# Reader SPM4423

## Legal Aspects of MAS Design

January 2013

*Editor*
Nienke Saanen

# Contents

**Information sheet** **6**

**Lecture 5 Contact lenses and coffee shops**

*Court of Justice of the European Union 2 December 2010, case C-108/09 (Ker-Optika bt).* *10*

*Selected paragraphs from: A. Littler (2011). Internet Based Trade and the Court of Justice: Different Sector, Different Attitude. Tilburg University.* *22*

*Court of Justice of the European Union 16 December 2010, case C-137/09 (Josemans).* *30*

**Lecture 6 Health services**

*Selected paragraphs from: A. den Exter (2008). Claiming access to health care in the Netherlands under international treaty law. Medicine and Law, 27, 569-586.* *44*

*I.G. Lang (2009). Patient mobility in the European Union: pushing for EU internal health market. Medicine and Law, 28, 661-668.* *61*

*Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.* *69*

**Lecture 8 Nature conservation**

*Commission of the European Communities (2009). Commission Decision Nature conservation areas. NN 8/2009. Brussels.* *91*

*Case T-347/09: Action brought on 31 August 2009 — Germany v Commission. Official Journal C 267/75, 07/11/2009, P. 0075-0076.* *109*

*Commission of the European Communities (2010). Commission Decision Subsidies for nature management. N 376/2010. Brussels.* *110*

*Commission of the European Communities (2010). Commission Decision Subsidy scheme for acquisition of land for nature conservation (NL). N 308/2010. Brussels.* *124*

**Lecture 9 Public Procurement**

*Selected paragraphs from: B.J. Drijber & H. Stergiou (2009). Public Procurement Law and Internal Market Law. Common Market Law Review, 46, 805-846.* 141

*Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.* 160

*Directive 2004/17/EC of the European Parliament and the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors.* 168

**Lecture 10 Sustainable Coffee and Local Rail Transport**

*Selected paragraphs from: European Commission (2004). Buying green! A handbook on environmental public procurement. Brussels.* 178

*Rechtbank Alkmaar (2010). Bezwaren van Douwe Egberts afgewezen.* 184

*Opinion of Advocate General Kokott 15 December 2011, case C-368/10 (Max Havelaar).* 185

**Lecture 11 Environmental Law: General Principles and EIA**

*Selected paragraphs from: J.H. Jans (2008). European Environmental Law. Groningen: Europa Law Publishing.* 214

*Selected paragraphs from: M. Onida (2004). Europe and the environment: legal essays in honour of Ludwig Krämer. Groningen: Europa Law Publishing.* 225

**Lecture 12 Environmental Law: Habitat and Air Quality**

*F. Fleurke & N. Koeman (2005). The Impact of the EU Air Quality Standards on the Planning and Authorisation of Large Scale Infrastructure Projects in the Netherlands. JEEPL, 375-383.* 239

*Selected chapters from: European Communities (2000). Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' directive 92/43/EEC. Luxembourg.* 248

*Selected paragraphs from: European Communities (2007). Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC.* 266

**Lecture 13 Regional Airports: Groningen and Antwerp**

*Afdeling bestuursrechtspraak van de Raad van State 3 december 2003, zaak 200205524/1.* 285

*Afdeling bestuursrechtspraak van de Raad van State 11 juni 2008, zaak 200603116/1, AB 2008, 371.* 297

*Commission of the European Communities (2009). Commission Decision Maatregelen ten gunste van Groningen Airport Eelde NV. NN 43/2009. Brussels.* 323

*Commission of the European Communities (2009). Opinion of the Commission Lübeck-Blankensee airport. C(2009) 3218. Brussels.* 339

*Parts of: Belgische Raad van State, Afdeling Bestuursrechtspraak 13 augustus 2010, zaak 192.847/X-14.210.* 348

*Annotation of judgment in case Leipzig-Halle* 366

**Lecture 14 Dredging the Westerschelde**

*Selected paragraphs from: Commissie Natuurherstel Westerschelde (2008). Wennen aan de Westerschelde. Advies Commissie Natuurherstel Westerschelde: Alternatieven voor ontpoldering Hertogin Hedwigepolder.* 368

*Afdeling bestuursrechtspraak van de Raad van State 28 juli 2009, zaak 200806565/3/R1 e.a., BR 2009, 163.* 374

*Afdeling bestuursrechtspraak van de Raad van State 13 januari 2010, zaak 200806565/1/R1 e.a., BR 2010, 44.* 380

*Parts of: Judgement of the Court in case C-226/08, Stadt Papenburg v. Bundesrepublik Deutschland.* 387

**Lecture 15 Legal analysis: a case and a judgment**

*Case: Import prohibition of fur* *397*

# SPM4423: Legal Aspects of MAS Design

**Course Manager:** Nienke Saanen
TPM B2.190
Tel: 015-2783556
E-mail: N.Saanen@tudelft.nl

## Lectures:

| | | |
|---|---|---|
| Wednesdays | 08.45 – 10.30 a.m. | CT-CZ F |
| Thursdays | 13.45 – 15.30 p.m. | EWI-CZ C |
| Fridays | 13.45 – 15.30 p.m. | EWI-CZ C |

**Note:** Lecture 5 will take place on Tuesday 5 March 2013 in room TBM-CZ A.

## Course materials:

- J. Steiner / L. Woods, EU Law, 11th edition (2012)
- Reader 'Legal Aspects of MAS Design', 2012/2013

The book is available at Curius and online at bol.com. Readers can be ordered through BlackBoard.

Not all chapters of the book are exam material. **Only the chapters and paragraphs indicated in the 'Detailed information on the lectures' have to be studied**.

*Useful links (additional):*
http://europa.eu (information on the European Union)
http://eur-lex.europa.eu (legal documents)

The exam questions can relate to all materials (Book, Reader and BlackBoard) *and* the lecture slides.

## Exam

The exam will be held on **10 April 2013, 9.00 – 12.00 a.m.** The Book, Reader, lecture slides, lecture notes, BlackBoard materials and a dictionary may be used during the exam.

## SPM7050

Critical reading (SPM7050) is a skill included in this course. In order to pass this skill, you have to do two assignments.

First, you will have to hand in an analysis of a judgment of the Court of Justice. The judgment and further details on the analysis will be published on BlackBoard. Hand in date for your analysis is **13 March 2013, 10.00 a.m.** You have to upload your analysis as a **Word file (.doc/.docx)** on BlackBoard.

Secondly, you will have to hand in your answers to the questions that will be discussed during Lecture 16. This **Word file (.doc/.docx)** needs to be uploaded on BlackBoard before **27 March 2013, 10.00 a.m.** The questions will be published on BlackBoard. Your answers are not judged on the basis of correctness but on the basis of effort and seriousness.

Both assignments have to be individual work. Your work is graded either satisfactory (v) or unsatisfactory (x). **Documents handed in after the deadline will not be graded.**

There is **no** second opportunity to pass this skill. When you do not hand in your documents on time or when one or both of your assignments is graded unsatisfactory, you have to participate in SPM7050 next year.

## Grade

Your final grade for spm4423 will be completely based on the written exam. In order to pass this course your final grade should be 5.75 or above.

You are reminded that in order to pass SPM7050 an analysis of a judgment of the Court of Justice (lecture 15) and answers to the old exam questions (lecture 16) have to be handed in on time, which must be graded satisfactory.

## Detailed information on the lectures:

Wed. 13 February 2013
1. Introduction and institutional law: history, institutions and lawmaking
EU Law: Ch. 1, 2 (§ 2.1 – 2.6, 2.11 – 2.13), Ch. 3 (§ 3.7 - 3.8, 3.10)

Thu. 14 February 2013
2. Institutional law: supremacy, direct effect and enforcement
EU Law: Ch. 4, 5, 7

Wed. 20 February 2013
3. Free movement of goods
EU Law: Ch. 15, 17 - 19

Thu. 21 February 2013
4. Free movement of services, persons and capital
EU Law: Ch. 20, 21, 22 (§ 22.1, 22.2, 22.3, 22.4.1 – 22.4.4, 22.5, 22.6, 22.8 – 22.8.6, 22.10), Ch. 24 and 25

Tue. 5 March 2013
5. Contact lenses and coffee shops
Reader: Lecture 5

Wed. 6 March 2013
6. Health services
Reader: Lecture 6

Thu. 7 March 2013
7. State aid
EU Law: Ch. 28 and 30

Fri. 8 March 2013
8. Nature conservation
Reader: Lecture 8

Wed. 13 March 2013
9. Public Procurement
Reader: Lecture 9

Thu. 14 March 2013
10. Sustainable Coffee and Local Rail Transport
Reader: Lecture 10

Fri. 15 March 2013
11. Environmental Law: General Principles and EIA
Reader: Lecture 11

Wed. 20 March 2013
12. Environmental Law: Habitat and Air Quality
Reader: Lecture 12

Thu. 21 March 2013
13. Regional airports: Groningen and Antwerp
Reader: Lecture 13

Fri. 22 March 2013
14. Dredging the Westerschelde
Reader: Lecture 14

Wed. 27 March 2013
15. Legal analysis: a case and a judgment
Reader: Lecture 15 and Blackboard

Thu. 28 March 2013
16. Time for questions and (some) answers
Blackboard (to participate in this lecture, you need to upload the answers to Blackboard the day before)

*The content can be modified. Check BlackBoard regularly for updates.*

# LECTURE 5

## Contact lenses and coffee shops

20 February 2012

JUDGMENT OF THE COURT (Third Chamber)

2 December 2010 (*)

(Free movement of goods – Public health – Selling of contact lenses via the Internet – National legislation authorising the sale of contact lenses solely in medical supply shops – Directive 2000/31/EC – Information society – Electronic commerce)

In Case C−108/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Baranya megyei bíróság (Hungary), made by decision of 10 February 2009, received at the Court on 23 March 2009, in the proceedings

**Ker-Optika bt**

v

**ÀNTSZ Dél-dunántúli Regionális Intézete,**

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 15 April 2010,

after considering the observations submitted on behalf of:

– the Hungarian Government, by R. Somssich, K. Szíjjártó, K. Veres and M. Fehér, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the Greek Government, by E. Skandalou, acting as Agent,

– the Spanish Government, by J.M. Rodríguez Cárcamo, acting as Agent,

– the Netherlands Government, by C. Wissels, M. de Grave and Y. de Vries, acting as Agents,

– the European Commission, by H. Krämer and A. Sipos, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2010,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

('Directive on electronic commerce') (OJ 2000 L 178, p. 1) and of Articles 34 TFEU and 36 TFEU.

2 The reference has been made in proceedings between Ker-Optika bt ('Ker-Optika') and ÀNTSZ Dél-dunántúli Regionális Intézete (South Transdanubian Regional Directorate of the national public health and medical services; 'ÀNTSZ') concerning an administrative decision whereby ÀNTSZ prohibited Ker-Optika from selling contact lenses via the Internet.

## Legal context

*European Union ('EU') legislation*

3 Under Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34'), the following meanings are to apply:

'"service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– "at a distance" means that the service is provided without the parties being simultaneously present,

– "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

– "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

...'

4 Recitals 18, 21 and 34 of the preamble to Directive 2000/31 state:

'(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered. ... activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

...

(21) ... the coordinated field covers only requirements relating to on−line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member States' legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; ...

...

(34) Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by

electronic means; the examination of the legislation requiring such adjustment should be systematic and should cover all the necessary stages and acts of the contractual process, including the filing of the contract; the result of this amendment should be to make contracts concluded electronically workable ... '

5 Under Article 1(1),(2), (3) and (5) of Directive 2000/31:

'1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

…

5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of information society services:

– the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

– the representation of a customer and defence of his interests before the courts,

– gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.'

6 Article 2 of Directive 2000/31 is worded as follows:

'For the purpose of this Directive, the following terms shall bear the following meanings:

(a) "information society services"; services within the meaning of Article 1(2) of Directive 98/34 ...;

...

(h) "coordinated field"; requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

– the taking up of the activity of an information society service, such as

requirements concerning qualifications, authorisation or notification,

– the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.

(ii) The coordinated field does not cover requirements such as:

– requirements applicable to goods as such,

– requirements applicable to the delivery of goods,

– requirements applicable to services not provided by electronic means.'

7 Under Article 3 of Directive 2000/31:

'1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

…

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its

intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

…'

8 Article 4(1) of that directive states:

'Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.'

9 Under Article 9(1) of Directive 2000/31:

'Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.'

*National legislation*

10 Under Article 3(1) of Law CVIII of 2001 on electronic commerce and information society services (a elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatásokról szóló 2001. évi CVIII. Törvény; 'the Law on electronic commerce'):

'No prior authorisation or official decision having equivalent effect shall be required in order to take up or pursue the activity of an information society services provider.'

11 Under Article 3(1) of Order 7/2004 (XI. 23.) of the Ministry of Health on the technical requirements relating to the sale, repair and hiring of medical devices (a gyógyászati segédeszközök forgalmazásának, javításának, kölcsönzésének szakmai követelményeiről szóló 7/2004 (XI. 23.) Egészségügyi Minisztériumi rendelet) ('the Ministry of Health Order'):

'Medical devices may be sold, repaired and hired … in a specialist shop, provided that it has an operating licence under a separate provision and that it satisfies the conditions laid down in Points I.1 and I.2 of Annex 2 to this order.'

12 Under Annex 1 of that Order:

'The following medical devices are excluded from the scope of this order:

...

– mass–produced optical products, with the exception of contact lenses;

...'

13 It is apparent from Point I.1(d) of Annex 2 to that Order that, in order to sell contact lenses and custom–made spectacles, a shop with a minimum area of 18 $m^2$ or premises separated from the workshop is required. One of the conditions relating to staff, in point I.2(c) of that Annex, is the requirement that the services of an optometrist or an ophthalmologist qualified in the field of contact lenses must be used.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

14 Ker-Optika sells contact lenses via its Internet site. By a decision of 29 August 2008, ÀNTSZ Pécsi, Sellyei, Siklósi Kistérségi Intézete (the local ÀNTSZ office for the districts of Pécs, Sellye and Siklós), prohibited that activity.

15 Following a complaint made by Ker-Optika against that decision, ÀNTSZ confirmed that prohibition by a decision of 14 November 2008.

16 ÀNTSZ relied, in particular, on the provisions of the Ministry of Health Order, under which the only ways in which contact lenses can be sold are either in a shop which specialises in the sale of medical devices or by home delivery for final consumption. Neither the name nor the content of the latter concept covers selling via the Internet.

17 Ker-Optika brought an action against that decision claiming, in particular, that the sale of contact lenses via the Internet cannot be subject to restrictions in the light of Article 3(1) of the Law on electronic commerce, which safeguards the right of an information society service provider to pursue that activity freely.

18 In that regard, ÀNTSZ relied on Recital 18 of Directive 2000/31 which makes it clear that the scope of the Law on electronic commerce cannot encompass the sale of contact lenses via the Internet. According to Recital 18, activities which, by their very nature, cannot be carried out at a distance or by electronic means, such as medical advice requiring the physical examination of a patient, are not information society services. The selling of contact lenses requires such an examination.

19 In those circumstances, the Baranya megyei bíróság decided to stay proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

‘1. Does the sale of contact lenses constitute medical advice requiring the physical examination of a patient and thus not fall within the scope of Directive [2000/31]?

2. If the sale of contact lenses does not constitute medical advice requiring the physical examination of a patient, must Article 30 EC be interpreted as precluding legislation of a Member State under which contact lenses may be sold only in shops which specialise in the supply of medical devices?

3. Does the principle of the free movement of goods laid down in Article 28 EC preclude the provision of Hungarian law which authorises the selling of contact lenses solely in shops which specialise in the supply of medical devices?’

**Consideration of the questions referred for a preliminary ruling**

20 By its questions, which should be examined together, the referring court asks, in essence, whether EU law precludes national legislation, such as that at issue in the main proceedings, which authorises the sale of contact lenses only in shops which specialise in the sale of medical devices and which prohibits, consequently, the sale of contact lenses via the Internet.

21 To answer the questions raised, the Court must identify the provisions of EU law applicable to the sale of contact lenses via the Internet and then decide whether those provisions preclude national rules such as those at issue in the main proceedings.

22 First, in relation to Internet sales, the following features can, inter alia, be identified. Such sales comprise, initially, the act of selling *per se* which consists in the making of a contractual offer on-line and the conclusion of a contract by electronic means. Next, such sales involve the delivery of the product sold, generally to the customer’s home. Furthermore, in certain

individual cases, the customer obtains medical advice before the sale or the supply takes place.

*Directive 2000/31*

23 As regards, first, the act of selling, it should be recalled, at the outset, that, in accordance with Articles 1(2) and 2(a) of Directive 2000/31, that directive approximates certain national provisions on information society services, namely services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

24 As is apparent from Recital 18 of Directive 2000/31, such information society services cover, inter alia, the selling of goods on-line.

25 That is confirmed by the explanatory memorandum accompanying the proposal for a directive submitted by the Commission on 18 November 1998 (COM(1998) 586 final), which states that information society services include services of selling goods and services allowing on-line electronic transactions to purchase goods such as interactive tele-shopping and on-line shopping malls.

26 Next, it should be observed that, in accordance with Recital 34 and Article 9(1) of Directive 2000/31, each Member State must systematically adjust any of its legislation which contains requirements likely to curb the use of contracts by electronic means and which covers all the necessary stages and acts of the contractual process of selling goods on-line, such as the contractual offer, the negotiation and the conclusion of the contract by electronic means.

27 Lastly, it should be stated that the activity of selling medical devices such as contact lenses is not listed among the activities to which, under Article 1(5) of Directive 2000/31, that directive is not applicable.

28 Consequently, the coordinated field of Directive 2000/31 covers the national provisions which prohibit acts relating to the selling of contact lenses, namely, in particular, the on-line offer and the conclusion of the contract by electronic means.

29 Secondly, as regards supply, it should be observed that, according to the precise wording of Article 2(h)(ii) of Directive 2001/31, the coordinated field does not cover requirements applicable to the supply of goods in respect of which a contract has been concluded by electronic means.

30 Consequently, the national rules which relate to the conditions under which goods sold via the Internet may be supplied within the territory of a Member State fall outside the scope of that directive.

31 It follows that the conditions of the supply of contact lenses are not covered by Directive 2000/31.

32 Thirdly, the Court should consider whether the above findings are affected by the fact that the selling or the supply of contact lenses may be subject to the requirement that the customer first obtain medical advice.

33 In that regard, as stated in Recital 18 of Directive 2000/31, activities which, by their very nature, cannot be carried out at a distance or by electronic means, such as medical advice requiring the physical examination of a patient, are not information society services, and consequently, do not fall within the scope of that directive.

34 Accordingly, if medical advice requiring a physical examination of a customer is inseparable from the selling of contact lenses, the fact that such advice is required means that such selling does not, ultimately, fall within the scope of that directive.

35 On that point, it should be observed that contact lenses come into direct contact with the eyes and constitute medical devices the use of which may, in individual cases, cause eye inflammations and even lasting visual impairment, medical conditions which may be caused by the mere wearing of contact lenses. The requirement of prior medical advice can therefore be held to be justified.

36 In that regard, any person who wishes to wear contact lenses may be obliged to undergo a precautionary ophthalmological examination in the course of which a check is made that no medical factors preclude that person from wearing lenses and a determination is made of the exact values, in dioptres, of the correction required.

37 However, that examination is not inseparable from the selling of contact lenses. It can be carried out independently of the act of sale, and the sale can be effected, even at a distance, on the basis of a prescription made by the ophthalmologist who has previously examined the customer.

38 Consequently, it must be held that it is possible to separate from the selling of contact lenses the obtaining of medical advice which requires the physical examination of a patient and on which the sale may be dependent.

39 Moreover, while it is true that health considerations may require that the customer obtain the benefit both of medical advice for the purposes of physical examinations of the fitting of lenses, and of ophthalmological checks, at regular intervals, to determine the effect of wearing lenses, those examinations and checks occur when the lenses are being used, in other words, after the supply of the lenses. Accordingly, such medical advice cannot be linked with the act of selling the lenses.

40 It follows that a national provision which prohibits the selling of such lenses via the Internet falls, in principle, within the scope of Directive 2000/31.

*Primary law*

41 Given that the rules relating to the conditions of the supply of contact lenses are not covered by Directive 2000/31, those rules must be assessed under primary law, namely the FEU Treaty.

42 As a preliminary point, the Court must consider whether those rules fall to be examined in relation to the freedom to provide services, as maintained by the Hungarian Government, or in relation to the free movement of goods, as suggested by the referring court.

43 In that regard, it is settled case-law that, where a national measure relates to both the free movement of goods and another fundamental freedom, the Court will in principle examine it in relation to one only of those two fundamental freedoms, if it appears that one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, Case C−275/92 *Schindler* [1994] ECR I−1039, paragraph 22, and Case C−20/03 *Burmanjer and Others* [2005] ECR I−4133, paragraph 35).

