it may be dangerous for the scenery, for the natural importance of the protected monument or for the animals or plants within the monument or that it may disfigure the monument without a license granted by either the provincial board or the minister of Agriculture, Nature protection and Food safety. A license is also required for acts outside the protected nature monument that are mentioned in the decision to designate the monument.

For a protected nature monument the provincial board in accordance with the owner or user may establish a management plan to protect, recover or develop the scenery or the natural importance of the monument.

So art. 16 contains a general measure to protect natural monuments while a management plan for the monument may contain site specific measures.

According to art. 19a Np act the provincial board, after consultation with the owners, users and other interested persons, has to establish a management plan for a designated Nature 2000 area or a provisional designated area. The management plan contains in compliance with the aims of maintenance the measures of maintenance that have to be taken and the way by which they shall be taken. The plan may also contain a description of acts and developments in and outside the area that do not harm the aims of maintenance taken into account the measures of maintenance. A plan has to be established within three years following the date of the decision to designate the area. It lasts for six years.

According to art. 19d Np act it is forbidden without a license granted by the provincial board or the minister to realize projects or other acts that may harm the quality of natural habitats and the habitats of species in a Nature 2000 area or that may have a significant disturbing effect on species for which the area has been designated. This prohibition is not applicable on the realization of projects or other acts in accordance with a management plan. The prohibition is also not applicable on already existing use during the period of establishing the management plan, unless this use forms a project that is not direct related or necessary for the maintenance of a Nature 2000 area but that may have in itself or in combination with other projects significant effects for the Natura 2000 area involved. Categories of projects or other acts may be exempted from this prohibition by governmental decree.

Art. 19l Np act contains a general duty to take care for the maintenance of designated natural monuments or Natura 2000 areas. This general duty implies the obligation for everybody knowing or understanding that his activities or omissions may harm the area to omit this activities or to take any reasonable measure to prevent or to restrict or undo the harm of these activities.

So for Nature 2000 areas priority has been given to site specific protection of the management plans supplemented by general rules. In practice however the establishment of management plans turns out to be complicated and time consuming; this means that only a few management plans have been established until now.

I.A.2 Who supervises habitat protection measures in your country? Are there also specialized inspectorates supervising them?

Habitat protection measures are supervised in the Netherlands by the General Inspectorate of the department of Agriculture, Nature protection and Food safety. Besides the Inspectorate provincial boards apply inspection officers, while also the ordinary police has specialized officers to supervise habitat protection measures.

I.A.3 If habitat protection measures are infringed, what type of sanction can be imposed by whom? Are these sanctions administrative, criminal or civil in nature? What is the level of sanctions? Are those sanctions often applied and considered to be effective? Can those sanctions be applied on legal persons?

The Np act offers the minister of Agriculture, Nature protection and food safety the competence to impose administrative sanctions to enforce the act; these are administrative coercion or a penal sum. This means that the minister may oblige a person to end and undo within a certain period an infringement of habitat protection measures; when the person does not end or undo the infringement the minister is entitled to end or undo it by himself while the involved person is liable for the costs of ending or undoing. When a penal sum is imposed, the involved person may lose a penal sum when he does not end or undo his infringement.

The provincial board has a general competence according to the Provinces act to impose administrative coercion or a penal sum for the infringement of regulations for which it has a responsibility.

The act does not limit the level of the penal sum. The level of a penal sum shall be in a reasonable relation to seriousness of the infringement.

The Np act is mentioned in art. 1a of the Act on economic offenses. This means that infringement of the mentioned articles of the Np act is considered to be an economic offense. The Act on economic offenses offers compared to the ordinary penal law additional competences to inspectors, other and higher sanctions, while infringements are judged by a special economic judge. Deliberate infringements are offenses; non deliberate infringements are misdemeanours. Sanctions on offenses are imprisonment for two years or a fine of the fourth category, that is up to 18.500 euro; sanctions on misdemeanours are imprisonment for one year and a fine of the same category.

My impression is that these sanctions are not often applied. Both the administrative and the penal sanctions may be applied on legal persons.

I.A.4 What type of sanctions can be applied if a plan or project as referred to in art. 6.3 of the Habitat-directive is carried out without an appropriate assessment? Makes it a difference if not only an appropriate assessment is lacking, but also a permit for the project or an approval of the plan?

According to the system of the Np act projects for which an appropriate assessment is required, are projects that may only be realised after the granting of a license. The appropriate assessment has to be drafted by the taker of the initiative for the project before the provincial board decides about the license. A decision about a license is open for appeal. Such a decision without an appropriate assessment will be nullified by the court.

The realisation of a project without a license and an appropriate assessment is illegal. The provincial board may react by using its administrative sanctions. The realisation of a project without a license is also an economic offense; art. 19d by which the license is regulated, is mentioned in the Act on economic offenses. Having an appropriate assessment is linked to the license. Without an assessment no license.

I.A.5 Conduct falling under art. 3(h) of the Ecocrime-directiv shall, at the latest on 26 december 2010, be qualified as a criminal offense and be punishable by effective, proportionate and dissuasive criminal penalties. Has these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this conduct described in your legislation: copy- and past or a specific national description? What are the minimum and maximum penalties? Is there a difference between penalties for natural and legal persons? If such an infringement is reported, is it still possible not to prosecute such an offense before a criminal court and to apply other type of sanctions or simply to drop the case?

Art. 19l Np act by which the general duty to take care is regulated, is mentioned in the Act on economic offensives. This means that neglecting this duty is an economic offense. Until now no special legal measures are undertaken to implement art. 3(h) of the Ecocrime directive. Taken into account art. 19l NP act these special measures are not necessary. Art. 19l prescribes that everybody takes enough care to maintain designated areas. The article holds a specific national description.

The Netherlands legal system has no minimum penalties. The penalties are those mentioned under I.A.3. There is no legal difference between penalties for natural and legal persons. Given the fact that also administrative sanctions are available a choice has to be made between these sanctions and the penal ones. Although administrative sanctions without a criminal character like these may be applied

together with penal law sanctions, in most cases only one sanction will be applied. As soon as the administration applies administrative sanctions in general the public prosecutor will hold back. In penal law prosecution a opportunity principle is applied; this means that prosecution takes place when this is necessary. So the public prosecutor may drop a case or hold back when other sanctions are applied.

General remark: No cases about enforcement of habitat protection regulations have been reported in the Netherlands. The process of designation of areas and especially of drafting and establishing management plans is going on. Besides this a number of administrative cases is reported about licenses, especially for existing chicken or pig farms that do have an environmental license but need a Np act license because they are situated in the neighbourhood of Nature 2000 areas. The question in those cases is whether the existing farm may be considered as existing use and may continue on the basis of their environmental license or not. According to the Papenburg-decision of the European court of justice the department of jurisdiction of the Council of State accepts a continuation on the basis of the granted environmental license without requiring a new Np act license.

B. SPECIES PROTECTION

Questions

I.B.1 Are the fauna (including birds) and flora protection measures organized within one coherent legislative framework, or through a patchwork of legislation, or is there a combination of general and specific measures?

As said before the protection of flora and fauna is regulated in one act, the Flora and fauna act (F and f act). The act offers one system for the protection of species but one can not say that this system is very coherent.

The act opens with a general duty to take care for wild animals and plants and for their direct habitats. This duty implies that everybody who knows or may understand that his acts or omissions may cause harm to flora and fauna is obliged to omit this acting or has to take all reasonable measures to prevent or to restrict or undo this harm.

Art. 3 F and F act gives the competence to the Dutch government to designate by governmental decree domestic species of plants as protected species. A designation that is necessary to execute European directives may be given by ministerial decree.

Protected species of animals are designated by the act itself. Art. 4 F and f act holds that protected species of domestic animals are:

- a. all domestic mammals, except by governmental decree designated domesticated mammals and except the black and the brown rat and the house-mouse;
 - b. all species of birds living on the area of the member-states of the European union, except by governmental decree designated domesticated birds;
 - c. all domestic amphibians and reptiles, and
 - d. all domestic species of fish, except those that fall under the Fishery act 1963.
- In additional to this designation by formal act domestic species of animals may be designated by governmental decree,
- a. when they are endangered, or
 - b. when they are not endangered but protection measures are necessary to prevent excessive utilization, or
 - c. when they have been disappeared from the Netherlands but their return is probable, or
 - d. when they resemble that much on protected species according to the sections a, b and c that designation is necessary to protect these species.

When designation is necessary to execute European directives it may be given by ministerial decree.

Non domestic species of plants and of animals may be designated by governmental decree, when:

- a. they are endangered or resemble that much to endangered species that designation is necessary to protect these species, or
- b. they are not endangered, but measures are necessary to prevent excessive utilization or they resemble that much to endangered species that designation is necessary to protect these species.

When designation is necessary to execute international treaties or binding decisions of organs of the European Union or other organisations of international law, it may be given by ministerial decree.