44 Further, it follows from Case C−322/01 *Deutscher Apothekerverband* [2003] ECR I−14887, paragraphs 65, 76 and 124, that a national measure concerning an arrangement characterised by the sale of goods via the Internet and the delivery of those goods to the customer's home is to be examined only with regard to the rules relating to the free movement of goods and, consequently, with regard to Articles 34 TFEU and 36 TFEU.

45 In the present case, the national legislation prohibiting the selling of contact lenses via the Internet concerns a selling arrangement characterised by the delivery of such lenses to the customer's home.

46 Consequently, that legislation must be examined with regard to Articles 34 TFEU and 36 TFEU.

Whether there is a restriction on the free movement of goods

47 According to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article 34 TFEU (see, inter alia, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, and Case C−110/05 *Commission* v *Italy* [2009] ECR I−519, paragraph 33).

48 It is also apparent from settled case-law that Article 34 TFEU reflects the obligation to comply with the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of EU products to national markets (see *Commission* v *Italy*, paragraph 34 and the case−law cited).

49 Accordingly, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having an effect equivalent to quantitative restrictions, as are rules that lay down requirements to be met by such goods, even if those rules apply to all products alike (see *Commission* v *Italy*, paragraphs 35 and 37).

50 Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept (*Commission* v *Italy*, paragraph 37).

51 For that reason, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the case−law flowing from *Dassonville*, unless those provisions apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the selling of domestic products and of those from other Member States. The application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is by nature such as to prevent their access to the market or to impede such access more than it impedes the access of domestic products (see, to that effect, Joined Cases C−267/91 and C−268/91 *Keck and Mithouard* [1993] ECR I−6097, paragraphs 16 and 17, and *Commission* v *Italy*, paragraph 36).

52 Accordingly, it is necessary to examine whether the national legislation at issue in the main proceedings meets the two conditions stated in the preceding paragraph of this judgment, in other words, whether it applies to all relevant traders operating within the national territory and whether it affects in the same manner, in law and in fact, the selling of domestic products and the selling of those from other Member States.

53 As regards the first condition, it is clear that the legislation applies to all relevant traders involved in selling contact lenses, which means that that condition is satisfied.

54 As regards the second condition, it is undisputed that the prohibition on the selling of contact lenses via the Internet applies to contact lenses from other Member States which are sold by mail order and delivered to the home of customers resident in Hungary. It is clear that the prohibition on selling contact lenses by mail order deprives traders from other Member States of a particularly effective means of selling those products and thus significantly impedes access of those traders to the market of the Member State concerned (see, by analogy, in relation to medicinal products, *Deutscher Apothekerverband*, paragraph 74).

55 In those circumstances, that legislation does not affect in the same manner the selling of

contact lenses by Hungarian traders and such selling as carried out by traders from other Member States.

56 It follows that that legislation constitutes a measure having an effect equivalent to a quantitative restriction, as prohibited by Article 34 TFEU, unless that legislation can be objectively justified.

Whether the restriction on the free movement of goods is justified

57 According to settled case-law, an obstacle to the free movement of goods may be justified on one of the public interest grounds set out in Article 36 TFEU or in order to meet overriding requirements. In either case, the national provision must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, *Commission* v *Italy*, paragraph 59 and the case-law cited).

58 In that regard, if that measure is within the field of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a measure of discretion (see Joined Cases C−570/07 and C−571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I−0000, paragraph 44 and the case-law cited).

59 In the present case, the justification relied on by the Hungarian Government concerns the need to ensure protection of the health of contact lens users. That justification corresponds, therefore, to the public health concerns acknowledged in Article 36 TFEU which may justify an obstacle to the free movement of goods.

60 Accordingly, it is necessary to examine whether the legislation at issue in the main proceedings is appropriate for securing the attainment of the objective pursued.

61 In that regard, the Hungarian and Spanish Governments maintain that it is necessary to require customers to take delivery of contact lenses in specialist shops, because they must have access to an optician who can carry out the necessary physical examinations, undertake checks and give those customers instructions on the wearing of the lenses.

62 On that point, it should be recalled, as was stated in paragraph 35 of this judgment, that the mere wearing of contact lenses may, in individual cases, cause eye ailments, and even lasting visual impairment.

63 Given the risks to public health which thus exist, a Member State may impose a requirement that contact lenses are to be supplied by qualified staff who are to alert the customer to those risks, carry out an examination of the customer and recommend or advise against the wearing of lenses, while inviting the person concerned, where necessary, to obtain the advice of an ophthalmologist. Because of those risks, a Member State may also impose a requirement that, where the wearing of lenses is not advised against, qualified staff are to determine the most appropriate type of lenses, check the positioning of the lenses on the eyes and provide the customer with information on the correct use and care of the lenses (see, to that effect, Case C−271/92 *LPO* [1993] ECR I−2899, paragraph 11).

64 While not entirely eliminating the risks incurred by users of lenses, the establishment of a link to a qualified optician and the services provided by such an optician are likely to reduce those risks. Accordingly, by reserving the supply of contact lenses to the opticians' shops which offer the services of such an optician, the legislation at issue in the main proceedings is appropriate for securing the attainment of the objective of ensuring protection of the health of those users.

65 It is also necessary, however, that that legislation does not go beyond what is necessary in

order to attain that objective, in other words that there are not other measures less restrictive of the free movement of goods by means of which that objective could be achieved.

66 First, as regards the requirement that the customer must be physically present to have his eyes examined by an optician at the sales outlet, it must be observed, first, that precautionary examinations, carried out for investigative purposes, can be undertaken by ophthalmologists in places other than opticians' shops.

67 Also, there is nothing in the documents submitted to the Court to suggest that it is a requirement of the legislation at issue in the main proceedings either that an optician must make every supply of lenses dependent on a precautionary examination or on medical advice having first been obtained or that those conditions are imposed, in particular, on each occasion when there is a series of supplies of lenses to the same customer.

68 Accordingly, undergoing such examinations and obtaining such advice must be held to be optional, and consequently it is primarily the responsibility of each contact lens user to make use of them, while the task of the optician in that regard is to give advice to the users.

69 However, customers can be advised, in the same way, before the supply of contact lenses, as part of the process of selling the lenses via the Internet, by means of the interactive features on the Internet site concerned, the use of which by the customer must be mandatory before he can proceed to purchase the lenses (see, to that effect, as regards the selling of medicinal products via the Internet, *Deutscher Apothekerverband*, paragraph 114).

70 Second, it is true that the Member State can require – as was stated in paragraph 63 of this judgment – that the determination of which type of contact lenses is the most appropriate should be undertaken by a optician, who is under an obligation, at that time, to check the positioning of the lenses on the customer's eyes and to make available to the customer advice on the correct use and care of the lenses.

71 However, it should be observed that those services are required, as a general rule, only when contact lenses are first supplied. At the time of subsequent supplies, there is, as a general rule, no need to provide the customer with such services. It is sufficient that the customer advise the seller of the type of lenses which were provided when lenses were first supplied, the specifications of those lenses having been adjusted, where necessary, by an ophthalmologist who has issued a new prescription which takes into account any change in the customer's vision.

72 Third, while the extended use of contact lenses must be accompanied by supplementary information and advice, those can be given to the customer by means of the interactive features to be found on the supplier's Internet site.

73 Moreover, the Member State may require the economic operators concerned to make available to the customer a qualified optician whose task is to give to the customer, at a distance, individualised information and advice on the use and care of the contact lenses. The provision of such information and advice at a distance may, moreover, offer advantages, since the lens user is enabled to submit questions which are well thought out and pertinent, and without the need to go out (see, to that effect, as regards the selling of medicinal products via the Internet, *Deutscher Apothekerverband,* paragraph 113).

74 It follows from the foregoing that the objective of ensuring protection of the health of users of contact lenses can be achieved by measures which are less restrictive than those provided for under the legislation at issue in the main proceedings, namely measures which subject to certain restrictions only the first supply of lenses and which require the economic operators concerned to make available a qualified optician to the customer.

75 Consequently, where a Member State adopts legislation such as that at issue in the main proceedings, it exceeds the limits of the discretion referred to in paragraph 58 of this judgment,

and that legislation must therefore be held to go beyond what is necessary to attain the objective the Member State claims to pursue.

76 For the same reasons, since it contains a prohibition on selling contact lenses via the Internet, that legislation cannot be held to be proportionate to the objective of ensuring the protection of public health, for the purposes of Article 3(4) of Directive 2000/31.

77 In the light of the foregoing, the answer to the questions submitted by the referring court is that the national rules relating to the selling of contact lenses fall within the scope of Directive 2000/31 since they concern the act of selling such lenses via the Internet; on the other hand, the national rules relating to the supply of contact lenses are not covered by that directive.

78 Articles 34 TFEU and 36 TFEU, and Directive 2000/31, must be interpreted as precluding national legislation which authorises the selling of contact lenses only in shops which specialise in medical devices.

**Costs**

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**The national rules relating to the selling of contact lenses fall within the scope of Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal market ('Directive on electronic commerce'), since they concern the act of selling such lenses via the Internet. On the other hand, the national rules relating to the supply of contact lenses are not covered by that directive.**

**Articles 34 TFEU and 36 TFEU, and Directive 2000/31, must be interpreted as precluding national legislation which authorises the selling of contact lenses only in shops which specialise in medical devices.**

[Signatures]

---

* Language of the case: Hungarian.

TILBURG UNIVERSITY

TILEC

# TILEC Discussion Paper

DP 2011-007

## Internet Based Trade and the Court of Justice: Different Sector, Different Attitude

By Alan Littler

February 2011

ISSN 1572-4042

http://ssrn.com/abstract=1752944

**Internet Based Trade and the Court of Justice: Different Sector, Different Attitude**

∗ Dr. Alan Littler

Abstract

With increasing reliance by suppliers and consumers of goods and services on the internet as a means of doing business there has been a rise in cross-border trade. Inevitably this has led to clashes between suppliers seeking to rely upon the free movement principles which underpin the European Union's internal market and the competence of Member States to restrict cross-border movement for reasons pertaining to consumer protection. In this paper consumer protection is understood as incorporating regulatory approaches intended to protect consumers from risk. Member States enjoy a margin of discretion when seeking to uphold restrictive measures, subject to oversight by the Court of Justice through the preliminary reference procedure. However, when responses of the Court to restrictive measures in different sectors are compared a considerable chasm emerges in the degree to which the Court critiques national law. Such a divergence is highly apparent when the case-law surrounding online gambling is compared with that relating to the online sale of medical devices and medicinal products. This paper illustrates how the Court has been far more critical of measures intended to protect consumers from exposure to risk arising from online gambling compared to the online sale of medical devices and medicinal products.

Keywords

European Court of Justice, consumer protection, E-commerce, free movement of services, margin of discretion, necessity test, online gambling, online pharmacies, risk regulation

JEL Codes

F13, I18, K20, L81, L83, O38

## I. Introduction

E-commerce and information society services became part of the quotidian language of the European institutions in the mid-1990s, as the European institutions gazed into a crystal ball whereby electronic commerce would further the competitiveness of the internal market.[1] Gradually increasing volumes of customers began to purchase goods and services via the internet reflecting the development by undertakings of the internet as a sales channel but also due to the regulation of such transactions.[2] Concurrently the internet can be characterised by its tendency to bring market actors closer together and the case of *DocMorris*,[3] concerning the sale of medicinal products via the internet, has been described as constituting an instance whereby the technological revolution which the internet embodies has "well and truly reached the doors" of the Court of Justice.[4]

With a proliferation of cross-border economic activity it was only a matter of time before the Court faced preliminary references from national courts confronted with measures restricting internet based trade. Many of the sectors concerned have not been subject to any degree of harmonisation through secondary legislation, thus leaving the Court with the role of filling regulatory gaps by interpreting primary law, i.e. the Treaty on the Functioning of the European Union. This proliferation reflects a change in the lifestyles of individuals, but to what extent does this transition create new, and magnify existing, risks? As the nature of the risks to consumers evolve as a consequence of migration to the internet; what are the consequences in terms of consumer protection and what role has the Court played shaping

---

*Post-doctoral researcher at the Tilburg Law School and TILEC (Tilburg Law and Economics Center), Tilburg University, the Netherlands.

[1] European Commission, *Europe's Way to the Information Society. An Action Plan*, 19 July 1994, COM(94) 347 final.

[2] For example Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('the Directive on electronic commerce'), which states in the Preamble in Recital 3 "Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce" whilst Recital 5 realises that "[t]he development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation…".

[3] Case C-322/01, *Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval* [2003] ECR I-14887.

[4] Richard Lang, 'Case C-322/01, *Deutscher Apothekerverband eV* v. *0800 DocMorris NV and Jacques Waterval*, judgment of the Full Court of 11 December 2003, nyr', 42 *Common Market Law Review* (2005), pp. 189 *et sqq*., at p. 190.

national responses to this evolution?[5] When responding to preliminary references in the gambling field the Court has shown considerable deference to the Member States in permitting them a wide margin of discretion within which they are able to maintain measures which are restrictive of the cross-border movement of gambling services and service suppliers. An integral part of this deference relies upon the approach of the Court to the risks associated with gambling on the internet; the Court appears to be overly accommodating of the concerns of the Member States.

Whilst this is interesting as an independent phenomenon it is of heightened intrigue when the gambling case-law is compared with that which has emerged from other sectors where commerce has migrated to the online environment, such as that of medical devices and medicinal products. It is the objective of this short article to compare the approach of the Court in responding to concerns of national authorities arising from the risks associated with the provision of gambling services via the internet with the sale of medical devices and medicinal products via the internet.[6] Consequently the case of *Ker-Optika* will be reviewed with reference to the earlier *DocMorris* judgement before moving onto the gambling related case-law to offer a comparison.

## II. Sale of Medical Devices and Medicinal Products

*Ker-Optika*[7] concerns the sale of contact lenses via the internet and the relationship between the requirements of Hungarian law specifying that such medical devices can only be sold in shops which specialise in the sale of medical devices or by delivery to the home of the final customer. Ker-Optika was engaged in the business of selling such lenses via its internet site, when the competent regional directorate of the national public health and medical services (referred to hereafter by its Hungarian shorthand, ÀNTSZ[8]) sought to prohibit this activity. The plaintiff countered that decision on the basis that it contradicted its alleged right as an information society service provider to freely sell such products via the internet. In response,

[5] Synergies thus prevail with the issues arising within the emerging field of 'lifestyle risks'. See Simon Planzer and Alberto Alemanno, 'Lifestyle Risks: Conceptualisation of an Emerging Category of Research', 4 *European Journal of Risk Regulation* (2010), pp. 337 *et sqq*.

[6] As such it will not be the objective of this report to assess whether the considerable deference to the Member States when regulating gambling is liable to unduly hinder the development of the internal market for this particular economic activity.

[7] Case C-108/09, *Ker-Optika v. ÀNTSZ Dél-dunántúli Regionális Intézete*, judgment of the Third Chamber of 2 December 2010, n.y.r..

[8] ÀNTSZ Dél-dunántúli Regionális Intézete.

and relying upon the E-Commerce Directive, ÀNTSZ claimed that such an activity was not an information society service because it required the physical examination of the patient.[9] A preliminary ruling was sought by the national court seized of the matter[10] to ascertain whether the sale of lenses constituted medical advice requiring the physical examination of the patient thus bringing it outside the scope of the E-Commerce Directive. Furthermore the national court sought clarification on whether the domestic requirements surrounding the sale of contact lenses were compatible with the free movement of goods.

Before assessing the Hungarian measure in question, the Court had to preliminarily establish whether the measure was contrary to secondary law, i.e. the E-Commerce Directive or primary law in terms of Article 34 TFEU upholding the free movement of goods. In view of the focus of this report it will suffice to note that the with regards to the E-Commerce Directive the Court found that through prohibiting the sale of contact lenses via the internet, Hungarian law fell within the scope of the Directive because of the separability of the medical advice from the actual sale of the contact lenses.[11] The Court readily found that the measure was a restriction in terms of Article 34 TFEU because it impeded access to the market for products from other Member States more so than domestic products. [12]

Consequently the Court proceeded to consider whether the restriction can be justified as a public health measure as provided for in Article 36 TFEU, having accepted that the measure is one to ensure the health of contact lens users.[13] Attention was then directed to ascertaining whether the restriction is both appropriate for attainting the given objective and necessary in terms of there being no other measure which would achieve the objective whilst being less restrictive on the free movement of goods. The Court was relatively brief in considering the appropriateness of the measure. Due to the risk of eye ailments or even lasting visual impairment arising from the incorrect use of contact lenses, the Court recognised that with a view to protecting public health Member States are competent to require that lenses be supplied by qualified staff who advise individual consumers whether lenses should be worn. If lenses are deemed appropriate for an individual then Member States can also require that such staff ensure that the correct lenses are supplied, correctly positioned on the eyes and

[9] Council Directive 2000/31on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000 L 178/1.
[10] The Baranya megyei bíróság.
[11] *Ker-Optika*, paras. 39-40.
[12] See *Ker-Optika* at para. 54 for how the Court views the internet as a means of providing non-domestic suppliers an opportunity to enter a market.
[13] *Ker-Optika*, para. 59.

provide consumers with information on the correct use and care of such lenses. Although the elimination of risks to public health are not wholly eliminated by restricting the sale of contact lenses to opticians' shops, by establishing a link to the services of a qualified optician such dangers are likely to be reduced. The likelihood of reducing risk in this manner is deemed sufficient to consider the measure as appropriate for its objective, although the Court did not attempt to provide a more precise indication as whether there is a threshold at which point the restrictive measure has the capacity to eliminate a sufficient degree of risk to be appropriate.

The compatibility of Hungary's law faltered however on the necessity test, in other words having examined the assumption that every sale of contact lenses requires direct contact between an optician and the consumer the Court ultimately found that the objective of protecting public health can be achieved in a less trade restrictive manner. Initially the Court noted that precautionary examinations before contact lenses are purchased, and to establish if a need exists in the first place, do not necessarily have to occur on the premises of an optician. Secondly, the Court discovered no evidence in the case file to suggest that every single instance of lenses being supplied is dependent upon a precautionary examination or medical advice. Indeed, the Court noted, where a user is purchasing his or her regular supply of lenses it is not a requirement of Hungarian law that they are examined upon each and every purchase, but it is a responsibility of the consumer to be examined and obtain medical advice.[14]

Having established as a matter of fact that an examination, and any advice which the examination may give rise to, is not conditional for each sale the Court considered that advice can be provided to consumers when sales are concluded via the internet by way of "the interactive features on the Internet site concerned, the use of which by the customer must be mandatory before he can proceed to purchase the lenses."[15] The Court drew heavily upon its approach to the selling of non-prescription medicines via the internet in *DocMorris*; concerning the incorrect use of medicines and the possibility that an online pharmacy may be abused. As to the incorrect use of medicine the Court countered that the risk of this arising could be reduced through increasing the "number of on-line interactive features" which must be completed before a purchase can be made. It then stated that it saw no difference in terms

[14] It should be borne in mind that in *DocMorris* the Court felt that the need to ensure that prescriptions are genuine was reason enough restrict the sale of prescription only medicines via the internet. See *DocMorris* at para. 106.
[15] *Ker-Optika*, para. 69.

of difficulty in acquiring non-prescription medicines unlawfully between traditional pharmacies and those online, thus dismissing the abuse related concern.[16]

Furthermore, an examination to determine whether lenses are required, the appropriate type and advice on correct use and care thereof only arises as a 'general rule' when lenses are first supplied and there is "as a general rule, no need to provide the customer with such services" during subsequent supplies.[17] The Court considered a sufficient degree of protection to be afforded by customers advising the seller of the type of lenses required including any changes arising from the issuance of a new prescription by an optician. Importantly for the purposes of internet based trade the Court also held that interactive features on a supplier's website will suffice in providing supplementary information and advice on the continued use of contact lenses. Yet the Court did not stop here and drew upon its earlier decision in *DocMorris* as it detailed how Member States could require suppliers to ensure that qualified opticians are available to provide individualised information and advice via their websites. The Court displayed considerable faith in the internet to deliver, noting how this may "offer advantages, since the lens user is enabled to submit questions which are well thought out and pertinent, and without the need to go out".[18] This reflects *DocMorris* where "time to think about the questions to ask the pharmacists" in relation to the sale of non-prescription medicines online was viewed as an advantage of the internet.[19] For the elderly or those with reduced mobility the provision of such advice (be it on medical devices or medicinal products) in the comfort of their own homes may be advantageous, and it appears that the Court is suggesting that there is a danger that some customers will fail to ask the right questions whilst standing in a busy shop and yet communication at a distance will alleviate such problems.[20]

Given the separation of the need for an examination and medical advice upon each and every instance in which contact lenses are sold the Court found that the requirement that such medical devices are only sold in optician's shops to be overly restrictive of trade since less trade restrictive alternatives prevail. As this amounts to Hungary exceeding its margin of discretion the measure is found to be unnecessary, and thus in so far as the rules relate to the

[16] *DocMorris*, para. 114.
[17] *Ker-Optika*, para. 71.
[18] *Ker-Optika*, para. 73.
[19] *DocMorris*, para. 113.
[20] In *Ker-Optika* the Court does not repeat the view aired in *DocMorris* that the internet offers improved access to the products in question given that it allows consumers to place their order from their home or office. However, the discourse at this part of the ruling in *Ker-Optika* was concerned with the provision of individualised information and advice rather than the ease of consumers being able to purchase contact lenses per se.

selling of contact lenses they are incompatible with the E-Commerce Directive and the free movement of goods. In essence the Court deconstructed and challenged measures which Hungary found necessary to mitigate the risks associated with the sale of contact lenses and thereby the Court paved the way for such products to be sold via the internet. This contrasts starkly with how the Court responds to national perceptions to, and management of, risks associated with online gambling.

JUDGMENT OF THE COURT (Second Chamber)

16 December 2010 (*)

(Freedom to provide services − Free movement of goods − Principle of non-discrimination − Measure adopted by a local public authority which restricts access to coffee-shops to Netherlands residents − Marketing of 'soft' drugs – Marketing of non-alcoholic beverages and of food − Objective of combating drug tourism and the accompanying public nuisance − Public order − Protection of public health − Coherence − Proportionality)

In Case C−137/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Raad van State (Netherlands), made by decision of 8 April 2009, received at the Court on 15 April 2009, in the proceedings

**Marc Michel Josemans**

v

**Burgemeester van Maastricht,**

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), A. Ó Caoimh and P. Lindh, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 April 2010,

after considering the observations submitted on behalf of:

– Mr Josemans, by A. Beckers, advocaat,

– the Burgemeester van Maastricht, by S.A.R. Lely, advocaat,

– the Netherlands Government, by C. Wissels, M. Noort and J. Langer, acting as Agents,

– the Belgian Government, by C. Pochet and L. Goossens, acting as Agents,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the French Government, by E. Belliard, G. de Bergues and A. Czubinski, acting as Agents,

– the European Commission, by H. van Vliet and I. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 18 EC, 29 EC and 49 EC.

2 The reference has been made in proceedings between Mr Josemans, who runs the 'Easy Going' coffee-shop, and the Burgemeester van Maastricht (the Mayor of the municipality of Maastricht) on the ground that the latter declared the establishment in question temporarily closed following two reports attesting that persons who are not resident in the Netherlands had been admitted to it contrary to the provisions in force in that municipality.

**Legal context**

*European Union legislation*

3 The necessity of combating drugs, inter alia by punishing the illegal trafficking in those drugs and by preventing the consumption of narcotic drugs and drug addiction, has been acknowledged by a number of measures and instruments of the European Union.

4 Recital 1 in the preamble to Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8) states that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States.

5 Article 2(1)(a) of Framework Decision 2004/757 states that each Member State is to take the necessary measures to ensure that the following intentional conduct when committed without right is punishable: the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs. Article 2(2) states that the conduct described in paragraph 1 is not included in the scope of that framework decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law.

6 Under Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam, 13 Member States of the European Union, amongst them the Kingdom of the Netherlands, are authorised to establish, within the institutional and legal framework of the European Union and the EU and EC Treaties, closer cooperation among themselves within the scope of the Schengen *acquis* as set out in the annex to that protocol.

7 The Convention implementing the Schengen Agreement, of 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed at Schengen (Luxembourg) on 19 June 1990 is part of the Schengen *acquis* so set out.

8 Article 71(1) of that convention provides that the Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

9 Article 71(2) to (4) specifies the various measures which the Parties undertake to adopt in connection with the prevention and punishment inter alia of the illegal export and import of narcotic drugs and psychotropic substances, including cannabis, and in connection with the sale, supply and handing over of such products and substances. Article 71(5) states that the Parties are to do their utmost to prevent and combat the negative effects arising from the illicit demand for narcotic drugs and psychotropic substances.

10 Certain instruments of the European Union, such as the Council Resolution of 29 November 1996 on measures to address the drug tourism problem within the European Union (OJ 1996 C 375, p. 3) and the Joint Action of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking (OJ 1996 L 342, p. 6), relate expressly to the fight against drug tourism.

11 The European Union is a party to the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, concluded in Vienna on 20 December 1988 (*United Nations Treaty Series*, Vol. 1582, No 1-27627). According to the declaration annexed to Council Decision 90/611/EEC of 22 October 1990 concerning the conclusion, on behalf of the European Economic Community, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (OJ 1990 L 326, p. 56), the Community is competent for questions of commercial policy relating to the substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances.

*National legislation*

12 Under the 1976 Law on opium (Opiumwet 1976), the possession, dealing, cultivation, transportation, production, import and export of narcotic drugs, including cannabis and its derivatives, are prohibited. Those acts are subject to criminal sanctions unless the substance or product in question is used for medical, scientific or educational purposes and prior authorisation has been given.

13 The Kingdom of the Netherlands applies a policy of tolerance with regard to the sale and consumption of cannabis. That policy is based on a distinction between 'hard' drugs, which present an unacceptable risk to health, and 'soft' drugs, which although deemed to be 'risky' do not give rise to the same concerns.

14 The policy of tolerance has been implemented within the framework of the directives issued by the College van procureurs-general (College of public prosecutors). The competent authorities have relied on the principle of discretionary prosecution to pursue a policy of selective punishment. In the interest of the effectiveness of criminal prosecutions, the sale of cannabis, in strictly limited quantities and in controlled conditions, is tolerated, priority thus being given to the punishment of other offences which are considered to be more dangerous.

15 That policy of tolerance is reflected inter alia in the establishment of coffee-shops. In such establishments, which are classified as catering establishments, cannabis is sold and consumed in the same way as food and non-alcoholic beverages. The sale of alcoholic beverages is, however, prohibited.

16 The local authorities may authorise coffee-shops in compliance with certain criteria. Such establishments need an operating licence and must satisfy the same conditions relating to management and hygiene as are applicable to other catering establishments.

17 The conditions under which the marketing of cannabis in coffee-shops may be tolerated are defined, at national level, by the directives of the Openbaar Ministerie (the Public Prosecutor's Office). Those criteria, commonly known as 'the AHOJG criteria', are the following:

'A ("affichering") drugs may not be advertised; H ("harddrugs") no hard drugs may be sold; O ("overlast") the coffee-shop must not cause any nuisance; J ("jeugdigen") no drugs may be sold to minors (under the age of 18) nor may minors be admitted to the premises; G ("grote hoeveelheden") no more than five grams per person may be sold in any one transaction. Furthermore, the commercial stock ("handelsvooraad" of a tolerated coffee shop must not exceed 500 grams.'

18 The municipality of Maastricht adopted a policy on cannabis by defining, inter alia, certain strict conditions in which a limited number of coffee-shops are tolerated. At the material time in

the main proceedings, that number was set at 14.

19 In an effort to reduce drug tourism, indeed to prevent it, the Gemeenteraad (Municipal Council) of that municipality, by decision of 20 December 2005, inserted a residence criterion in the 2006 version of the General Maastricht Municipal Regulation (Algemene plaatselijke verordening Maastricht) ('the APV'). That amendment entered into force on 13 January 2006.

20 Pursuant to Article 2.3.1.3e(1) of the APV, the proprietor of an establishment as referred to in Article 2.3.1.1(1)(a)(3) of that regulation is forbidden to admit persons other than residents to the establishment or to permit them to remain in or at the establishment. The term 'establishment' is defined by the latter provision as a space to which the public has access and where food and/or non-alcoholic beverages are provided commercially, whether or not by means of vending machines, for consumption on the premises. Under Article 2.3.1.1(1)(d), 'residents' means persons who have their actual place of residence in the Netherlands.

21 Article 2.3.1.3e(2) of the APV provides that the Burgemeester van Maastricht may specify that the rule laid down in subparagraph (1) does not apply to one or more types of establishment referred to in that ordinance throughout the municipality or in one or more parts of the municipality designated therein. By decision of 13 July 2006, the Burgemeester von Maastricht exempted, throughout the municipality of Maastricht, certain categories of establishment from the obligation to refuse access to non-residents, namely all the establishments referred to in Article 2.3.1.1(1)(a)(3) of the APV, with the exception of coffee-shops, tearooms and the like, by whatever designation they might be known.

22 Pursuant to Article 2.3.1.5a(f) of the APV, the Burgemeester van Maastricht may declare an establishment as referred to in Article 2.3.1.1(1)(a)(3) of that ordinance closed for a specified or unspecified period if the proprietor of the establishment acts contrary to Article 2.3.1.3e(1).

**The facts which gave rise to the dispute in the main proceedings and the questions referred for a preliminary ruling**

23 Mr Josemans runs the 'Easy Going' coffee-shop in the municipality of Maastricht, an establishment in which 'soft' drugs, non-alcoholic beverages and food are sold and consumed.

24 The 'Easy Going' coffee-shop falls within the scope of the policy of tolerance applied by the Kingdom of the Netherlands with regard to the marketing of cannabis. The sale of cannabis, although illegal, does not give rise to criminal proceedings if it takes place in a recognised coffee-shop and if a certain number of conditions, inter alia 'the AHOJG criteria', are complied with.

25 Following two reports attesting that persons who are not resident in the Netherlands had been admitted to the coffee-shop in question contrary to Article 2.3.1.3e(1) of the APV, which establishes a criterion of residence, the Burgemeester van Maastricht, by decision of 7 September 2006, declared that establishment temporarily closed.

26 Mr Josemans lodged an objection against that decision. As that objection was dismissed by the Burgemeester van Maastricht by decision of 28 March 2007, Mr Josemans brought an action before the Rechtbank Maastricht (Maastricht Court). By judgment of 1 April 2008, that court annulled that decision and revoked the decision of 7 September 2006. According to that court, the prohibition set out in the APV of admitting persons who are not resident in the Netherlands to coffee-shops constitutes indirect discrimination on grounds of nationality, which is contrary to Article 1 of the Netherlands Constitution. By contrast, there is no infringement of European Union law. It considers that it is apparent from Case 289/86 *Vereniging Happy Family Rustenburgerstraat* [1988] ECR 3655 and Case C-158/98 *Coffeeshop'Siberië'* [1999] ECR I-3971 that the trade in narcotic drugs is not covered by the EC Treaty.

27 Mr Josemans and the Burgemeester van Maastricht, on 5 and 8 May 2008 respectively, appealed against that judgment to the Raad van State (Council of State). The Burgemeester

van Maastricht disputes the interpretation of the Netherlands Constitution. Mr Josemans submits that the legislation at issue in the main proceedings constitutes unjustified unequal treatment of citizens of the European Union and that, more specifically, people who are not resident in the Netherlands are denied the possibility of buying legal products in coffee-shops, which is contrary to European Union law.

28 In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does a regulation, such as that at issue in the main proceedings, concerning the access of non-residents to coffee-shops, fall wholly or partly within the scope of the EC Treaty, with particular reference to the free movement of goods and/or services, or of the prohibition of discrimination laid down in Article 12 [EC] in conjunction with Article 18 [EC]?

2. In so far as the provisions of the EC Treaty concerning the free movement of goods and/or services are applicable, does a prohibition of the admission of non-residents to coffee-shops form a suitable and proportionate means of reducing drug tourism and the public nuisance which accompanies it?

3. Is the prohibition of discrimination against citizens on grounds of nationality, as laid down in Article 12 [EC] in conjunction with Article 18 [EC], applicable to the rules on the access of non-residents to coffee-shops if and in so far as the provisions of the EC Treaty concerning the free movement of goods and services are not applicable?

4. If so, is the resulting indirect distinction between residents and non-residents justified, and is the prohibition of the admission of non-residents to coffee-shops a suitable and proportionate means of reducing drug tourism and the public nuisance which accompanies it?’

**Consideration of the questions referred**

*Initial observations*

29 By its reference for a preliminary ruling the national court seeks to ascertain whether European Union law precludes municipal rules, such as those forming the subject-matter of the dispute in the main proceedings, which prohibit the admission of persons who are non-resident in the Netherlands to coffee-shops situated in the municipality in question. It refers more specifically to the free movement of goods under Article 28 EC et seq., the free movement of services under Article 49 EC et seq., and the principle of non-discrimination on grounds of nationality under Article 12 EC in conjunction with Article 18 EC, which relates to citizenship of the Union.

30 At the outset, it must be borne in mind that, as is apparent from paragraphs 15 to 17 of this judgment, coffee-shops constitute establishments covered by the category of catering establishments in which cannabis is marketed to consumers of at least 18 years of age. Such an establishment must have an operating licence and must, moreover, satisfy all of ‘the AHOJG criteria’.

31 It is common ground that the cannabis sold in coffee-shops is not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes.

32 Although, according to the Netherlands Government, there are such establishments whose sole activity is the marketing of cannabis, the fact remains that in a number of coffee-shops non-alcoholic beverages and food are also sold and consumed. According to the order for reference, that is the case as regards the ‘Easy Going’ coffee-shop.

33 In such circumstances, it is necessary to assess, in the light of the provisions referred to by the reference for a preliminary ruling, first, the marketing of cannabis in coffee-shops and, secondly, the question of whether the sale of non-alcoholic beverages and food in such establishments may have an effect on the answer to be given to the national court.

*The first question*

34 By its first question the national court asks, in essence, whether a coffee-shop proprietor may, when marketing, first, narcotic drugs which are not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes and, secondly, non-alcoholic beverages and food, rely on Articles 29 EC, 49 EC and/or 12 EC, the latter in conjunction with Article 18 EC, to object to municipal rules such as those at issue in the main proceedings.

35 As regards the marketing of cannabis, Mr Josemans submits that that activity falls within the scope of European Union law and that the rules at issue in the main proceedings are contrary to the principle of non-discrimination on grounds of nationality. The Burgemeester van Maastricht and the Netherlands, Belgian, German and French Governments submit, by contrast, that the activity in question does not fall within the scope either of the freedoms of movement or of the principle of non-discrimination, in view of the existence of a prohibition on the offering for sale of narcotic drugs. The European Commission takes the view that it is not necessary, in order to give a decision on the reference for a preliminary ruling, to rule on the marketing of cannabis.

36 In that connection it is important to bear in mind that, since the harmfulness of narcotic drugs, including those derived from hemp, such as cannabis, is generally recognised, there is a prohibition in all the Member States on marketing them, with the exception of strictly controlled trade for use for medical and scientific purposes (see, to that effect, Case 50/80 *Horvath* [1981] ECR 385, paragraph 10; Case 221/81 *Wolf* [1982] ECR 3681, paragraph 8; Case 240/81 *Einberger* [1982] ECR 3699, paragraph 8; Case 294/82 *Einberger* [1984] ECR 1177, paragraph 15; Case 269/86 *Mol* [1988] ECR 3627, paragraph 15; and *Vereniging Happy Family Rustenburgerstraat*, paragraph 17).

37 That legal position complies with various international instruments which the Member States have cooperated on or acceded to, such as the United Nations Single Convention on Narcotic Drugs, concluded at New York on 30 March 1961, amended by the 1972 Protocol amending the Single Convention of 1961 (*United Nations Treaty Series*, Vol. 520, No 7515) ('the Single Convention') and the United Nations Convention on Psychotropic Substances, concluded at Vienna on 21 February 1971 (*United Nations Treaty Series*, Vol. 1019, No 14956). The measures provided for by those conventions were subsequently strengthened and supplemented by the Convention concluded at Vienna on 20 December 1988, to which all the Member States of the European Union are parties. Cannabis is among the substances and products referred to in those conventions.

38 In the preamble to the Single Convention the parties declare themselves conscious of their duty to prevent and combat addiction to narcotic drugs, whilst recognising that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes. Under Article 4 of that convention, the parties are to take all the measures necessary to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs (see *Wolf*, paragraph 9, and Case 240/81 *Einberger*, paragraph 9).

39 As regards more specifically European Union law, Framework Decision 2004/757 provides, in Article 2(1)(a), that each Member State is to take the necessary measures to ensure that, inter alia, the following intentional conduct when committed without right is punishable: offering, offering for sale, distribution, sale, delivery on any terms whatsoever and brokerage of drugs. Under Article 2(2) the conduct described in paragraph 1 is not to be included in the scope of that Framework Decision when it is committed by its perpetrators exclusively for their own

personal consumption as defined by national law. It is stated in Article 1(1) of that act that the term 'drugs' includes any of the substances covered by the Single Convention and by the United Nations Convention on Pyschotropic Substances, concluded at Vienna on 21 February 1971.

40 Furthermore, pursuant to Article 71(1) of the Convention implementing the Schengen Agreement, of 14 June 1985, the States who are parties to that convention undertook, as regards both the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

41 It follows that narcotic drugs which are not distributed through channels which are strictly controlled by the competent authorities to be used for medical and scientific purposes are, because of their very nature, subject to a prohibition on importation and offering for sale in all the Member States (see, to that effect, *Wolf*, paragraph 10; Case 240/81 *Einberger*, paragraph 10; Case 294/82 *Einberger*, paragraph 15; *Mol*, paragraphs 15 and 18; *Vereniging Happy Family Rustenburgerstraat*, paragraphs 17 and 20; and *Coffeeshop 'Siberië'*, paragraph 14). The fact that some Member States describe a narcotic drug as a 'soft' drug is not capable of calling that finding into question (see, to that effect, *Vereniging Happy Family Rustenburgerstraat*, paragraph 25).

42 As narcotic drugs which are not distributed through such strictly controlled channels are prohibited from being released into the economic and commercial channels of the European Union, a coffee-shop proprietor cannot rely on the freedoms of movement or the principle of non-discrimination, in so far as concerns the marketing of cannabis, to object to municipal rules such as those at issue in the main proceedings.

43 That finding cannot be impugned by the fact that, as is apparent from paragraphs 12 to 14 of the present judgment, the Kingdom of the Netherlands applies a policy of tolerance to the sale of cannabis, even though trade in narcotic drugs is prohibited in that Member State. It is apparent from the case-law of the Court that such a prohibition is not affected by the mere fact that, in view in particular of their limited manpower and means, the national authorities responsible for implementing that prohibition give lower priority to bringing proceedings against a certain type of trade in drugs, because they consider other types to be more dangerous. Above all, such an approach cannot put illegal drugs dealing on the same footing as economic channels which are strictly controlled by the competent authorities in the medical and scientific field. The latter trade is actually legalised whereas illegal dealings, albeit tolerated, remain prohibited (see, to that effect, *Vereniging Happy Family Rustenburgerstraat*, paragraph 29).

44 As regards the marketing of non-alcoholic beverages and food in coffee-shops, Mr Josemans, the German Government and the Commission submit that the Court should assess the effects of the rules at issue in the main proceedings on the exercise of that activity. The German Government stresses that those goods are to be consumed on the premises. The Commission doubts that non-residents buy them with the intention of exporting them to their States of residence. Therefore, the provisions to be applied are those governing the freedom to provide services within the meaning of Article 49 EC and not those relating to the free movement of goods under Article 29 EC.

45 The Burgemeester van Maastricht and the Netherlands, Belgian, German and French Governments submit that the marketing of non-alcoholic beverages and food in such establishments is altogether secondary to the marketing of cannabis and cannot have any bearing on the outcome of the main proceedings.

46 That latter argument cannot be accepted. Although coffee-shops are primarily dedicated to the sale and consumption of cannabis, the fact remains that the marketing, in such establishments, of non-alcoholic beverages and food generally constitutes a not inconsiderable economic activity. In reply to a question asked by the Court, the Netherlands Government stated, at the hearing, that that activity generally represents between 2.5% and 7.1% of the turnover of

coffee-shops in the municipality of Maastricht. As regards more specifically the economic situation of the 'Easy Going' coffee-shop, according to the information provided by Mr Josemans, the proportion of its turnover from the sale of such goods is in that bracket.

47 Consequently, it is necessary to examine whether, and, if so, to what extent, the rules at issue in the main proceedings are capable of affecting, in so far as concerns the marketing of non-alcoholic beverages and food, the exercise of the freedoms of movement governed by Articles 29 EC and 49 EC or of undermining the principle of non-discrimination 'on grounds of nationality' within the meaning of Article 12 EC in conjunction with Article 18 EC.

48 In order to ascertain whether such an activity concerns the free movement of goods or the freedom to provide services, it must be borne in mind that an establishment is defined in Article 2.3.1.1(1)(a)(3) of the APV as a space to which the public has access and where food and/or non-alcoholic beverages are provided commercially, whether or not by means of vending machines, for consumption on the premises.

49 In such circumstances, as the Advocate General pointed out at point 76 of his Opinion, the marketing of non-alcoholic beverages and food in coffee-shops appears to constitute a catering activity characterised by an array of features and acts in which services predominate as opposed to the supply of the product itself (see, by analogy, Case C-491/03 *Hermann* [2005] ECR I-2025, paragraph 27).