The F and f act contains a number of prohibitions related to designated species of plants and animals.

According to art. 8 it is forbidden to pick, to gather, to cut, to dig, to destroy, to uproot or to remove plants belonging to a protected domestic species.

According to art. 9 it is forbidden to kill, to wound, to catch, to capture or to trace animals belonging to a protected domestic species.

According to art. 11 it is forbidden to damage, to destroy, to extract, to take away or to disturb nests or holes or other places for reproduction, rest or residence of animals belonging to a protected domestic species.

According to art. 12 it is forbidden to seek, extract, harm or destroy eggs of animals belonging to a protected domestic species.

It is also, according to art. 13, forbidden to transport plants or products of plants, animals or eggs, nests or products of animals that belong to a protected domestic or non domestic species.

The problem is in the possibility to make exemptions on these forbidding. Art. 75 F and f act gives a general possibility to make by governmental decree exemptions on the forbidding of the art. 8 till 18. This possibility is used to make a great number of exemptions by governmental decree. This means that the system seems rather comprehensive on the level of the formal act, but it should be considered in relation to the governmental decree. This combination offers a less comprehensive protection system than the act itself seems to offer.

Besides this the provincial boards are entitled to make exemptions in individual cases on these forbidding, when no other solution is available and no harm is done to the favourable state of maintenance of the species,

- a. to protect public health;
- b. to protect airplane safety;
- c. to prevent important damage to crops, cattle, forests, professional fishery and waters;
- d. to prevent damage to flora and fauna, and
- e. to protect other by governmental decree designated interests.

Additional to the competences of the provincial board the minister of Agriculture, Nature protection and Food safety has a competence to make exemptions.

A special exemption may be made for the seeking of eggs of peewits. The minister of Agriculture, Nature protection and Food safety may fix a period within 1st march and 9th april in which the provincial boards may give an exemption to coöperations of meadow-bird protectors to seek and pick up peewit eggs. Exemptions may be given under the condition that nests of meadow birds will be protected.

I.B.2 Who supervises fauna and flora protection measures in your country? Are there also specialized inspectorates supervising them?

See the answer under I.A.2.

I.B.3 Do the enforcement efforts concentrate on a few types of fauna, birds or flora? Are there some topics that gather all attention, all enforcement efforts? Is there an evolution through time in the focus of enforcement efforts?

As far as I know one can not say that in the Netherlands enforcement efforts are concentrated on one or few topics. The level of enforcement in general is not

very high. Some enforcement efforts are concentrated on illegal hunting. I do not have the impression that there is a development in time in the focus of enforcement.

I.B.4 If fauna and flora protection measures are infringed, what type of sanctions can be imposed by whom? Are these sanctions administrative, criminal or civil in nature? What is the level of the sanctions? Are those sanctions often applied and considered to be effective? Can those sanctions be applied on legal persons?

Art. 112 F and f act offers the same competence to impose administrative sanctions to the minister of Agriculture, Nature protection and Food safety as art. 57 Np act does. Provincial boards do have a general competence to impose administrative sanctions based on the Provinces act.

Articles of the F and f act are mentioned in art. 1.1a of the Act on economic offenses. So an infringement of these articles is an economic offense. The level of punishment is the same as for infringements of articles of the Np act.

I think that the sanctions in itself may be considered as effective, but the general level of enforcement is low and these sanctions are not often applied.

Sanctions may be applied on natural and legal persons.

I.B.5 Conduct falling under article 3(f) of the Ecocrime-directive shall, at the latest on 26 december 2010, be qualified as a criminal offence and be punishable by effective, proportionate and dissuasive criminal penalties. Has these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this conduct described in your legislation: copy- and past or specific description? What are the minimum and maximum penalties? Is there a difference between penalties for natural and legal persons? If such an infringement is reported, is it still possible not to prosecute such an offense before a criminal court and to apply other types of sanctions or to simply drop the case?

Taking into account the general forbidding of the F and f act art. 3(f) of the Ecodirective is implemented by pre-existing legislation with a specific national description.

See further the answer under I.A.5

II. International trade

By mr A.V. van den Berg

II.1. Who supervises compliance with the CITES-regulation in your country? Do the monitoring efforts concern as well the import into and export from the Community as the commercial activities and movements of life specimens within the Community, your country?