50 Since the free movement of goods aspect is entirely secondary to that of the freedom to provide services and may be considered together with it, the Court will examine the rules at issue in the main proceedings only in the light of the latter fundamental freedom (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I−1039, paragraph 22; Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 46; Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 26; Case C−452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 34; and Case C−233/09 *Dijkman and Dijkman-Laveleije* [2010] ECR I-0000, paragraph 33).

51 As regards the applicability of Article 12 EC, which lays down a general prohibition of all discrimination on grounds of nationality, it should be noted that that provision applies independently only to situations governed by European Union law for which the EC Treaty lays down no specific rules of non-discrimination (see, inter alia, Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraphs 12 and 13; Case C-443/06 *Hollmann* [2007] ECR I-8491, paragraph 28; and Case C−269/07 *Commission* v *Germany* [2009] ECR I-7811, paragraph 98).

52 As the principle of non-discrimination has been implemented, in the area of the freedom to provide services, by Article 49 EC, Article 12 EC does not apply in circumstances such as those in the main proceedings.

53 As regards the applicability of Article 18 EC, that provision, which lays down generally the right for every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in the provisions guaranteeing the freedom to provide services (see, inter alia, Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 34; and Case C-56/09 *Zanotti* [2010] ECR I-0000, paragraph 24). As citizens of the European Union who do not reside in the Netherlands and wish to go into coffee-shops in the municipality of Maastricht to consume lawful goods there are to be regarded as 'persons for whom' services 'are intended' within the meaning of Article 49 EC, it is not necessary for the Court to rule on the interpretation of Article 18 EC.

54 Consequently, the answer to the first question is that, in the course of marketing narcotic drugs which are not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes, a coffee-shop proprietor may not rely on Articles 12 EC, 18 EC, 29 EC or 49 EC to object to municipal rules such as those at issue in the main proceedings, which prohibit the admission of persons who are non-resident in

the Netherlands to such establishments. As regards the marketing of non-alcoholic beverages and food in those establishments, Article 49 EC et seq. may be relied on by such a proprietor.

*The second question*

55 The second question was asked in the event that the provisions governing the free movement of goods or those relating to the freedom to provide services apply in the circumstances of the dispute in the main proceedings. It relates, in essence, to whether municipal rules, such as those at issue in the main proceedings, constitute a restriction on the exercise of one of those freedoms and, if so, whether that measure may be justified by the objective of combating drug tourism and the accompanying public nuisance and, lastly, whether it constitutes a proportionate measure in relation to that objective.

56 Having regard to the answer to the first question, that question must be assessed solely in the light of Article 49 EC et seq. and limited to an examination of the effects of those rules on the marketing, in coffee-shops, of non-alcoholic beverages and food.

57 It is common ground that, under the rules at issue in the main proceedings, only 'residents' are admitted to coffee-shops. That term covers, under Article 2.3.1.1(1)(d) of the APV, any person who has his actual place of residence in the Netherlands. Consequently, the proprietors of such establishments are not entitled to provide catering services to persons residing in other Member States and those persons are precluded from enjoying such services.

58 It is clear from the Court's case-law that the principle of equal treatment, of which Article 49 EC embodies a specific instance, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, inter alia, Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8; Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 13; Case C−28/04 *Tod's and Tod's France* [2005] ECR I-5781, paragraph 19; and Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 41).

59 That is true, in particular, of a measure under which a distinction is drawn on the basis of residence, in that that requirement is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners (see, inter alia, Case C-224/97 *Ciola* [1999] ECR I−2517, paragraph 14; Case C−388/01 *Commission* v *Italy*, paragraph 14; Case C−103/08 *Gottwald* [2009] ECR I-9117, paragraph 28; and Case C-73/08 *Bressol and Others* [2010] ECR I-0000, paragraph 45).

60 It must, however, be examined whether such a restriction may be justified by legitimate interests which European Union law recognises.

61 The German Government takes the view that the rules at issue in the main proceedings are justified by the derogating provisions set out in Article 46(1) EC in conjunction with Article 55 EC, namely grounds of public policy, public security or public health. The Burgemeester van Maastricht and the Belgian Government rely, in the alternative, on grounds of public policy and public security. According to the Netherlands Government, the need to combat drug tourism constitutes a public-interest objective for the purposes of the line of case-law initiated in *'Cassis de Dijon'* (Case 120/78 *Rewe-Zentral* [1979] ECR 649).

62 While acknowledging the importance of the fight against drug tourism, the Commission submits that, as they are discriminatory, those rules can be compatible with European Union law only if they are covered by an express derogating provision, namely Article 46 EC in conjunction with Article 55 EC. The derogations provided for by those provisions should be interpreted restrictively. As regards more specifically grounds of public policy, they may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, inter alia, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35).

63 In the present case, it is common ground that the rules at issue in the main proceedings are intended to put an end to the public nuisance caused by the large number of tourists wanting to purchase or consume cannabis in the coffee-shops in the municipality of Maastricht. According to the information provided by the Burgemeester van Maastricht at the hearing, the 14 coffee-shops in the municipality attract around 10 000 visitors per day and a little more than 3.9 million visitors per year, 70% of which are not resident in the Netherlands.

64 The Burgemeester van Maastricht and the Netherlands Government state that the problems associated with the sale of 'soft' drugs which arise in that commune, such as the various forms of public nuisance and crime and the increasing number of illegal points of sale of drugs, including 'hard' drugs, have been exacerbated by drug tourism. The Belgian, German and French Governments refer to the public order problems to which that phenomenon, including the illegal export of cannabis, gives rise in Member States other than the Kingdom of the Netherlands, in particular in neighbouring States.

65 It must be pointed out that combating drug tourism and the accompanying public nuisance is part of combating drugs. It concerns both the maintenance of public order and the protection of the health of citizens, at the level of the Member States and also of the European Union.

66 Given the commitments entered into by the European Union and its Member Sates, there is no doubt that the abovementioned objectives constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by European Union law, even under a fundamental freedom such as the freedom to provide services.

67 In that connection, it is important to bear in mind, as is apparent from paragraphs 11, 37 and 38 of this judgment, that the need to combat drugs has been recognised by various international conventions which the Member States, and even the European Union, have cooperated on or acceded to. The preambles to those instruments mention the danger to the health and well-being of individuals constituted, in particular, by demand for and the illicit traffic in narcotic drugs and psychotropic substances, as well as their harmful effects on the economic, cultural and political bases of society.

68 Furthermore, the need to fight drugs, in particular by preventing drug addiction and punishing the illicit trafficking in such products or substances, has been set out in Article 152(1) EC and in Articles 29 EU and 31 EU. As regards provisions of secondary law, the first recital in the preamble to Framework Decision 2004/757 states that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States. Furthermore, as is apparent from paragraph 10 of this judgment, certain instruments of the European Union relate expressly to the prevention of drug tourism.

69 However, measures which restrict the freedom to provide services may be justified by the objective of combating drug tourism and the accompanying public nuisance only if they are suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it (see, to that effect, *Omega*, paragraph 36; Case C−438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraph 75; and Case C−244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 42).

70 In that connection it is important to bear in mind that a restrictive measure can be considered to be suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner (see, to that effect, Case C−169/07 *Hartlauer* [2009] ECR I−1721, paragraph 55; Joined Cases C−171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 42; and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraphs 59 to 61).

71 Mr Josemans calls into question the suitability and proportionality of the rules at issue in the main proceedings. They relate exclusively to coffee-shops. Under 'the AHOJG criteria', those

establishments are required, unlike the illegal premises selling drugs in the municipality of Maastricht, to fight against the public nuisance caused by their customers. Furthermore, those rules are liable to drive drug tourists to use illegal channels.

72 The Commission expresses doubts as to the necessity of the rules at issue in the main proceedings and as to their consistency. It states that the national measures to combat the public nuisance caused by the consumption of drugs should be based on objective and non-discriminatory criteria. It refers, in that connection, to the judgment in Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, concerning the right of residence or establishment of prostitutes, and to the case-law deriving from it.

73 The Burgemeester van Maastricht and the Netherlands, Belgian and German Governments take the view, by contrast, that the rules at issue in the main proceedings constitute an appropriate and proportionate means of combating drug tourism and the accompanying public nuisance. The Burgemeester van Maastricht and the Netherlands Government state that the various measures adopted by municipalities applying a policy of tolerance with regard to coffee-shops in order to deal with that phenomenon have not achieved the objective pursued.

74 In the present case, it cannot be denied that the policy of tolerance applied by the Kingdom of the Netherlands with regard to the sale of cannabis encourages persons who are resident in other Member States to travel to that State, and more specifically to the municipalities in which coffee-shops are tolerated, in particular in border regions, in order to buy and consume that drug. Furthermore, according to the information in the case-file, some of those persons purchase cannabis in such establishments in order to export it illegally to other Member States.

75 It is indisputable that a prohibition on admitting non-residents to coffee-shops, such as that which is the subject-matter of the dispute in the main proceedings, constitutes a measure capable of substantially limiting drug tourism and, consequently, of reducing the problems it causes.

76 In that connection, it is important to point out that the discriminatory nature of the rules at issue in the main proceedings does not, on its own, mean that the way in which they pursue the intended objective is inconsistent. Although the Court took the view in *Adoui and Cornuaille* that a Member State cannot validly rely on grounds of public policy with regard to the behaviour of a non-national inasmuch as it does not adopt repressive measures or other genuine and effective measures with respect to the same conduct on the part of its own nationals, the fact remains that the dispute in the main proceedings is part of a different legal context.

77 As was pointed out in paragraph 36 of this judgment, there is, under international law and European Union law, a prohibition in all the Member States on marketing narcotic drugs, with the exception of strictly controlled trade for use for medical and scientific purposes. By contrast, prostitution, the behaviour referred to in *Adoui and Cornuaille*, aside from trafficking in human beings, is tolerated or regulated in a number of Member States (see, to that effect, Case C-268/99 *Jany and Others* [2001] ECR I−8615, paragraph 57).

78 It cannot be held to be inconsistent for a Member State to adopt appropriate measures to deal with a large influx of residents from other Member States who wish to benefit from the marketing – tolerated in that Member State – of products which are, by their very nature, prohibited in all Member States from being offered for sale.

79 As regards the scope of rules such as those at issue in the main proceedings, it is important to bear in mind that they apply only to establishments the main activity of which is the marketing of cannabis. They do not preclude a person who is not resident in the Netherlands from going, in the municipality of Maastricht, into other catering establishments in order to consume non-alcoholic beverages and food. According to the Netherlands Government, there are more than 500 such establishments.

80 As regards the possibility of adopting measures which are less restrictive of the freedom to

provide services, according to the case-file, in the municipalities which apply a policy of tolerance with regard to coffee-shops, various measures relating to combating drug tourism and the accompanying public nuisance have been implemented, such as a restriction on the number of coffee-shops or their opening hours, the implementation of a card system which allows customers access to them or even a reduction in the amount of cannabis per person which may be bought. According to the information provided by the Burgemeester van Maastricht and the Netherlands Government, those measures have nevertheless proved to be insufficient and ineffective in the light of the objective pursued.

81 As regards more specifically the possibility of granting non-residents access to coffee-shops whilst refusing to sell cannabis to them, it must be pointed out that it is not easy to control and monitor with accuracy that that product is not served to or consumed by non-residents. Furthermore, there is a danger that such an approach would encourage the illegal trade in or the resale of cannabis by residents to non-residents inside coffee-shops.

82 Member States cannot be denied the possibility of pursuing the objective of combating drug tourism and the accompanying public nuisance by the introduction of general rules which are easily managed and supervised by the national authorities (see, by analogy, Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 67, and Case C-142/05 *Mickelsson and Roos* [2009] ECR I−4273, paragraph 36). In the present case, nothing in the case-file gives grounds to assume that the objective pursued could be achieved to the extent envisaged by the rules at issue in the main proceedings by granting non-residents access to coffee-shops whilst refusing to sell them cannabis.

83 In such circumstances, it must be stated that rules such as those at issue in the main proceedings are suitable for attaining the objective of combating drug tourism and the accompanying public nuisance and do not go beyond what is necessary in order to attain it.

84 Having regard to all of the foregoing considerations, the answer to the second question is that Article 49 EC must be interpreted as meaning that rules such as those at issue in the main proceedings constitute a restriction on the freedom to provide services laid down by the EC Treaty. That restriction is, however, justified by the objective of combating drug tourism and the accompanying public nuisance.

*The third and fourth questions*

85 The third and fourth questions were asked in the alternative and relate to the application of the principle of non-discrimination on grounds of nationality laid down in Article 12 EC in conjunction with Article 18 EC, which governs the free movement of citizens of the European Union.

86 Having regard to the answer given to the first question, there is no need to answer those questions.

**Costs**

87 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

**1. In the course of marketing narcotic drugs which are not distributed through channels strictly controlled by the competent authorities with a view to use for medical or scientific purposes, a coffee-shop proprietor may not rely on Articles 12**

**EC, 18 EC, 29 EC or 49 EC to object to municipal rules, such as those at issue in the main proceedings, which prohibit the admission of persons who are non-resident in the Netherlands to such establishments. As regards the activity of marketing non-alcoholic beverages and food in those establishments, Article 49 EC et seq. may be relied on by such a proprietor.**

**2. Article 49 EC must be interpreted as meaning that rules such as those at issue in the main proceedings constitute a restriction on the freedom to provide services laid down by the EC Treaty. That restriction is, however, justified by the objective of combating drug tourism and the accompanying public nuisance.**

[Signatures]

---

* Language of the case: Dutch.

# LECTURE 6

## Health services

23 February 2012

Medicine and Law
September, 2008

Access to Health Care

# *569 CLAIMING ACCESS TO HEALTH CARE IN THE NETHERLANDS UNDER INTERNATIONAL TREATY LAW

André den Exter [FNa1]

Copyright © 2008 by Yozmot; André den Exter

**Abstract:** In the Netherlands, access to healthcare has been guaranteed by social health insurance legislation. But since the introduction of the health insurance system in the 1960s, it has been under frequent review, the latest reform was the introduction of regulated competition. At the same time, claiming health insurance entitlements under international (European) law has been changing, notably due to judicial activism.

**Keywords**: Social health insurance law; entitlements; international law; patient mobility

## 1. Introduction

In the Netherlands, access to healthcare has been guaranteed by social health insurance legislation. But since the introduction of the health insurance system in the 1960s, the system has been in a state of flux. Numerous reforms have changed the system gradually, of which the latest is the introduction of a competitive health insurance scheme for the entire population.

Cutting across the various reforms has, however, been the goal of access to healthcare services as defined by international treaty law, including European Union law. [FN1] In particular the leverage of Community law in strengthening the patient's right to healthcare is remarkable. Since the European Court of Justice (ECJ) has accepted that healthcare should be considered as a service in terms ***570** of the EC Treaty, rights to healthcare have become inextricably linked with the free movement principles and are no longer restricted to the jurisdiction of the country of origin.

This article examines the consequences of international and European Union law for claiming access to healthcare in the Netherlands.

## 2. Access to Healthcare in The Netherlands: The Legal Framework of the National Law

The Dutch healthcare system is based on the principle of solidarity. Solidarity means that all members of society in need must have access to healthcare, regardless of their ability to pay. Solidarity is not a woolly notion about the common good. It has a specific meaning that a healthcare system is organised and managed on the basis of universal access, without risk selection, based on income related premiums and with no significant differences in the benefit package. [FN2] It is a concept enshrined in Dutch statutory health insurance law and recognised by the decisions of the judiciary, including the European Court of Justice, as described below.

Due to the prohibition of constitutional review by the judiciary, the Dutch legal debate on access to

healthcare starts from a statutory law perspective. [FN3] More specifically, that debate primarily focuses on health insurance issues (access to the health insurance scheme, the scope and nature of the benefit package, contribution rates, etc.). That does not mean that the constitutional health provision is of no importance, but in terms of healthcare claims statutory law and international legal standards are decisive. [FN4]

Generally, the principle of access to health care has been interpreted as a social right, which means that the competent authorities in the Netherlands ***571** have quite a broad discretion in determining how and when this social right will be implemented. Based on both the solidarity principle and the equality principle, equal access to healthcare services has been enshrined in social insurance law (e.g., the new Health Insurance Act, the "*Zorgverzekeringswet*") and formulated into healthcare entitlements as defined by secondary law. [FN5] The "*Zorgverzekeringswet*," introduced a compulsory health insurance scheme for the entire population, carried out by (for-profit) insurance companies. In brief, the new Health Insurance Act provides the insured for essential curative care tested against the criteria of proven efficacy, cost effectiveness, and the need for collective financing. Under the new insurance scheme, the insured may opt for a benefits-in-kind or reimbursement model. Although both models guarantee a standard insurance policy, under the latter model the insured have free choice of provider. Whereas under the benefits-in-kind variant, the insured may claim the types of care as entitlements provided by contracted health providers. Thus free choice of provider is restricted to contracted providers only. However, in exceptional cases the insured may opt for a non-contracted provider, for instance in the face of long waiting times and will receive a cash benefit (reimbursement model). Due to jurisprudence of the European Court of Justice, the reimbursement rules under the new Health Insurance Act had to be amended (this is discussed further below). One of the reasons is the statutory obligation of the insurance fund to guarantee access to medical care under the insurance scheme. This obligation forms the essence of the benefit-in-kind healthcare system, for which the insurer is accountable and -- in case of non compliance -- may be held liable. It is therefore a principle of sound management that the benefit-in-kind insurer purchases sufficient care in and/or outside its area of activity. Except for *force majeure*, the insurance fund cannot be released from its obligation to provide for access to healthcare. The insurance fund cannot defend itself on the basis that it had insufficiently contracted for care or allocated insufficient funds to a hospital facility. [FN7] It can, ***572** however, claim *force majeure* in the case of restrictive residential capacity regulation set by the government as this is viewed as an externality factor beyond the powers of insurers to affect. Nonetheless, given the possibility of contracting health care abroad, such an appeal will likely be less successful in the future.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

## 3. European Union law and healthcare

### 3.1. *Public health law*

The European Union (previously, the European Community) was established with the ratification of the Treaty of Maastricht (1992). Since Maastricht, the European Union (EU) Treaty has been modernised by the so-called Treaty of Amsterdam (1997), and will be replaced by the Treaty of Lisbon (2009). [FN19] ***576** These Treaties have created a new, distinctive legal order that can be distinguished from traditional international law by its content, instruments and sources of law. [FN20]

For historical reasons, the EU has no general competence to regulate in the field of health. The original Treaty of Rome establishing the European Communities did not foresee a "European" health system. [FN21] Health policy, notably the issue of access to healthcare services and facilities has been regulated by the domestic legal orders of individual Member States. Community competences with respect to health were mainly based on general treaty provisions as far as they concerned the functioning of the common market. [FN22] It was only in the Treaty of Maastricht that the EU received supranational competence to run a public health policy of disease prevention and health promotion (Article 129 EC Treaty of Maastricht). The conferred public health tasks to the EU were restricted however by the principle of subsidiarity, *i.e.* only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. [FN23] Thus the Treaty constrains EU jurisdiction *vis-à-vis* health.

The Amsterdam amendment (1997), introduced considerable changes although the lack of legal precision of Article 152(4)(a) still leaves scope for interpretation. [FN24] Article 152 EC of the Treaty of Amsterdam replaced the Maastricht public health provision, Article 129. As a result Union action will no ***577** longer be limited to measures or activities, which are preventive in nature. [FN25] Since "such action shall cover the fight against the major health scourges, by promoting research ... as well as health information and education" (section 1), the Union may also take positive steps in order to improve public health. Further extended Union public health actions include measures, *inter alia*, setting standards of quality and safety of organs and substances of human origin, blood and blood derivatives and in the fields of veterinary and plant health. [FN26]

In the fifth section it is mentioned that Union action in the field of public health "shall fully respect the responsibility of the Member States for the organisation and delivery of **health services** and medical care." It re-emphasises the reluctance of Member States to hand over their competences in organising and financing their respective national healthcare system. Consequently, individual claims to access healthcare services cannot be based on Article 152.

### 3.2 *The free movement principles*

Although national authorities have in theory exclusive competencies *vis-à-vis* the organization, financing and delivery of **health** care **services**, this jurisdiction is affected by policy decisions made at the **European** level and by provisions of EU law designed to realise the internal market.

According to article 14(2) of the EC Treaty, the internal market "shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

the provisions of this Treaty." Under certain circumstances, Union citizens may even derive specific rights emanated from the "free movement" provisions. For patients, the most relevant provisions are the free movement of persons, services and goods. [FN27] The internal ***578** market provisions' impact on the health sector is, however, incomplete and differs by provision.

With regard to the free movement of persons, relevant treaty provisions include the freedom of movement for "workers" (art. 39-42 EC) and the rights of "establishment" (art. 43-44 EC). These provisions have, in turn, been further substantiated by secondary legislation. [FN28] Free movement for workers shall entail, *inter alia*, the right to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action.

The free movement provisions are relevant not only to health professionals, but also to patients. Article 22 of co-ordination regulation 1408/71 (Regulation 1408/71) in conjunction with Article 39 EC, entitles cross-border workers to access the health care system in their country of residence; emergency care in case of temporary residence abroad; and pre-authorised care abroad by the patient's insurer or the competent (national) health authority. [FN29] Since free movement is not restricted to "workers," relatives, tourists and other categories of EU citizens can also make an appeal to benefit from this provision. Although Regulation 1408/71 aims to coordinate the different social security systems in the Member States, free movement of patients remains problematic. A major problem countries face with cross-border health care is how to regulate and finance this varied care. Some Member States fear an influx of patients from those Member States lacking facilities and/or providing lower-quality care. Rulings from the Court of Justice, simplifying patient mobility, have only strengthened this fear.

## ***579 4. The ECJ's rulings on patient mobility and its consequences for the Dutch social health insurance system**

### **4.1** ***Patient mobility***

The European Court of Justice (ECJ) is entrusted with, *inter alia*, the provision of preliminary rulings. [FN30] On references of the parties in the main proceedings before the national court, the ECJ, by means of a preliminary ruling, is exclusively competent to pronounce the interpretation of the Treaty provisions if a question on this subject is raised. As such, the Court is able to promote the uniformity of interpretation of Union law in the Member States.

In quite a number of cases, the Court's jurisdiction has been invoked in national judicial procedures on patient mobility. [FN31] In a typical case an insured complains that his/her insurance fund has imposed a restrictive condition or denied approval to receive care abroad and thus questions the legitimacy of the Regulation's pre-authorisation requirement in view of the fundamental freedoms. Since the precedent-setting case of *Decker and Kohll*, the ECJ has been confronted with a growing number of cases questioning the conformity of the Dutch social health insurance system with the free movement principles. [FN32]

In the joined case of *Smits and Peerbooms*, the Dutch social health insurance fund refused Mrs. Smits reimbursement for specific multidisciplinary hospital treatment costs incurred in a German clinic, specialising in Parkinson's disease. Justifying its decision, the social insurance fund said that satisfactory and ***580** adequate treatment for Parkinson's disease was available in the Netherlands and that the specific clinical treatment provided in Germany provided no additional advantage. Thus, it was not "medically necessary" that Mrs. Smits undergo treatment at the German clinic.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

The second claimant, Mr. Peerbooms fell into a coma following a road accident. He was transferred to a hospital in the Netherlands and then transferred in a vegetative state to the university clinic in Innsbruck in Austria where he received a special intensive therapy using neurostimulation. In the Netherlands, that technique was considered experimental and only to be used in certain circumstances. Pursuant to guidelines operating in the Netherlands, Peerbooms would not have qualified for such experimental treatment due to his age. Thus the Sickness Fund refused to pay the costs of treatment.

In both cases, the ECJ had to rule on the pre-authorisation rule, and whether such a rule in the circumstances of those particular cases constitutes a barrier to the freedom to provide services. In contrast to the *Decker and Kohll* ruling (dealing with non-hospital care within a reimbursement system), the *Smits/Peerbooms* case concerned access to hospital care services for which the sickness fund had not contracted, and which, within the Netherlands, is provided on a "benefit-in-kind" basis. [FN33] The Court agreed that sickness funds should not be exposed to the cost of hospital services for which they had not contracted. However, the pre-authorisation condition as applied by the authorities in the Netherlands was criticised for its potentially discriminatory effect. In the Netherlands; the general legal rule under which the costs of medical treatment are covered is where the treatment is found to be "normal in the professional circles concerned." [FN34] This expression, however, is open to a number of interpretations, depending in particular on whether what is "normal" is considered as such in Dutch medical circles (this narrow interpretation being favoured by the national court in the Netherlands). In contrast, the ECJ decision that to allow only treatment habitually carried out on national territory and scientific views prevailing in national medical circles to determine what is or is not ***581** "normal," will not offer sufficient guarantees to patients that the guidelines in place are objective, non-discriminatory, known in advance and not used arbitrarily. Moreover, such a focus on national conceptions of "normal" will make it likely that Dutch providers will always be preferred in practice. [FN35] The ECJ found that where treatment is sufficiently tried and tested by international medical science, refusal of the prior authorisation cannot be justified. Further, to satisfy the "normal" criterion, a Member State "must take into consideration all the relevant available information, including, in particular, existing scientific literature and studies, the accepted opinions of specialists and the fact that the proposed treatment is covered or not covered by the sickness insurance system of the Member State in which the treatment is provided." [FN36]

From this case, it became clear that Member States must apply the pre-authorisation procedure consistently and that patients cannot be denied health care abroad arbitrarily (i.e., there have to be non-discriminatory, transparent procedures, and appeal mechanisms). For patients entitled to benefit-in-kind services, such as provided in the Dutch system, the ruling means that it should be just as easy to receive medical treatment from a foreign non-contracted provider as it is to obtain from a non-contracted provider in the country of insurance. As such, the ECJ's interpretation of communal pre-authorisation conditions creates new opportunities for extended access to health care abroad. [FN37]

Subsequent to the *Smits/Peerbooms* case, the ECJ had to rule on two more or less identical situations in the Dutch mixed case of *Müller-Fauré/Van Riet*. [FN38] Here, the Court consolidated and clarified its previous reasoning on prior authorisation, at least concerning inpatient hospital care. However, the Court also confirmed that there are several reasons that may justify requiring prior authorisation where social health insurance funds cover benefits provided in another Member State. These reasons include: the protection of public health in as much as the system of agreements is intended to ensure that there is a high-quality, balanced medical and hospital service open to all; to guarantee the ***582** financial balance of the social security system; and, finally, to enable managing authorities to control expenditures for and the planning of **health services**. The Court noted that concerns regarding undermining the financial balance of the social security system are particularly valid *vis-à-vis* hospital care. In the case of hospital services, according to the Court, it is well known that to ensure sufficient access to a wide range of hospital services and in order to contain

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

costs, careful planning is required regarding the number of hospitals, their geographical distribution, the mode of their organisation and the equipment with which they are provided. [FN39] Nonetheless, the conditions attached to the grant of authorisation must be justified and satisfy the requirement of proportionality, and such a prior authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of being challenged in judicial or quasi-judicial proceedings. [FN40]

However, with respect to outpatient (non-hospital) health care, as is the case in *Müller-Fauré* (i.e. dental care), the Court was not convinced that abolishing prior authorisation will have a system-undermining effect. According to the Court, "there was no evidence that indicated that the removal of the prior authorisation requirement for that type of care would give rise to patients travelling to other countries in such large numbers, despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided there, and that the financial balance of the social security system would be seriously upset." [FN41] Therefore, in case of non-hospital services, there was no justification for requiring prior authorisation when one applies the free movement principle.

Although the *Müller-Fauré/Van Riet* case was considered the latest in a line of cross-border rulings, new Court rulings on hospital-related expenditures in another Member State (the *Leichtle* case), as well as the reimbursement of hospital services in non-EU countries, have further extended the notion of patient mobility (the *Keller* case), and its relevance to national health system ***583** funded systems (Watts). [FN42] Although the cases question the German (*Leichtle*), Spanish (*Keller*), and the UK (Watts) legal norms on cross-border care, the outcome is relevance to all Member States, including the Netherlands.

In the *Leichtle* case, the question raised did not concern so much the approval and reimbursement of the expenditures of the health care facility abroad (i.e., health spa), but the rules concerning the reimbursement of other expenditures related to the treatment abroad (travel, lodging, etc.). Since the conditions for reimbursement of this kind of costs were set for out-of-country treatment only (i.e., increased prospects of success, and the report written by a medical officer), Germany could deter the insured from approaching health care providers abroad, thus hindering free movement. Expenditures related to board and lodging can be considered as an integral part of the health care itself. After all, just as hospital treatment may involve a stay in hospital, health care service administered for therapeutic purposes may well, by its nature, involve admission at a spa. Although travel costs and visitor's tax are not medical in character, they are, according to the Court, "inextricably linked to the cure itself since the patient is required to travel and stay at the spa in Italy." [FN43] Consequently, the conditions for these expenditures have to be tested according to the previously accepted reason for justification. Additionally, this means that the measure taken should be necessary and that its objective cannot be reached by an alternative, less invasive measure under the same conditions (proportionality test).

The German authorities claimed that the absence of the disputed conditions would seriously harm the financial equilibrium of the German social security system if it is not accompanied by an analysis of the appropriateness and proportionality of the restrictive measure. Since they could not support that claim with well-founded arguments, the Court did not accept the general-interest reason as justification for restricting the free movement of patients. Therefore, ***584** Mr Leichtle was compensated for the additional expenditures of the health spa abroad. *A contrario*, when a Member State can show there is no less intrusive alternative equally effective as the suggested measure, or make a reasonable case for the financial instability of the system in case many people would access health spas abroad, the outcome of this case may have been different.

What has become clear from the *Leichtle* case is that national rules that restrict contracting to health institutions in the Member State exclusively are forbidden. However, the condition that a treatment should be provided by an institution listed in a so-called "Registration of Health Spas" does not necessarily hinder ac-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

cess to spa services in another Member State, since the rationale of such a measure is to ensure that the health insurance fund can check the "seriousness" of services provided by health spas, in and outside the country. [FN44] Nonetheless, the registration requirement may still have a potential hindering effect, which depends on the objectivity of the conditions for registration. Finally, the definition of the health plan entitlements, as well as the amount of reimbursement granted, remains the prerogative of the member states themselves. This is caused by the absence of harmonizing competences at Community level in the field of social security.

In the *Keller* case, the Court was confronted with the question whether EU citizens, may ask for (the reimbursement of) medical treatment outside the European Union based on European social security rules. More specific, the Court was being asked whether the granted authorisation, provided by the Spanish health authorities (Insalud) to undergo a medical treatment in a Member State (Germany), should be interpreted as an approval for a surgical operation that, in view of its extreme delicate nature and the special expertise required, could only be performed in a non-Member State private clinic (Switzerland). In other words, whether the Insalud is bound by the diagnosis and choice of treatment of the doctors authorised by the German medical bodies, and thus whether consequently there is an obligation to reimburse the costs of Keller's hospital treatment the Swiss clinic.

The Court refers to the objective of the applicable social security provision, and its function, i.e., helping to facilitate the free movement of persons covered by social insurance, and to the same extent, the provision of cross-border medical services between Member States based on Article 22 of regulation 1408/71.

***585** The achievement of the objective pursued is based on a sharing of responsibilities between the competent institution (Insalud) and the institution of the Member State of stay (Germany). Whereas the Insalud is responsible for granting authorisation for receiving health care abroad, it is for the German physicians to provide those services in accordance with the applicable German law. It follows from that rule of shared responsibilities, in correlation with the Union measures relating to the mutual recognition of diplomas of the formal qualifications of practitioners of medicine, that the Insalud is bound by the hands of the German physicians, and that it is obliged to accept and recognise the findings and choices of treatment made by those doctors. [FN45] In this particular case, Insalud gave permission to undergo surgery in Germany. Accordingly, when it has agreed to receive a medical treatment outside Spain, it is bound by the findings relating to the need for urgent vital treatment made by the authorised doctors. Similarly, Insalud is bound by the choice of treatment made by these doctors given the circumstances that the urgent treatment could only be provided outside the EU.

Under these circumstances, Ms Keller cannot be required to return to the competent authority, the Insalud, to undergo a medical examination there, when doctors in Germany considered that her state of health required urgent treatment. Moreover, asking prior approval of the Insalud would disregard the rule of shared responsibilities underlying European social security law and the principle of mutual recognition of doctors' professional skills. [FN46]

With respect to the conditions for reimbursement of the costs linked to medical treatment in a non-Member State, the Court refers to its previous rulings in which it concluded that, in principle, the insured enjoy the benefits-in-kind provided by the **health services** of the Member State of stay, on behalf of the competent authority. [FN47] In this particular case, it means that the costs of treatment borne by (the heirs of) Keller have to be reimbursed by the Insalud, in accordance with German reimbursement rules. By doing so, the Spanish insured are treated under the same conditions as insured citizens within Germany. Furthermore, it should be clear that the treatment received is among the benefits provided by the legislation of the competent member state, i.e., Spain.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

***586** The *Keller* case can be added to a series of rulings from the European Court of Justice on health care abroad. The difference from other rulings is that Keller asked for (reimbursement of) medical treatment outside the European Union, whereas previous rulings concerned in-and-out patient health care in another Member State. What makes this case interesting is the interpretation given by the Court on European social security law, more specifically the meaning of Regulation 1408/71 on the coordination of social security. Although the territorial scope of Union law is restricted to its Member States, that does not exclude its applicability when it concerns services provided outside the European Union. Essentially, this is what the Court of Justice has made clear. The Spanish government disputed such an extensive interpretation of Community law by claiming that since the medical treatment was provided outside the European Union, the outcome of the proceeding does not therefore depend on the interpretation of Union law, but is a matter exclusively for national law. [FN48] The Court parried that argument by stating that the decisive criterion for the applicability of the regulation is that the insured is affiliated to a social security scheme of a Member State. Since Ms Keller was affiliated under the Spanish Insalud, the applicability of Union law was therefore beyond doubt.

Furthermore, the Court based its decision on the rule of shared responsibilities between the home Member State and the Member State of stay. Secondly, due to the system of mutual recognition of diplomas, one may assume that German doctors are qualified and authorised to make a diagnosis and choice of treatment. Given that competence, the fact that the state to which the patient has been transferred is not a member of the European Union, is of no importance.

Finally, in the *Watts* case, the Court confirmed the interpretation on ‘undue delay’ as pointed out in the *Smits-Peerbooms* and *Müller-Fauré* rulings. In order to determine whether treatment can be obtained without undue delay in the Member State of residence (UK), the competent institution is required to have regard to all the circumstances of each case, including the patient's medical condition, the degree of pain or the nature of the patient's disability, but also his medical history. Furthermore, the competent institution cannot base its decision exclusively on the existence of waiting lists on that territory without taking into account of the specific circumstances of the patient's medical condition. [FN49] Only ***587** if the waiting time arising from the general planning objectives does not exceed a medically acceptable waiting time, the competent institution is allowed to refuse to grant authorization. In the situation opposite, the competent institution will grant authorization to receive hospital treatment abroad at the expense of the system of the state of residence.

### 4.2 *Consequences for the Dutch Health Insurance Scheme*

One may question whether the Court's case law, and in particular the recent ruling in *Keller*, has not opened a Pandora's box. Will the result be that patients, now empowered to search for the best health care services abroad, begin the eventual demise and dismantlement of the social health insurance system? The answer is, in short, no; but the implications for the Dutch -- and other -- health care schemes are considerable.

First, it is now clear that medical activities fall within the scope of the EC treaty provision on free movement of services, even hospital services. Consequently, national social security rules cannot be used to exclude application of the free movement provision. [FN50] This applies to insurance schemes, such as in the Netherlands, providing benefits-in-kind services, but also to hospital services provided by a National Health Service such as exists in the UK (*Watts*). The UK government unsuccessfully attempted to exempt NHS services from the ambit of article 50 of the EC since it provides services directly rather than reimbursing the cost of services received. The ECJ noted “that a medical service does not cease to be a provision of services because it is paid for by a national health services or by a system providing benefits-in-kind.” [FN51]

© 2011 Thomson Reuters. No claim to Orig. US Gov. Works.

Second, the Court has also, on occasion, made it clear that EU law does not undermine the power of the Member States to organise their respective social security systems. [FN52] In the absence of harmonisation at EU level, each Member State may pass legislation pursuant to which citizens have first a right or duty to be insured with a social security scheme, and, second, the conditions for entitlement to benefits. [FN53] Moreover, it is not incompatible with EU law for a ***588** Member State to establish, with a view toward achieving its aim of limiting costs, a negative list excluding certain products from reimbursement. [FN54] It follows that EU law cannot, in principle, have the effect of requiring a Member State to extend the list of medical services paid for by its social insurance system. [FN55] Nonetheless, in exercising its powers, the Member State must not disregard EU law. [FN56] Essentially, this means that the list of insured medical treatments must be drawn up in accordance with objective criteria, which are known in advance, and without reference to the origin of the service (non-discrimination). In the Netherlands, the health insurance system is not based on a pre-established list of types of treatment for which payment will be guaranteed; rather the Health Insurance Act has choosen a 'functional description' of the care covered by the insurance package. Whereas the law sets the legal requirements for what entitlements include, it is up to the provider and insurance fund who provides the care and where. Furthermore, the legislature has enacted a general rule providing that the care provided will also be determined by the state of medical science and practice" [FN57] It is thus largely up to the discretion of the health insurance funds to decide which types of treatment satisfy that condition; however, in applying that criterion, these funds must now interpret the criterion on the basis of what is sufficiently tried and tested by international medical science. [FN58] This could mean that where a certain treatment has sufficiently been tried and tested by international science, authorisation by the insurance fund could not be refused on the grounds that it is not presently provided in the Netherlands. The only justifiable reason to refuse approval is where, given the need to maintain an adequate supply of hospital care and to ensure the financial ***589** stability of the sickness insurance system, the "same or equally effective treatment can be obtained without undue delay" at a contracted provider. [FN59] It should be noted that in determining whether "the same or equally effective treatment can be obtained without undue delay," the mere fact that a person is on a waiting list does not necessarily mean that the treatment is unavailable. [FN60] "Undue delay" should be determined as the period within which medical treatment is necessary with respect to the patient's medical condition and history. Moreover, those Member States, like the Netherlands, that use the "normal criterion" in determining entitlements to coverage will not be required to allow their citizens to obtain treatment in any hospital in any EU country unless that treatment is both accepted in international medical circles and is not sufficiently available in the home country (medical necessity criterion). [FN61]

Third, patients are now entitled to search for non-hospital services abroad that are not available in their home country or, if available, are not available in a timely fashion (*Müller-Fauré/Van Riet*). One should keep in mind, however, that without prior authorisation, social health insurance funds are still fully entitled to reimburse only costs up to the maximum amount that is applicable in the country of residence. For that reason, the Court did not consider the removal of the administrative prior authorisation condition to be a serious threat to the financial balance of the social security system, since it had to bear the cost of treatment when received in the patient's home country anyway. Patients seeking non-hospital care in other EU nations without prior authorization must bear any additional costs above and beyond the relevant tariff that provided for in the relevant tariff in their own country.

Fourth, as mentioned above, the larger public interest in maintaining a sustainable social insurance system may be accepted as justifying barriers to freedom to provide medical services in the context of hospital infrastructure. [FN62] Member ***590** States need to determine whether their respective national rules can be legitimately justified in the light of such overriding reasons. In accordance with settled case law, it is necessary to ensure that they do not exceed what is objectively necessary for the given purpose and that the same result cannot be achieved by less restrictive rules. As determined in *Müller-Fauré/Van Riet* and *Watts*, these

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

requirements apply regardless of the type or nature of the health care system (e.g., whether a social insurance system as in the Netherlands or a national health service as in the U.K.). [FN63]

Fifth, the various ECJ rulings leave some unsettled questions particularly given that the difference between hospital (inpatient) and non-hospital (outpatient) care is not always that clear. [FN64] For example, some surgical services may be provided in a hospital or in an outpatient clinic. Moreover, certain types of care are only partly hospital-based, e.g., hospital treatment combined with admission to an outpatient clinic. Disagreement about the nature of the provided care concerned may give rise to legal uncertainty among the insured and cause an increase in litigation. Patients need to be particularly aware of whether or not the provided services will be classified as a hospital service. In such a case if a patient has not obtained prior authorization before receiving treatment in another Member State, then he or she may be denied reimbursement. [FN65] In a previous ruling, the ECJ confirmed the nexus between the need for prior authorization and hospitalization finding that where the "multidisciplinary treatment of pain which the claimant envisages [ ... ] involves her hospitalization, then this necessitated the patient obtaining prior authorisation." [FN66] In contrast, the District Court in Maastricht concluded that a special type of physiotherapy, which requires hospital admission, should not be considered to be hospital care, since it is generally qualified as non-hospital care. [FN67]

***591** These contrasting cases demonstrate that the difficult question of what constitutes hospital or non-hospital care is decisive for determining whether prior authorisation is required and thus whether patients will be reimbursed for the costs of treatment received in other Member States. However, in some cases there may be no *communis opinio* among medical professionals about whether or not hospitalization is necessary. In that case, patients searching for alternative treatment options in other Member States without prior authorisation take a considerable financial risk. Arguably at least, hospitalization should be interpreted in the patient's favour (as opposed to the national authorities'), meaning that the place of actual treatment should be decisive in interpreting whether hospitalization is required. [FN68] Any other interpretation may create a perverse incentive for social insurance funds to organise outpatient care in a hospital sphere for merely opportunistic reasons. [FN69]

Sixth and finally, based on the Court's extensive interpretation of the patient mobility provision in the *Keller* ruling, in exceptional cases, health insurance funds can be forced to reimburse the costs of planned treatment in a country outside of the EU. However, as a rule, the treatment provided, should be recognised by the Member State of stays' national law.