Implementation of the CITES-regulation in the Netherlands, especially with respect to its enforcement, is governed by the Flora- en faunawet (Flora and Fauna Act; further FFA). Under the FFA, the General Inspection Service (AID) of the Ministry of Agriculture, Nature and Food Quality has the principal responsibility for the control in The Netherlands of illegal trade of protected plants and animals, albeit for indigenous species or for species under CITES. For this purpose AID also supports Customs and ordinary police. Regional Environment Teams of the ordinary police monitor the compliance of businesses (e.g. animal and plant traders, nurseries) with (e.g.) the CITES obligations, Interregional Environment Teams of the ordinary police are responsible for large scale criminal investigations in this field. Customs supervise, with assistance of AID, the compliance with CITES rules at the national borders such as the Rotterdam harbour and Schiphol Amsterdam Airport (import and export).

II.2 If protection measures are infringed, what type of sanctions can be imposed by whom? Are these sanctions administrative, criminal or civil in nature? Do they include the possibility of seizure and confiscation of specimens? What is the level of fines and prison sentences? Are the sanctions often applied and considered to be effective? Can the sanctions be applied on legal persons?

II.3. Conduct falling under article 3(g) of the Ecocrime-directive shall, at the latest on 26 December 2010, be qualified as a criminal offence and be punishable by effective, proportionate and dissuasive criminal penalties. Has this provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this conduct described in your legislation: copy- and paste or a specific national description? What are the minimum and maximum penalties? Is there a difference between penalties for natural and legal persons? If such an infringement is reported, is it still possible not to prosecute such an offence before a criminal court and to apply other types of sanctions or to simply drop the case?

1. The core provision in the FFA on trade in protected species (par 13) reads:

“1. It is prohibited:

a. to order, to purchase or to obtain, to have available for sale, to sell or to offer for sale, to carry, to offer for transport, to deliver, to use for commercial gain, to hire or to rent, to exchange or to offer for exchange, to exhibit for commercial purposes, to import into or to export from The Netherlands or to possess plants or vegetal products, or animals, eggs, nests or animal products pertaining to a protected indigenous or foreign plant species or to a protected indigenous or foreign animal species respectively.”

This provision entered into force on 01-04-2002. Before that date, the implementation of the CITES-regulation was covered by the Act on Endangered Foreign Animal or Plant Species. This pre-existing provision also covers article 3(g) of the Ecocrime directive. As can be stated by comparison, it isn't copy-pasted from the directive.

2. Enforcement of the FFA can take the form of administrative measures or of imposing penal sanctions. Administrative measures and penal sanctions can be, and are in practice, also applied to legal persons, as far as possible (imprisonment of legal persons seems less possible).

2. Administrative measures

The Minister of Agriculture, Nature and Food Quality is, under the FFA (par 112), entitled to:

- Issue an order under penal sum (injunction) with respect to anybody who violates the FFA. This means that if and as long as a trespasser does not follow the order, he has to pay an amount of money (per infraction and/or per time period).
- Decide to bring back illegally imported protected plant or animal species or products thereof to the country of export, to the country of origin or to any other foreign country suitable for the purpose of CITES, at the full or partial expense of the owner, importer or carrier or his representative in the Netherlands.
- Wholly or partially recover the costs of care, housing or storage of these plants, animals or products to the owner, importer or carrier or his representative in the Netherlands, if it has been decided that these plants etc. will not be brought back.

This version of par 122 has entered into force on 01-07-2009. Comparable previous versions were in force at least from 01-04-2002.

3. Criminal sanctions

Under the Economic Offences Act, violations of par.13 of the FFA are criminal offences.

They are considered to be crimes if committed deliberately, and otherwise are considered to be misdemeanours.

- For crimes of this kind, maximum penalties are six years of imprisonment and/or a fine of € 45.000,-; if the value of the goods related to the crime committed is higher than ¼ of € 45,000,-, the maximum fine is € 450.000,-.
- For misdemeanours, maximum penalties are one year of imprisonment and/or a maximum fine of € 11.250,-; if the value of the goods related to the misdemeanour committed is higher than ¼ of € 11,250,-, the maximum fine is € 45.000,-.
- The general minimum penalties are 1 day of imprisonment and a fine of € 2,-.

There is no difference between penalties for natural and legal persons.

4. In criminal investigations, seizure of specimens is possible. As a part of a conviction, the court can order the confiscation of specimens.

5. The Prosecutors Office have developed an Enforcement Strategy Document for the FFA. For law enforcement, par 13 of the FFA is a priority paragraph.

a. *Specific priorities*

- For indigenous protected species, enforcement will concentrate on season linked catch of (prey) birds and amphibians, as well as on the trade activities with respect to the most vulnerable and the commercially most interesting animal and plant species (monitoring of traders including import and export).
- For the import and export (including transit) of foreign protected species, law enforcement with respect to private persons will concentrate on souvenirs (mostly dead specimens and products thereof), especially on the large scale passenger transport on international airports.
- For the import and export (including transit trade) of foreign protected species by importers and couriers for trade purposes, law enforcement will concentrate on air freight handling on airports (import of live species and/of fresh products). Customs, with support of AID have a central role there. For foreign protected species the harbours of Flushing and Rotterdam are

most important (tropical timber and plants, traditional Chinese medicine, reptiles, tropical ornamental birds, tortoises, eggs, caviar, ivory, animal skins, cactuses and orchids).

- For traders within The Netherlands (including nurseries) monitoring will concentrate primarily on trade streams: availability of licenses, marks, trade registration. Important (illegal) trade streams are again traditional Chinese medicine, reptiles, tropical ornamental birds, tortoises, eggs, caviar, ivory, animal skins, cactuses and orchids.

b. *Directives for the public prosecutors in court*

The Document contains also a calculation scheme for the public prosecutors in court cases concerning the CITES-regulation.

The base factor is the possession of an animal or a plant.

- Annex A animal species (dead or alive), per specimen: € 660,-
- Annex B animal species (dead or alive), per specimen: 440,-
- Annex A or B plant species (dead or alive), per specimen: € 264,-
- Parts of Annex A or B animal or plant species, per specimen: € 176,-
- Ivory: per gram € 2,20,-
- Products made of Annex A animals: a range from € 22 for less than 500 gram to € 5.280,- for 500-1000 kilogram animal stuff
- Products made of Annex B animals: a range from € 22 for less than 500 gram to € 3.520,- for 500-1000 kilogram animal stuff
- Products made of Annex A or B plant species: a range from € 22 for less than 500 gram to € 2112,- for 500-1000 kilogram vegetable stuff.
- Annex C animal or plant species (dead or alive): per specimen € 196,-
- Parts of annex C animals or plants : per specimen € 132
- Products made of Annex C plant or animal species: a range from € 22 for less than 500 gram to € 1584,- for 500-1000 kilogram animal or vegetable stuff
- The Directive contains a specific fine scheme for personal goods such as souvenirs and furniture, ranging from € 2,20 for one gram of ivory to € 330,- for 350 to 500 gram of caviar.

Calculation factors:

Recidivism: once + 50 %, twice + 100%, more + 150 %

Professionalism: private person: - 25 %, small enterprise + 0 %, medium enterprise + 25%, large enterprise + 50 %.

For the courts these calculation schemes are not binding; nevertheless the courts will generally follow the public prosecutor.

5. In criminal procedure, a paramount principle is the opportunity principle. This means that the public prosecutor has the right to decide whether or not he will bring a case before the court. So he has the competence to drop cases, depending on workload and priorities. It should be taken into account that under the Economic Offences Act, roughly 90 % of the cases fit for prosecution will end with a financial transaction (fine) offered by the public prosecutor to the trespasser followed by payment by the trespasser to the State. There are no reasons to believe that this is different for the enforcement of par 13 of the FFA.

6. Some statistics on the implementation of the CITES legislation

Derived from a fact sheet of the Ministry of Agriculture, Nature and Food Quality of June 2008

Customs

2005 monitoring actions 19.669 violations 492

2006 monitoring actions 26.799 violations 641

AID monitoring actions on the basis of information received

2006 1000 CITES informations and questions, 700 monitoring actions, 58 warrants, 17 warnings, 47 cases transferred tot the public prosecutor

Number of infractions

2005 129

2006 104

2007 117

CITES cases handled by the public prosecutor

2006 499

2007 490

Seizures and specimens

Indigenous protected animals dead or alive: 162 seizures, 2885 specimens

Foreign projected animals dead or alive: 451 seizures, 7986 specimens

Foreign protected plants dead or alive: 250 seizures, 302554 specimens (4 big cases on cactuses, orchids and Cycas)

Examples from police, AID and Customs practice:

2005 ivory, prepared birds on collectors fair

1600 kg caviar

8 tusks and 22 feet of African elephants at Schiphol Amsterdam Airport

2006 Fennek

5 poisonous tarantulas

Chlorocebus at Schiphol Amsterdam Airport

2 pumas and squirrel monkey

5 Haliaeetus pelagicus

2007 22 prey birds from Germany, Belgium and the UK

2008 25 iguanas and 5 spectacled caymans

88 songbirds from Surinam

3 Asheras

2003-2007 24 primates