In sum, there is no doubt that the Court's jurisprudence on patient mobility has significantly contributed to the development of a corpus of rights to access health care, although one may question whether the Court has gone too far at the battlefield of cross-border care. In contrast to Field Marshal Montgomery's experience with World War II's most tragic blunder, Operation Market Garden at the bridge of Arnhem, the Court has succeeded to force a break in the Dutch and other Member States' line of defence on social security. [FN70] Starting with the *Decker* and *Kohll* ruling, further case law has extended the patient's ***592** options to receive health care abroad and simplified the necessary conditions, and simultaneously, taking into account the public interest. In this respect, the *Watts* case was definitely not the last battle in this area. By strengthening the rights of patients, there is no bridge too far. The importance of the Court's role in patient mobility issues has been confirmed by the latest withdrawal of the Commission's proposal on regulating patient mobility in a framework Directive. Due to internal disagreement within the Commission and heavy criticism from some MEP's, the controversial proposal was shelved. In terms of content, the framework Directive was expected to set out clear rules on which institution is responsible for covering the costs and securing quality of cross-border treatment.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

## 5. International legal concerns

Although the "*Zorgverzekeringswet*" has been inspired by both international and European law, critics have questioned the law's conformity with treaty law. [FN71] So far, that debate was primarily focussing on the new role of health insurance entities when introducing a degree of competition in health insurance in relation to EU law.

However, little attention has been paid to the international legal consequences of the introduction of cost-sharing measures, such as the (withdrawn) no-claim refund and compulsory co-payments. Although cost-sharing measures may be successful to achieve the goal of cost-reduction, there may be serious consequences for certain categories of patients (e.g., chronically ill, low income patients). As a rule, cost-sharing should be so designed as to avoid hardship, but considering the amount of co-payments, in combination with the introduced fixed premium, there is a serious risk that the total costs will exceed the specified percentages as set in the (revised) European Social Security Code and therefore ***593** violate the Treaty hardship-clause. [FN72] In a way, history may repeat itself given the Central Appeals Tribunal's ruling prohibiting co-payments for maternity care. [FN73]

The hardship-clause can be considered the Code's equivalent of the "standstill" provision, as it is known in international treaty law. In the International Covenant on Economic, Social and Cultural Rights (ICESCR), the standstill clause has been defined as "[a]ny deliberately retrogressive measure would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided by the Covenant and in the context of the full use of the maximum available resources." [FN74] Although the standstill-clause is not absolute, "there is a strong presumption of impermissibility of any retrogressive measure," explained by the State party. [FN75] Also in that respect, a retrogressive measure such as the co-payment arrangement, is highly questionable, and can only be justified by means of the 'healthcare allowances' to be introduced simultaneously with the "Zorgverzekeringswet." [FN76] But in case ***594** such a grant appears insufficient, and the financial burden hinders the effectiveness of medical protection to (high-risk) persons, the impermissibility of the cost-sharing measure revives, causing a violation of the Treaty's core obligation. [FN77] Whether or not the judiciary would accept such a hardship or standstill argument remains to be seen. First of all, it requires hard evidence of the retrogressive effects of the new law.

## 6. Final Remarks

It is clear that international law, including European Union law, has had a significant influence on guaranteeing access to healthcare in the Netherlands. International legal norms conceptualise the content of the healthcare right, whereas the judiciary confirmed the enforceabilty of such a right in terms of benefit entitlements. Moreover, the European Court of Justice, with its rulings on patient mobility has extended the meaning of such a right, in the Netherlands and abroad.

There are, however, also reasons for concern. Generally interpreted as a social security right in the Netherlands, access to healthcare is based on the concept of solidarity and equality. With the new Health Insurance Act, introducing cost-sharing measures that may affect high-risk persons disproportionally, a change towards a more restricted notion of solidarity is emerging. Although the government claims that the new Health Insurance Law does not alter the nature of the social health insurance scheme, the competitive and for-profit nature of the insurance and providers market, or the increased elements of capitalisation (e.g., co-payments, medical care saving accounts considerations, etc.), the evidence is otherwise. It reflects a gradual shift from social towards more direct insurance that seems difficult to match with the solidarity notion, at least in terms of European and international law. The development of liberalizing the health (insurance) market challenges the country's autonomy to define the entitlements, as well as setting conditions restricting ac-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

cess to healthcare. A simple referral to the financial sustainability clause will not be sufficient to convince the judiciary of the importance of access' restrictive measures. As such, international treaty law challenges the future sustainability of the system ***595** and thus, ironically, may result in retrenchment in the entitlements as seen in the Netherlands.

[FNa1]. Lecturer in Health law, Erasmus University Medical Center/ Erasmus University Rotterdam, The Netherlands.

[FN1]. E.g., A. P. den Exter and H. E. G. M. Hermans, "The Constitutional Right to Healthcare," *European Journal of Health Law* 3 (1998): 261-290; A. P. den Exter and H. E. G. M. Hermans, eds., *The Right to Healthcare in Several European Countries* (The Hague: Kluwer Law International, 1999); A. P. den Exter, "The Right to Healthcare in International Law," in A. P. den Exter and J. Sándor, eds., *Frontiers of European Health Law* (Rottendam: Erasmus University Press, 2003): 12-26; B. C. A. Toebes, *The Right to Health as a Human Right in International Law* (Antwerp: Intersenntia, 1999).

[FN2]. A. den Exter and M. Buijsen, "Keuze voor Solidariteit. Kanttekeningen bij het Voorstel Zorgverzekeringswet," ("In Favour of Solidarity," in Dutch) *TvGR* (*Journal of Dutch Health Law*) 1 (2005): 111-117.

[FN3]. As an exception to that rule, the courts may review the constitutionality in terms of international and European law.

[FN4]. According to Article 22(1) of the Dutch Basic Law the authorities shall take steps to promote public health. This provision has been generally interpreted as a "mere" obligation of the government to be concerned with setting up health facilities and facilitating access to necessary healthcare. A. P. den Exter and H. E. G. M. Hermans, o.c. (1999): 271.

[FN5]. The "*Zorgverzekeringswet*" (Zvw) came into force on January 1, 2006; (Official Journal of the State 2005): 358. An English summary of the new Health Insurance Act is available at http://www.minvws.nl Next to the *Zvw*, there is a universal scheme covering the whole population, the so-called "AWBZ"-scheme covering exceptional medical expenses. Beyond these compulsory schemes, citizens may opt for an additional private insurance policy.

[FN6]. The conditions differ by type of care and include prescription by a general practitioner, quantitative maxima for prescribed pharmaceuticals and prior approval by the insurance fund.

[FN7]. Appeal court's Hertogenbosch July 2, 1990 (RZA 1990): 127.

[FN19]. The Lisbon Treaty will replace the previous Treaty of the European Union incorporating previous amendments, OJ 2007/C 306. The new Treaty (including the Human Rights Protocol) will replace the EU Constitutional Treaty that was rejected in France and the Netherlands by referendum.

[FN20]. P. J. G. Kaptcyn and P. Verloren van Themaat, 3rd ed., *Introduction to the Law of the European Communities* (London: Kluwer Law Int., 1998): 77, confirmed by the ECJ's landmark case *Van Gent en Loos* ECR (1963): 1.

[FN21]. Treaty establishing the European Community (Amsterdam consolidated version). Official Journal C 325 of December 24, 2002 Hereafter, references to the treaty refer to this version, available at <http://europe.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf> (last visited October 4, 2005).

© 2011 Thomson Reuters. No claim to Orig. US Gov. Works.

[FN22]. Inter alia, articles 94 and 308 EC. Both provisions are aimed at the realisation of the common market. Further restriction of intra-communautaire trade however, can be found in other relevant treaty provisions aimed at the protection of health and life of humans, for instance article 30 EC.

[FN23]. And therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community, Article 5 EC.

[FN24]. H. D. C. Roscam Abbing, "Public Health in the Treaty of Amsterdam," *European Journal of Health Law* 2 (1998): 173.

[FN25]. A. P. van der Mei and L. Waddington, "Public Health and the Treaty of Amsterdam," *European Journal of Health Law* 2 (1998): 135.

[FN26]. Article 152(4)(a)(b) EC.

[FN27]. EC competition rules fall out of the scope of this paper since these principles are primarily of relevance in the context of competition among health providers and social health insurance funds. See, for instance, T. S. Jost, D. Dawson and A. P. den Exter. "The Role of Competition in Health Care: A Western European Perspective" *Journal of Health Politics, Policy and Law* vol 31, no 3 2006, pp. 687-703; see also: A.P. den Exter. "Blending Private and Social Health Insurance in the Netherlands: Challenges Posed by the EU" in C.M. Flood, K Roach and L. Sossin, eds., *Access to Care Access to Justice. The Legal Debate over Private Health Insurance in Canada*. Toronto: University of Toronto Press, (2005): 257-277.

[FN28]. E.g., the mutual recognition directives, which facilitate a general system for the recognition of diplomas of certain health professionals (Directives 89/48/EEC and 92/51/EEC), recently replaced by the new Professional Qualification Directive 2005/36/EC.

[FN29]. Social security co-ordination regulation 1408/71 OJ No. L149 of July 5, 1971 as amended by Regulation 859/2003 of May 14,2003 PB No. L 124, 20/5/2003. In the near future Regulation 1408/71 is due to be replaced by Regulation 883/2004 simplifying and modenising the coordination of social security schemes. Article 91 of the new Regulation provides that Regulation 1408/71 will continue to apply until the entry into force of the implementing regulation. The Commission has put forward a proposal for an implementing measure (COM(2006)16).

[FN30]. Art 234 EC.

[FN31]. *Decker v. Caisse de Maladie des Employés Privés* C-120/5 (1998) ECR I-1831 and *Kohll v. Union des Caisses de Maladie* C-158/96 (1998) ECR 1-1931. The European Court of Justice overruled the pertinent Luxembourg regulations, which made reimbursement by the social security system of medical services provided in another Member State -- respectively orthodontic treatment and the supply of spectacles -- conditional on prior authorisation. The Decker and Kohll ruling has initiated a number of cases questioning the Dutch health insurance system, e.g., *Geraerts-Smits/Peerbooms* C-157/99 (2001) ECR 1-5473; *Müller-Fauré/Van Riet* C-385/99, (2003) ECR 1-4409; *Van der Duin v Onderlinge Waarborgmaatschappij ANOZ Zorgverzekeringen and Onderlinge Waarborgmaatschappij ANOZ Zorgverzekeringen v Van Wegberg-van Brederode* C-156/01 (2003) ECR 1-7045, *Inizan v. Caisse primaire d'assurance maladie des Hauts-de-Seine* C-56/01, (2003) ECR 1-12403; *Leichtle* C-8/02 (2004), ECR I-2641, *Keller* C-145/03 (2005), ECR.I-2529; and *Watts* C-372/04.(2006) ECR 1-4325

[FN32]. Smits/Peerbooms; Müller-Fauré/Van Riet; Van der Duin, and Wegberg-van Brederode, see note 31

[FN33]. In a benefit-of-kind system, the insured is entitled only to statutory benefits, provided by health pro-

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

viders having an agreement with sickness funds. This is different from a reimbursement system in which health insurers reimburse the costs of treatment to the insured. In such a model there is no contractual relationship between the health insurer and the health provider.

[FN34]. Based on settled case-law of the Central Appeals Tribunal (CRvB) May 23, 1995 (RZA 1995) No. 126.

[FN35]. Smits/Peerbooms, note 31, at para 96.

[FN36]. Smits/Peerbooms, note 31, at para 98.

[FN37]. H. A. G. Temmink, "Kroniek van het Europees recht (European law column, in Dutch)," *Nederlands Juristenblad* 31 (2001): 1502.

[FN38]. Müller-Fauré, note 31.

[FN39]. Müller-Fauré, *ibid*, para 77.

[FN40]. Müller-Fauré, *ibid*, para 85. Under the proportionality test, if a less invasive alternative measure or arrangement could perform an assigned task under the same conditions as the arrangement being challenged, the less invasive alternative should be chosen.

[FN41]. Müller-Fauré, *ibid*, para 95.

[FN42]. *Ludwig Leichtle v. Bundesanstalt für Arbeit* Case C-8/02 (2004), ECR I-2641, and the Keller case, *Keller v. Instituto Nacional de Gestión Sanitaria* (Ingesa), formerly Institute Nacional de la Salud (Insalud) being discussed by the author in: A. P. den Exter, "Patient Mobility in the European Union: Health Spas in Italy," *Croatian Medical Journal* 46, no. 2 (2005): 197-200; A. P. den Exter, "The European Court of Justice and the Keller case: A Bridge too Far?" *Medicine and Law* (2005), and *Watts* being discussed by Chris Newdick in his contribution "*Solidarity, Rights and Social Welfare in the NHS--Resisting the Tide of Bioethics?*"

[FN43]. Leichtle, note 42, para. 35.

[FN44]. Conclusion A-G Ruiz-Jarabo Colomer, Case C-8/02. ECR (2004): note 42, para 34.

[FN45]. Keller, note 42, para. 50.

[FN46]. Keller, note 42, para. 57.

[FN47]. Vanbraekel C-368/98, ECR (2001) 1-5363, para 32.

[FN48]. Keller, note 42, para. 37.

[FN49]. At para. 63.

[FN50]. Smits/Peerbooms, note 31, para. 54.

[FN51]. Müller-Fauré, note 31, para. 103, Watts, para. 89.

[FN52]. Duphar and Others C-238/82 (1984) ECR 1-523 para. 16 and Case C-158/96; Kohll, note 31, para. 17.

[FN53]. E.g., Kohll para. 18. In the Dutch situation, the nature and scope of entitlements are being set by the

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

main social insurance scheme, the new Health Insurance Act (Zvw).

[FN54]. Duphar and Others para. 16.

[FN55]. Smits/Peerbooms, note 31, para. 87.

[FN56]. This means, for instance, that they should respect basic community principles, including the non-discrimination principle. *Ferlini v. Centre hospitalier de Luxembourg* C-411/98 (2000), ECR 1-8081. In this case, the Court ruled that the application, on a unilateral basis, by a group of healthcare providers to EU officials of scales of fees for medical and hospital maternity care that are higher than those applicable to residents affiliated to the national social security scheme constitutes discrimination on the ground of nationality prohibited under Article 12(1) EC, in the absence of objective justification.

[FN57]. Besluit Zorgverzekeringswet artikel 2.1 sub 2, 28 June 2005.

[FN58]. This means, for instance, to include evidence from clinical randomized controlled trails (stage Ill studies), see, Health Care Insurance Board (CVZ) February 22, 2005 (RZA 2005): 37; District Court Utrecht, December 8, 2004 (RZA 2005): 58.

[FN59]. Smits/Peerbooms, note 31, para. 103.

[FN60]. Here, the Central Appeals Tribunal refers to standards, so-called "Treek-normen," defining the maximum acceptable waiting time for a specific medical intervention. The underlying idea is that hospitals, for planning and efficiency reasons, need a certain waiting time, CRvB June 18, 2004, para. 92. Also, CRvB June 18, 2004, USZ 2004/277, 11 month waiting time for a hip replacement is not considered as "timely."

[FN61]. CRvB 5 November 2003, USZ 2004/17; CRvB July 20, 2004 identical treatment timely available.

[FN62]. Kohll, *supra* note 31, para. 41; Müller-Fauré/Van Riet, note 31, para. 72.

[FN63]. Müller-Fauré and Watts.

[FN64]. As a rule, the Health Care Insurance Board (CVZ) decided that hospital care requires at least one day admission in an hospital institution. Letter no 03/35, June 25, 2003.

[FN65]. Also suggested by Advocate General Colomer in his opinion on Smits/Peerbooms, *supra* note 31, para. 61. The risk of denial of reimbursement is also present in case a non-hospital treatment still requires hospital admission, for instance due to medical complications. In such a case, since prior authorisation is absent, the costs of hospital admission and treatment will not be reimbursed.

[FN66]. *Inizan v. Caisse Primaire d'Assurance Maladie des Hauts-de-Seine* C-56/01 (2003) E.C.R. I-12403 at para. 55.

[FN67]. Maastricht District Court, September 26, 2003, AL3183, the Netherlands.

[FN68]. See also G. Davies, "Health and Efficiency: Community Law and National Health Systems in the Light of Müller-Fauré," *Modern Law Review* 67, no. 1 (2004): 103.

[FN69]. A similar interpretation - mutatis mutandis - was used by the Court in the Vanbraekel case, note 47, when ruling that the level of reimbursement for foreign hospital services should have been the same had the same services been received in the home country.

[FN70]. Operation Market Garden was aimed at crossing the bridge of Arnhem, near the German borders, in

© 2011 Thomson Reuters. No claim to Orig. US Gov. Works.

order to march on to Berlin. Unfortunately, British paratroops were dropped behind enemy lines, whereas allied forces could not release them since the German army occupied the bridge over the river Rhine. This historic battle inspired Hollywood filmmakers to shoot a film titled "ABridge Too Far."

[FN71]. E.g., A. P. den Exter, "De Europese kwetsbaarheid van de Zorgverzekeringswet (EU legal implications of the new Health Insurance Act)," *NJB, Dutch Law Journal* 2 (2005): 87-93; see also, A. P. den Exter, ed., *Competitive Social Health Insurance; Yearbook 2004* (Rotterdam; Erasmus University Press, 2005); and: "De Zorgverzekeringswet en GATS: een controverse?" In: De veellagige rechtsorde. E. Ten Napel en Hendriks (red.) Kluwer law international, The Hague, 2007, p. 95-106

[FN72]. Under the hardship-clause, cost sharing measures are limited to a certain level. In this respect, see the Resolutions from the Council of Ministers of the Council of Europe, in which cost-sharing measures were considered incompatible with the European Code (Part IV): CSS(86)10, February 17, 1986; resolution CSS (87) 10, March 12, 1987, and resolution CSS (90) 11, February 21, 1990.

[FN73]. See also, M. W. Wetters-Bronsgeest. "Eigen bijdragen aan een zijden draadje? (Own payments by a threat, in Dutch)," *Rechtspraak Zorgverzekering, RZA* (2004): 979-980. The European Code corresponds to ILO Convention 102, but foresees in (maximized) co-payments but avoiding hardship. In this respect, see also not 11, the CRvB ruling of 8 September 2006. Although it concerned the ILO Convention 102 (already withdrawn by the Dutch government), it ruled that co-payments were a violation of the European Code (Part VI).

[FN74]. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment no. 3, at 9. The nature of State parties obligations, Art. 2(1) UN Doc. E/1991/23 Fifth session, 1990.

[FN75]. General Comment no. 14. The right to the highest attainable standard of health (Art. 12, par. 1), UN Doc. E/C12/2000/4 (Twenty second session, 2000): at 32.

[FN76]. Under the new regime, the insured pay a nominal insurance premium to their health insurer. To keep the health insurance system financially affordable for all, a "healthcare allowance" was introduced. But that allowance will not compensate premium cost entirely, standstill clause is not absolute, see: M. M. Sepúlveda Carmona, "The Obligations of the State under the International Covenant on Economic, Social and Cultural Rights." *Utrecht University* (diss.) (2002): 348-349.

[FN77]. Concluding Observations Iraq UN Doc. E/1998/22, at 253, in which the UN Committee concluded that economic sanctions imposed by the UN on Iraq do not justify retrogressive measures towards Iraq's treaty obligation to guarantee food and pharmaceuticals. Although the ??(mt,ibd,d101308)
27 Med. & L. 569

END OF DOCUMENT

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

Medicine and Law
December, 2009

**Patients**' Rights

# *661 PATIENT MOBILITY IN THE EUROPEAN UNION: PUSHING FOR EU INTERNAL HEALTH MARKET

Iris Goldner Lang [FNa1]

Copyright © 2009 by Probook; Iris Goldner Lang

**Abstract:** Having access to high-quality healthcare is a priority issue for **European** citizens and is recognised by the Charter of Fundamental Rights of the EU. The right to healthcare also encompasses situations where **patients** travel from one EU Member State to another and receive treatment there. This paper will explore the contradictory relation between the competence of EU Member States to regulate their health systems on their own, on the one hand, and free movement of services in the **European Union**, on the other hand. It will discuss the consequences of the decisions of the **European** Court of Justice in this field and the provisions of the Proposal for a Directive on **Patients**' Rights in Cross-Border Healthcare, especially in the light of opening up of EU Member States' healthcare markets, the need to control national healthcare expenditures and to protect the welfare state and the population of the host state.

**Keywords:** EU Health Law; Free Movement of Services; Reimbursement; Overriding Reasons of General Interest; Public Health; Cross-Border Movement; Welfare State; Solidarity.

## 1. INTRODUCTION

Even though healthcare services are usually provided on a territorial basis, with the general trend of movement of service providers, service recipients and services themselves (e-health), healthcare services are becoming more and more mobile and accessible cross-border. Cross-border movement between two EU Member States of service providers, service recipients or services themselves, triggers the application of EC law. Article 49 EC states that ***662** "... restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended". Article 50(3) EC elaborates that " ... the person providing the service may, in order to do so, temporarily pursue his activity in the State, where the service is provided, under the same conditions as are imposed by that State on its own nationals". Even though these provisions refer to the situation where the service provider moves, the European Court of Justice (ECJ) has long ago established that these provisions afford protection no matter whether the movement is associated with the service provider, service recipient or the service itself. [FN1] Furthermore, when interpreted narrowly, these provisions would provide protection only against discriminatory measures. However, in its more recent case-law, the ECJ has held that Article 49 EC requires elimination of any discriminatory and non-discriminatory measure which prohibits or otherwise impedes the exercise of the market freedom. [FN2] The test of market access is now crucial in assessing whether a national measure comes within the scope of application of the relevant EC Treaty provision.

## 2. HEALTHCARE SERVICE UNDER EC LAW - THE EUROPEAN COURT OF JUSTICE TAKING

© 2011 Thomson Reuters. No claim to Orig. US Gov. Works.

**THE LEADING ROLE**

The European Court of Justice has asserted that as healthcare services are provided for remuneration, they must be regarded as services within the meaning of EC Treaty. [FN3] It has held that the special nature of social security services does not remove them from the ambit of the fundamental principle of freedom of movement. [FN4] Furthermore, the Court has held that the patient need not ***663** personally pay for the service in order to satisfy the remuneration requirement. The principle of free movement applies also in cases when the payment is made by the sickness insurance fund or by general taxation. [FN5] However, granting EU citizens the right to go to another Member State in order to receive treatment creates a new problem feared by the Member States - one has to establish who pays for such treatment.

Member States wanted to ensure their competence over national healthcare expenditures by expressly stating such right in the Treaty of Maastricht. Article 152 EC stipulates that "Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of healthcare services and medical care", thus relying on the principle of subsidiarity. [FN6] The ECJ has affirmed that the organisation and delivery of healthcare services is the responsibility of the Member States. [FN7] Therefore, the right of Community institutions to legislate the provision of healthcare services in compliance with Art. 152 EC is rather limited and confined to cross-border situations, thanks to the application of free movement rules. However, the EU has adopted a number of measures that have an impact on healthcare by using other legal bases. [FN8]

Healthcare services were removed from the Bolkenstein Directive so that its final version, Directive 2006/123 on services, no longer applies to healthcare services. The Commission's attempt to produce a draft measure dealing exclusively with cross-border provision of healthcare services had previously been blocked in its nucleus phase. There was no political will, on the side of EU Member States, for positive integration in the sphere of EU health law. Commission's arguments that such an initiative would provide legal clarity and certainty, so far lacking as regards the application of the EC Treaty provisions on free movement of healthcare services, had not produced any results on this ***664** controversial matter. [FN9] After its previous failures to deal with this topic, due to strong opposition of some Member States and MEPs, the Commission implied it would not approach this issue in its current mandate expiring in autumn 2009. [FN10] However, after a switch in the post of EU health commissioner, the Commission decided to give it another try and on 2 July 2008 managed to bring to light a Proposal for a Directive on the Application of Patients' Rights in Cross-Border Healthcare. [FN11]

On the other hand, the ECJ has been consistently developing its case-law in this area, probably contributing to legal uncertainty and possibly jeopardising the principle of solidarity and financial sustainability of national healthcare systems. [FN12] In this endeavour, the Court has relied on free movement rules as the legal basis for reaching its judgments. Court's rulings have, therefore, indirectly relaxed the rule of Member States' right to organise their healthcare systems on their own. [FN13] They have entered the field of healthcare through the ***665** back door via free movement rules. Such negative integration promotes patients' rights to choose where to receive healthcare services and get reimbursed from their home health insurance. In its decisions, the ECJ has stated, a number of times, that national measures breached Article 49 EC and could not be justified, [FN14] at the same time bending the rule stated in Article 22 of the Social Security Regulation 1408/71. [FN15] Other values, such as financial sustainability of the national healthcare system, solidarity and public health, might be at a loss here. For this reason, the ECJ has, sometimes, recognised such values as acceptable justifications for the patient's home Member State (Member State of patient's insurance) to impose the requirement of prior authorisation of cross-border health services for the purpose of reimbursement. Therefore, in a number of instances the Court has accepted such justifications for national prior authorisation for cross-border hospital care, but not for non-hospital care. [FN16] The Court has held that prior authorisation for hospital care is necessary and reasonable in order to guarantee a "high-quality,

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

balanced, medical and hospital service open to all". [FN17]

### 3. PROPOSAL FOR A DIRECTIVE ON THE APPLICATION OF PATIENTS' RIGHTS IN CROSS-BORDER HEALTHCARE

After repeated failures and lengthy internal consultations, resulting from the opposition of some Member States and MEPs, the Commission finally published its Proposal for a Directive on the Application of Patients' Rights in Cross-Border Healthcare on 2 July 2008. Unlike its earlier intention to draft a more general framework directive for cross-border healthcare, the 2008 Draft Directive exclusively covers patients' rights to obtain treatment in another Member State and have it reimbursed, without addressing other aspects of free movement - free movement of healthcare providers and healthcare services. In this respect, the 2008 Draft Directive is much narrower in its ***666** application. Nevertheless, the Draft Directive relies on and codifies the ECJ's case-law on the subject, trying to create legal certainty that has been missing so far, as it was not always easy to figure out how to apply the principles set by the Court generally. The Proposal, therefore, does not bring any major changes in comparison to the existing case-law of the ECJ, but develops and streamlines the principles already set by the Court. Following the Court's judgements, it grants EU citizens the right to be treated cross-border and be reimbursed for such treatment. However, reimbursement can be received only up to the level of costs that would have been assumed had such treatment been provided in the home Member State but not exceeding the actual costs, and only for the kind of treatment for which a patient would also be reimbursed if treated in his/her home Member State. [FN18] Citizens have the right to seek non-hospital care in another Member State without prior authorisation while Member States may put in place a system of prior authorisation for hospital care. [FN19] Such distinction between hospital and non-hospital care is explained by the statement that there is no evidence to suggest that non-hospital care would undermine either the financial sustainability of social security systems or the organisation, planning and delivery of health services, so that prior authorisation cannot be justified. [FN20] However, the Member State of patient's insurance (home Member State) may set limitations on the choice of the provider and other features of the treatment on patients seeking cross-border non-hospital care provided such requirements are applied also internally and non-discriminatory and they respect freedom of movement for persons. [FN21]

What are the possible drawbacks of the Draft Directive? First, one could argue that it gives priority to fundamental freedoms, in this case free movement of services, over the need to protect the welfare state. As its legal basis, the Draft Directive relies on Art. 95 EC which enables the Council to adopt measures for the approximation of Member States' laws "which have as their object the establishment and functioning of the internal market". The Explanatory Memorandum attached to the Draft Directive states that "the aim of this proposal is to establish a general framework for provision of safe, high quality and efficient ***667** cross-border healthcare in the European Union and to ensure free movement of health services and a high level of health protection, whilst fully respecting the responsibilities of the Member States for the organisation and delivery of health services and medical care". It adds that the proposal is "therefore fully in line with the requirements of both Art. 95 and 152 EC". However, a Member State representative has argued that "the acceptability of EU jurisdiction as a basis for the Directive is questionable". [FN22] Furthermore, such an approach, which relies on the objective, set by Art. 95 EC of establishing and promoting the EU internal market puts market freedoms in the spotlight while placing the interests of a welfare state more peripherally. The need to protect the welfare state, seems to mainly serve the purpose of justifying a national measure that restricts free movement of health services according to EC law. This means that EU Member States are prohibited from adopting national measures that would in any way "prohibit or otherwise impede" [FN23] cross-border movement of health services. Such measures are only exceptionally compatible with EC law provided they can be justified by "imperative reasons relating to the public interest", [FN24] and the protection of the welfare state can be seen as one of such imperative reasons of public interest, as has already been recognised by the European Court of Justice. [FN25] Member States' requirement of prior authorisation for

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

hospital care, even though restricting free movement of health services, might therefore be justified by the imperative reason to protect the welfare state, provided such a requirement is applied in a non-discriminatory and proportionate manner. For this reason one could claim that the protection and promotion of the welfare state is not the aim of the Draft Directive, but serves only as a safeguard criterion to allow national measures which, even though restricting free movement of health services, should be justified by imperative reasons of general interest.

The second possible drawback of the Draft Directive is articulated in the frequently expressed criticism of its inadequate protection of solidarity and ***668** equity. [FN26] This criticism is primarily based on the need for patients to first pay for the care themselves before being able to seek reimbursement, [FN27] but also on the fact that patients can only get reimbursed for the treatment but not for other costs, such as travel costs. The fact that the Draft Directive has opted for the approach which obliges patients to pay for treatment before getting reimbursed is not novel to health insurance regimes of some Member States. However, such an approach might be interpreted as compromising equal access to healthcare and prioritising wealthy citizens over the poor ones. Furthermore, the fact that the Draft Directive does not provide for reimbursement of travel costs might play a role in reducing the incentive to receive health services cross-border.

Thirdly, the Draft Directive could lead to potential overloading of certain hospitals, thus creating or widening the gap between different Member States. Even though only 4% of EU citizens received medical treatment in another Member State between May 2006 and May 2007 [FN28] and expectations of significant numbers of patients crossing borders have not materialised, [FN29] it is probable that with the adoption of the new Directive, EU citizens will seek more cross-border treatment, especially in case the patient's home Member State does not provide the same quality treatment. This statement is supported by the figures showing that one of the top motives for EU citizens to be willing to travel to another Member State for the purpose of treatment is the hope of better quality. [FN30] On the other hand, fostering a more equal level of quality ***669** treatment across the EU does not seem to be the aim of this Directive. Some commentators have therefore remarked that the EU should first focus on facilitating the same level of quality care throughout Member States, thus minimizing the possibility of overloading certain hospitals and of widening the gap between different Member States. [FN31]

On a more positive note, the Draft Directive has a number of advantages. It strengthens legal certainty in this area, promotes EU internal market freedoms and focuses on patients and their right to choose. When adopted, it will facilitate treatment in tourist centres and in border regions where the nearest medical facility is in another Member. It will also make more accessible specialised treatment which might be best provided cross-border. However, it remains uncertain whether the Draft Directive becomes adopted. The EU health ministers' meeting on 16 December 2008 portrayed the remaining division among EU Member States over the Draft Directive. [FN32] Some ministers reaffirmed their fears about losing national sovereignty over healthcare. The functioning of the principle of prior authorisation for healthcare reimbursement, as well as the definition of “hospital” and “non-hospital” care and “specialised” care were also matters of concern. When defining the meaning of these terms, it seems crucial whether Member States or EU institutions will be the ones authorised to give the final say. Leaving the definitions to EU institutions would prevent any abuse or discrepancies among Member States. The Draft Directive is supposed to be discussed by ministers for Employment, Social Affairs, Health and Consumer Affairs Council of 8-9 June 2009 and the European Parliament is expected to issue its opinion in spring 2009. Even though the first reading in the European Parliament may take place in spring 2009, the readings will have to be started all over again after the June 2009 parliamentary elections. When adopted, Member States will have one year to implement the Directive. [FN33]

***670 4. CONCLUSIONS**

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

The development of the ECJ's case-law has led to the opening up of the healthcare market in the EU, consequently making health services more easily accessible to individuals, but also indirectly affecting Member States' organisation and management of their healthcare systems. Member States have shown greater concern about the potential internal effects of such rulings on their healthcare systems (such as quality control, financial sustainability, exclusive contracting between social security institutions and healthcare providers) than about a massive inflow or outflow of patients. [FN34] ECJ's rulings in this area have lead to the current Proposal of the draft Directive on the Application of Patients' Rights in Cross-Border Healthcare. However, at least in some Member States the Draft Directive has been met with anxiety and recognised as an assault of Member States' right to organise their national health (insurance) systems. The future of the Draft Directive is, therefore, uncertain. On the other hand, ECJ's rulings and the Draft Directive might result in more proactive Member States' healthcare policies, integrating foreign supply into national healthcare planning, and possibly easing long waiting lists in some Member States. [FN35]

Generally speaking, Member States' fear addresses a difficult issue as to how to reconcile patients' rights to have access to health services cross-border and get reimbursed for such services, with the need to provide adequate treatment and equal access to health services to the population as a whole, at the same ***671** time preserving the sustainability of the health (insurance) systems. [FN36] When perceived from another angle, the question remains as to how to maintain national sovereignty over healthcare without, at the same time, reducing or blocking further development of individual rights to access health services cross-border and get reimbursed for the treatment. [FN37] In its future judgements, the ECJ will have to be careful not to undermine the basic notion of a welfare state when applying market principles to health services. The special nature of health services, recognised by the Court, should not be forgotten in future case-law. In this context, the Court will have to play an important role of interpreting the future Directive by finding the right balance between market freedoms and general interests (such as financial sustainability of the national healthcare system, solidarity and public health) and, thus, preserving the principle of proportionality.

[FNa1]. Dr. LL.M. (London School of Economics and Political Science, UK) Faculty of Law, University of Zagreb, Croatia

[FN1]. For the movement of a service provider, see e.g. Case C-76/90 *Säger* [1991] ECR I-4221. For the movement of a service recipient, see e.g. Case C-186/87 *Cowan* [1989] ECR I-195. Sometimes the existence of a potential recipient suffices for the application of EC law -- see e.g. C-384/93 *Alpine Investment* [1995] ECR I-1141 and C-405/98 *Gourmet International* [2001] ECR I-1795.

[FN2]. Para. 12 in *Säger* (n. 1).

[FN3]. Para. 16 in Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377; para. 18 in Case C-159/90 *SPUC. V. Grogan* [1991] ECR I-4685. Art. 50 EC stipulates that “services shall be considered to be “services” within the meaning of this Treaty where they are normally provided for remuneration ...”

[FN4]. Paras. 20 and 21 in Case C-158/96 *Kohll* [1998] ECR I-1931.

[FN5]. Para. 55-56 in Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473; para. 39 in Case C-385/99 *Müller-Faure* [2003] ECR I-4509.

[FN6]. For a detailed analysis of Art. 152 EC see T. Hervey and J. V. McHale, *Health Law and the European Union*, Cambridge University Press, 2004.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN7]. See e.g. para. 17 in *Kohll* (n. 4); para. 44 in *Geraets-Smits and Peerbooms* (n. 5); para. 146 in Case C-372/04 *Watts* [2006] ECR I-4325.

[FN8]. For an overview and analysis of secondary legislation adopted in the field of healthcare, see e.g. V. Hatzopoulos, "Health Law and Policy: The Impact of the EU" in G. de Bùrca (ed.), *EU Law and the Welfare Stat: In Search of Solidarity*, Oxford University Press, 2005, pp. 122-125.

[FN9]. For the discussion see Commission Communication "Consultation regarding Community action on health services", SEC(2006) 1195/4, dating from 26 September 2006, and Commission Communication "Follow-up to the high level reflection process on **patient mobility** and healthcare developments in the **European Union**", COM(2004) 301 final, dating from 20 April 2004.

[FN10]. L. Kubosova, "EU executive to tackle **patient mobility** in new social package", EUobserver, 2 July 2008, available at http://euobserver.eom/9/26427 last accessed on 9 January 2008.

[FN11]. Proposal for a Directive of the **European** Parliament and the Council on the Application of **Patients**' Rights in Cross-Border Healthcare COM(2008) 414 final, 2 July 2008.

[FN12]. For a detailed discussion of the pros and cons of positive and negative integration in the healthcare field and the balance of powers between the EU and Member States as regards healthcare, see T. Hervey and L. Trubek, "Freedom to provide health care services within the EU: An Opportunity for a Transformative Directive", paper presented at Law in New Governance Law Taskforce 11 Conference, 26-27 May 2006, University College London. See also T. Hervey, "The European Union and the Governance of Health Care" in G. de Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US*, Oxford, Hart, 2006; T. Hervey and J. V. McHale (n. 6). On the issue of regulatory competition see M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, Oxford: Hart, 1998.

[FN13]. By the analysis of three case studies on France, the UK and Germany, A. J. Obermaier ("The National Judiciary - Sword of European Court of Justice Rulings: The Example of the *Kohll/Decker* Jurisprudence", *European Law Journal*, Vol. 14, No. 6, 2008, 735-752) shows that, after the ECJ's rulings in *Kohll* and *Decker*, national courts played an important role in overcoming national resistance against these rulings. Obermaier suggests that, by applying ECJ's reasoning in a number of national cases, national courts forced national legislators to implement ECJ's rulings and end judicial uncertainty.

[FN14]. Para. 53 in *Kohll* (n. 4); para. 108 in *Müller-Fauré* (n. 5).

[FN15]. Council Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 149, 5 July 1971, p. 2.

[FN16]. C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, 2007, pp. 362-369.

[FN17]. See e.g. public health justification in paras. 69, 79-81 in *Müller-Fauré* (n. 5).

[FN18]. Art. 6(2) of the Draft Directive (n. 11).

[FN19]. Art. 7 and 8 of the Draft Directive (n. 11).

[FN20]. Point 7.2. of the Explanatory Memorandum attached to the Draft Directive (n. 11).

[FN21]. Art 6(3) of the Draft Directive (n. 11).

© 2011 Thomson Reuters. No claim to Orig. US Gov. Works.

[FN22]. EurActiv, “EU faces “long row” over cross-border healthcare”, 17 July 2008, accessible at http://www.euractiv.com/en/health/eu-faces-long-row-cross-border-healthcare/article-174265 last accessed on 9 January 2009.

[FN23]. Para. 12 in Säger (n. 1).

[FN24]. Para. 15 in Säger (n.1).

[FN25]. Paras. 69, 79-81 in Müller-Fauré (n. 5).

[FN26]. For such criticism see e.g. European Public Health Alliance (EPHA), “After more than a decade, the European Commission released the directive on patients' rights in cross-border healthcare, 24 September 2008, accessible at http:www.epha.Org/a/2878 last accessed on 9 January 2008.

[FN27]. On the other hand, nothing in the Draft Directive prevents Member States from setting up national regimes that would pay in advance for the cross-border treatment.

[FN28]. Flash Eurobarometer 210, “Cross-border health services in the EU - Analytical Report”, June 2007, accessible at http://ec.europa.eu/public_opinion/flash/fl_210_en.pdf, last accessed on 9 January 2008.

[FN29]. According to J. Sussex (“Cross-border healthcare: Going nowhere”, *Health Service Journal*, Vol. 111, 2001), some of the factors might be doctors' reluctance to refer patients outside their home Member State as well as some legal and administrative uncertainties about reimbursement for cross-border treatment.

[FN30]. According to Flash Eurobarometer 210 (n. 29), 78% of those questioned stated that their motive for being open to cross-border treatment is to receive better quality treatment than at home.

[FN31]. **European** Public Health Alliance (EPHA), “After more than a decade, the **European** Commission released the directive on **patients**' rights in cross-border healthcare (n. 27).

[FN32]. This reflects the discussion in S. L. Greer (“Uninvited **Europeanization**: neofunctionalism and the EU in health policy”, *Journal of **European** Public Policy* 13:1, 2006, pp. 134-152) suggesting that all Member States can try to work for now is EU law that they like and that EU policy creates EU politics

[FN33]. Art. 22 of the Draft Directive (n. 11).

[FN34]. W. Palm, N. Nickless, H. Lewalle, A. Coheur, *Implications of recent jurisprudence on the coordination of healthcare protection systems*, report produced for the European Commission Directorate-General for Employment and Social Affairs, Brussels, Association International de la Mutualité (AIM), 2000. See also R. Baeten, “European Integration and National Healthcare Systems: A Challenge for Social Policy” 8 infose 1, 2001; Y. Jorens, “The Right to Health Care Across Borders” in R. Baeten, M. McKee and E. Mossialos (eds.), *The Impact of EU Law on Health Care Systems*, Brussels: PIE Pieter Lang, 2003.

[FN35]. E. Mossialos and W. Palm, “The **European** Court of Justice and the free movement of **patients** in the **European Union**”, *International Social Security Review*, Vol. 56, 2/2003.

[FN36]. Such fear has sometimes had a positive impact on Member States by stimulating them to reduce waiting times for domestic **patients** -- see L. Bertinato *et al, Policy Brief: Cross-Border Health Care in Europe*, Brussels, World Health Organisation on behalf of the **European** Observatory on Health Systems and Policies, 2005. For an analysis of EU's governance of healthcare via the “Open Method of Coordination” see T. Hervey, “The **European Union's** governance of health care and the welfare modernization agenda”, Regulation & Governance 2, 2008, pp. 103-120.

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN37]. A. Cygan (“Public Healthcare in the **European Union**: Still a Service of General Interest?”, International and Comparative Law Quarterly (ICLQ), Vol. 57, 2008, pp. 529-560) suggests that, when having to choose priorities in the application of two opposed objectives, the one within Art. 49 and the other within Art. 152(5) EC - the Court has given priority to Art. 49 EC and opted to protect individual economic rights over equal access to a universal healthcare service.

*Watts* (n. 7) has shown that Member States have limited control over issues such as waiting lists. W. Palm and J. Nickless (“Access to healthcare in the European Union -- The consequences of the Kohll and Decker judgements”, Eurohealth Vol. 7, 2001, pp. 13-15) questioned Member States' powers to make access to healthcare subject to certain procedures such as waiting lists (the question was posed prior to *Watts*) and to certain conditions such as age.

28 Med. & L. 661

END OF DOCUMENT

© 2011 Thomson Reuters. No claim to Orig. US Gov. Works.

# DIRECTIVES

## DIRECTIVE 2011/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**of 9 March 2011**

**on the application of patients' rights in cross-border healthcare**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 114 and 168 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Having regard to the opinion of the Committee of the Regions ([2]),

Acting in accordance with the ordinary legislative procedure ([3]),

Whereas:

(1) According to Article 168(1) of the Treaty on the Functioning of the European Union (TFEU), a high level of human health protection is to be ensured in the definition and implementation of all Union policies and activities. This implies that a high level of human health protection is to be ensured also when the Union adopts acts under other Treaty provisions.

(2) Article 114 TFEU is the appropriate legal basis since the majority of the provisions of this Directive aim to improve the functioning of the internal market and the free movement of goods, persons and services. Given that the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, Union legislation has to rely on this legal basis even when public health protection is a decisive factor in the choices made. In this respect, Article 114(3) TFEU explicitly requires that, in achieving harmonisation, a high level of protection of human health is to be guaranteed taking account in particular of any new development based on scientific facts.

(3) The health systems in the Union are a central component of the Union's high levels of social protection, and contribute to social cohesion and social justice as well as to sustainable development. They are also part of the wider framework of services of general interest.

(4) Notwithstanding the possibility for patients to receive cross-border healthcare under this Directive, Member States retain responsibility for providing safe, high quality, efficient and quantitatively adequate healthcare to citizens on their territory. Furthermore, the transposition of this Directive into national legislation and its application should not result in patients being encouraged to receive treatment outside their Member State of affiliation.

(5) As recognised by the Council in its Conclusions of 1-2 June 2006 on Common values and principles in European Union Health Systems ([4]) (hereinafter the 'Council Conclusions') there is a set of operating principles that are shared by health systems throughout the Union. Those operating principles are necessary to ensure patients' trust in cross-border healthcare, which is necessary for achieving patient mobility as well as a high level of health protection. In the same statement, the Council recognised that the practical ways in which these values and principles become a reality vary significantly between Member States. In particular, decisions about the basket of healthcare to which citizens are entitled and the mechanisms used to finance and deliver that healthcare, such as the extent to which it is appropriate to rely on market mechanisms and competitive pressures to manage health systems, must be taken in the national context.

(6) As confirmed by the Court of Justice of the European Union (hereinafter the 'Court of Justice') on several occasions, while recognising their specific nature, all types of medical care fall within the scope of the TFEU.

([1]) OJ C 175, 28.7.2009, p. 116.
([2]) OJ C 120, 28.5.2009, p. 65.
([3]) Position of the European Parliament of 23 April 2009 (OJ C 184 E, 8.7.2010, p. 368), position of the Council at first reading of 13 September 2010 (OJ C 275 E, 12.10.2010, p. 1), position of the European Parliament of 19 January 2011 (not yet published in the Official Journal) and decision of the Council of 28 February 2011.

([4]) OJ C 146, 22.6.2006, p. 1.

(7) This Directive respects and is without prejudice to the freedom of each Member State to decide what type of healthcare it considers appropriate. No provision of this Directive should be interpreted in such a way as to undermine the fundamental ethical choices of Member States.

(8) Some issues relating to cross-border healthcare, in particular reimbursement of healthcare provided in a Member State other than that in which the recipient of the care is resident, have already been addressed by the Court of Justice. This Directive is intended to achieve a more general, and also effective, application of principles developed by the Court of Justice on a case-by-case basis.

(9) In the Council Conclusions, the Council recognised the particular value of an initiative on cross-border healthcare ensuring clarity for Union citizens about their rights and entitlements when they move from one Member State to another, in order to ensure legal certainty.

(10) This Directive aims to establish rules for facilitating access to safe and high-quality cross-border healthcare in the Union and to ensure patient mobility in accordance with the principles established by the Court of Justice and to promote cooperation on healthcare between Member States, whilst fully respecting the responsibilities of the Member States for the definition of social security benefits relating to health and for the organisation and delivery of healthcare and medical care and social security benefits, in particular for sickness.

(11) This Directive should apply to individual patients who decide to seek healthcare in a Member State other than the Member State of affiliation. As confirmed by the Court of Justice, neither its special nature nor the way in which it is organised or financed removes healthcare from the ambit of the fundamental principle of the freedom to provide services. However, the Member State of affiliation may choose to limit the reimbursement of cross-border healthcare for reasons relating to the quality and safety of the healthcare provided, where this can be justified by overriding reasons of general interest relating to public health. The Member State of affiliation may also take further measures on other grounds where this can be justified by such overriding reasons of general interest. Indeed, the Court of Justice has laid down that public health protection is among the overriding reasons of general interest that can justify restrictions to the freedom of movement envisaged in the Treaties.

(12) The concept of 'overriding reasons of general interest' to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case-law in relation to Articles 49 and 56 TFEU and may continue to evolve. The Court of Justice has held on a number of occasions that overriding reasons of general interest are capable of justifying an obstacle to the freedom to provide services such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources. The Court of Justice has likewise acknowledged that the objective of maintaining a balanced medical and hospital service open to all may also fall within one of the derogations, on grounds of public health, provided for in Article 52 TFEU, in so far as it contributes to the attainment of a high level of health protection. The Court of Justice has also held that such provision of the TFEU permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for public health.

(13) It is clear that the obligation to reimburse costs of cross-border healthcare should be limited to healthcare to which the insured person is entitled according to the legislation of the Member State of affiliation.

(14) This Directive should not apply to services the primary purpose of which is to support people in need of assistance in carrying out routine, everyday tasks. More specifically, this Directive should not apply to those long-term care services deemed necessary in order to enable the person in need of care to live as full and self-determined a life as possible. Thus, this Directive should not apply, for example, to long-term care services provided by home care services, in assisted living facilities and in residential homes or housing ('nursing homes').

(15) Given their specificity, access to and the allocation of organs for the purpose of organ transplants should fall outside the scope of this Directive.

(16) For the purpose of reimbursing the costs of cross-border healthcare, this Directive should cover not only the situation where the patient is provided with healthcare in a Member State other than the Member State of affiliation, but also the prescription, dispensation and provision of medicinal products and medical devices where these are provided in the context of a health service. The definition of cross-border healthcare should cover both the situation in which a patient purchases such medicinal products and medical devices in a Member State other than the Member State of affiliation and the situation in which the patient purchases such medicinal products and medical devices in another Member State than that in which the prescription was issued.

(17) This Directive should not affect Member States' rules concerning the sale of medicinal products and medical devices over the Internet.

(18) This Directive should not give any person an entitlement to enter, stay or reside in a Member State in order to receive healthcare in that State. Where the stay of a person on the territory of a Member State is not in accordance with the legislation of that Member State concerning the right to enter or stay on its territory, such person should not be regarded as an insured person according to the definition in this Directive. Member States should continue to be able to specify in their national legislation who is considered as an insured person for the purposes of their public healthcare scheme and social security legislation as long as the patients' rights set out in this Directive are secured.

(19) When a patient receives cross-border healthcare, it is essential for the patient to know in advance which rules will be applicable. The rules applicable to cross-border healthcare should be those set out in the legislation of the Member State of treatment, given that, in accordance with Article 168(7) TFEU, the organisation and delivery of health services and medical care is the responsibility of the Member States. This should help the patient in making an informed choice, and should avoid misapprehension and misunderstanding. It should also establish a high level of trust between the patient and the healthcare provider.

(20) In order to help patients to make an informed choice when they seek to receive healthcare in another Member State, Member States of treatment should ensure that patients from other Member States receive on request the relevant information on safety and quality standards enforced on its territory as well as on which healthcare providers are subject to these standards. Furthermore, healthcare providers should provide patients on request with information on specific aspects of the healthcare services they offer and on the treatment options. To the extent that healthcare providers already provide patients resident in the Member State of treatment with relevant information on those specific aspects, this Directive should not oblige healthcare providers to provide more extensive information to patients from other Member States. Nothing should prevent the Member State of treatment from also obliging other actors than the healthcare providers, such as insurance providers or public authorities, to provide the information on specific aspects of the healthcare services offered, if that would be more appropriate with regard to the organisation of its healthcare system.

(21) In its Conclusions the Council recognised that there is a set of common values and principles that are shared across the Union about how health systems respond to the needs of the population and patients that they serve. The overarching values of universality, access to good quality care, equity, and solidarity have been widely acknowledged in the work of various Union institutions. Therefore, Member States should also ensure that these values are respected with regard to patients and citizens from other Member States, and that all patients are treated equitably on the basis of their healthcare needs rather than on the basis of their Member State of affiliation. In doing so, Member States should respect the principles of free movement of persons within the internal market, non-discrimination, inter alia, with regard to nationality and necessity and proportionality of any restrictions on free movement. However, nothing in this Directive should oblige healthcare providers to accept for planned treatment patients from other Member States or to prioritise them to the detriment of other patients, for instance by increasing the waiting time for treatment of other patients. Inflows of patients may create a demand exceeding the capacities existing in a Member State for a given treatment. In such exceptional cases, the Member State should retain the possibility to remedy the situation on the grounds of public health, in accordance with Articles 52 and 62 TFEU. However, this limitation should be without prejudice to Member States' obligations under Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [1].

(22) Systematic and continuous efforts should be made to ensure that quality and safety standards are improved in line with the Council Conclusions and taking into account advances in international medical science and generally recognised good medical practices as well as taking into account new health technologies.

(23) Ensuring clear common obligations in respect of the provision of mechanisms for responding to harm arising from healthcare is essential to prevent lack of confidence in those mechanisms being an obstacle to taking up cross-border healthcare. Systems for addressing harm in the Member State of treatment should be without prejudice to the possibility for Member States to extend the coverage of their domestic systems to patients from their country seeking healthcare abroad, where this is more appropriate for the patient.

(24) Member States should ensure that mechanisms for the protection of patients and for seeking remedies in the event of harm are in place for healthcare provided on their territory and that they are appropriate to the nature and extent of the risk. However, it should be for the Member State to determine the nature and modalities of such a mechanism.

[1] OJ L 166, 30.4.2004, p. 1.

(25) The right to the protection of personal data is a fundamental right recognised by Article 8 of the Charter of Fundamental Rights of the European Union. Ensuring continuity of cross-border healthcare depends on transfer of personal data concerning patients' health. These personal data should be able to flow from one Member State to another, but at the same time the fundamental rights of the individuals should be safeguarded. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1] establishes the right for individuals to have access to their personal data concerning their health, for example the data in their medical records containing such information as diagnosis, examination results, assessments by treating physicians and any treatment or interventions provided. Those provisions should also apply in the context of cross-border healthcare covered by this Directive.

(26) The right to reimbursement of the costs of healthcare provided in another Member State by the statutory social security system of patients as insured persons has been recognised by the Court of Justice in several judgements. The Court of Justice has held that the Treaty provisions on the freedom to provide services include the freedom for the recipients of healthcare, including persons in need of medical treatment, to go to another Member State in order to receive it there. The same should apply to recipients of healthcare seeking to receive healthcare provided in another Member State through other means, for example through eHealth services.

(27) In accordance with the principles established by the Court of Justice, and without endangering the financial balance of Member States' healthcare and social security systems, greater legal certainty as regards the reimbursement of healthcare costs should be provided for patients and for health professionals, healthcare providers and social security institutions.

(28) This Directive should not affect an insured person's rights in respect of the assumption of costs of healthcare which becomes necessary on medical grounds during a temporary stay in another Member State according to Regulation (EC) No 883/2004. In addition, this Directive should not affect an insured person's right to be granted an authorisation for treatment in another Member State where the conditions provided for by Union regulations on the coordination of social security systems are met, in particular by Regulation (EC) No 883/2004 or Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [2], which are applicable by virtue of Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality [3] and Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [4].

(29) It is appropriate to require that also patients who seek healthcare in another Member State in other circumstances than those provided for in Regulation (EC) No 883/2004 should be able to benefit from the principles of free movement of patients, services and goods in accordance with the TFEU and with this Directive. Patients should enjoy a guarantee of assumption of the costs of that healthcare at least at the level as would be provided for the same healthcare, had it been provided in the Member State of affiliation. This should fully respect the responsibility of the Member States to determine the extent of the sickness cover available to their citizens and prevent any significant effect on the financing of the national healthcare systems.

(30) For patients, therefore, the two systems should be coherent; either this Directive applies or the Union regulations on the coordination of social security systems apply.

(31) Patients should not be deprived of the more beneficial rights guaranteed by the Union Regulations on the coordination of social security systems when the conditions are met. Therefore, any patient who requests an authorisation to receive treatment appropriate to his condition in another Member State should always be granted this authorisation under the conditions provided for in the Unions regulations when the treatment in question is among the benefits provided for by the legislation in the Member State where the patient resides and when the patient cannot be given such treatment within a time limit that is medically justifiable, taking account of his current state of health and the probable course of the condition. However, if a patient instead explicitly requests to seek treatment under the terms of this Directive, the benefits which apply to reimbursement should be limited to those which apply under this Directive. Where the patient is entitled to cross-border healthcare under both this Directive and Regulation (EC) No 883/2004, and the application of that Regulation is more advantageous to the patient, the patient's attention should be drawn to this by the Member State of affiliation.

[1] OJ L 281, 23.11.1995, p. 31.
[2] OJ L 149, 5.7.1971, p. 2.
[3] OJ L 344, 29.12.2010, p. 1.
[4] OJ L 124, 20.5.2003, p. 1.

(32) Patients should, in any event, not derive a financial advantage from the healthcare provided in another Member State and the assumption of costs should be therefore limited only to the actual costs of healthcare received.

(33) This Directive does not aim to create an entitlement to reimbursement of the costs of healthcare provided in another Member State, if such healthcare is not among the benefits provided for by the legislation of the Member State of affiliation of the insured person. Equally, this Directive should not prevent the Member States from extending their benefits-in-kind scheme to healthcare provided in another Member State. This Directive should recognise that Member States are free to organise their healthcare and social security systems in such a way as to determine entitlement for treatment at a regional or local level.

(34) Member States of affiliation should give patients the right to receive at least the same benefits in another Member State as those provided for by the legislation of the Member State of affiliation. If the list of benefits does not specify precisely the treatment method applied but defines types of treatment, the Member State of affiliation should not refuse prior authorisation or reimbursement on the grounds that the treatment method is not available in its territory, but should assess if the cross-border treatment sought or received corresponds to benefits provided for in its legislation. The fact that the obligation to reimburse cross-border healthcare under this Directive is limited to such healthcare that is among the benefits to which the patient is entitled within its Member State of affiliation does not preclude Member States from reimbursing the cost of cross-border healthcare beyond those limits. Member States are free, for example, to reimburse extra costs, such as accommodation and travel costs, or extra costs incurred by persons with disabilities even where those costs are not reimbursed in the case of healthcare provided in their territory.

(35) This Directive should not provide either for the transfer of social security entitlements between Member States or other coordination of social security systems. The sole objective of the provisions regarding prior authorisation and reimbursement of healthcare provided in another Member State should be to enable freedom to provide healthcare for patients and to remove unjustified obstacles to that fundamental freedom within the patient's Member State of affiliation. Consequently this Directive should fully respect the differences in national healthcare systems and the Member States' responsibilities for the organisation and delivery of health services and medical care.

(36) This Directive should provide for the right for a patient to receive any medicinal product authorised for marketing in the Member State of treatment, even if the medicinal product is not authorised for marketing in the Member State of affiliation, as it is an indispensable part of obtaining effective treatment in another Member State. Nothing should oblige a Member State of affiliation to reimburse an insured person for a medicinal product prescribed in the Member State of treatment, where that medicinal product is not among the benefits provided to that insured person by the statutory social security system or national health system in the Member State of affiliation.

(37) Member States may maintain general conditions, criteria for eligibility and regulatory and administrative formalities for receipt of healthcare and reimbursement of healthcare costs, such as the requirement to consult a general practitioner before consulting a specialist or before receiving hospital care, also in relation to patients seeking healthcare in another Member State, provided that such conditions are necessary, proportionate to the aim, not discretionary or discriminatory. This may include an assessment by a health professional or healthcare administrator providing services for the statutory social security system or national health system of the Member State of affiliation, such as the general practitioner or primary care practitioner with whom the patient is registered, if this is necessary for determining the individual patient's entitlement to healthcare. It is thus appropriate to require that these general conditions, criteria and formalities should be applied in an objective, transparent and non-discriminatory way and should be known in advance, based primarily on medical considerations, and that they should not impose any additional burden on patients seeking healthcare in another Member State in comparison with patients being treated in their Member State of affiliation, and that decisions should be made as quickly as possible. This should be without prejudice to the rights of the Member States to lay down criteria or conditions for prior authorisation in the case of patients seeking healthcare in their Member State of affiliation.

(38) In the light of the case-law of the Court of Justice, making the assumption by the statutory social security system or national health system of costs of healthcare provided in another Member State subject to prior authorisation is a restriction to the free movement of services. Therefore, as a general rule, the Member State of affiliation should not make the assumption of the costs of healthcare provided in another Member State subject to prior authorisation, where the costs of that care, if it had been provided in its territory, would have been borne by its statutory social security system or national health system.

(39) Patient flows between Member States are limited and expected to remain so, as the vast majority of patients in the Union receive healthcare in their own country and prefer to do so. However, in certain circumstances

patients may seek some forms of healthcare in another Member State. Examples include highly specialised care or healthcare provided in frontier areas where the nearest appropriate facility is on the other side of the border. Furthermore, some patients wish to be treated abroad in order to be close to their family members who are residing in another Member State, or in order to have access to a different method of treatment than that provided in the Member State of affiliation or because they believe that they will receive better quality healthcare in another Member State.

(40) According to the constant case-law of the Court of Justice, Member States may make the assumption of costs by the national system of hospital care provided in another Member State subject to prior authorisation. The Court of Justice has judged that this requirement is both necessary and reasonable, since the number of hospitals, their geographical distribution, the way in which they are organised and the facilities with which they are equipped, and even the nature of the medical services which they are able to offer, are all matters for which planning, generally designed to satisfy various needs, must be possible. The Court of Justice has found that such planning seeks to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the Member State concerned. In addition, it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. According to the Court of Justice, such wastage would be all the more damaging because it is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources made available for healthcare are not unlimited, whatever mode of funding is applied.

(41) The same reasoning applies to healthcare not provided in a hospital but subjected to similar planning needs in the Member State of treatment. This may be healthcare which requires planning because it involves use of highly specialised and cost-intensive medical infrastructure or medical equipment. In light of technological progress, the development of new methods of treatment and the different policies of the Member States regarding the roles of hospitals in their healthcare systems, the question of whether this kind of healthcare is delivered within hospital or ambulatory care facilities is not the decisive factor for deciding whether it requires planning or not.

(42) Given that the Member States are responsible for laying down rules as regards the management, requirements, quality and safety standards and organisation and delivery of healthcare and that the planning necessities differ from one Member State to another, it should therefore be for the Member States to decide whether there is a need to introduce a system of prior authorisation, and if so, to identify the healthcare requiring prior authorisation in the context of their system in accordance with the criteria defined by this Directive and in the light of the case-law of the Court of Justice. The information concerning this healthcare should be made publicly available in advance.

(43) The criteria attached to the grant of prior authorisation should be justified in the light of the overriding reasons of general interest capable of justifying obstacles to the free movement of healthcare, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources. The Court of Justice has identified several potential considerations: the risk of seriously undermining the financial balance of a social security system, the objective of maintaining on grounds of public health a balanced medical and hospital service open to all and the objective of maintaining treatment capacity or medical competence on national territory, essential for the public health, and even the survival of the population. It is also important to take into consideration the general principle of ensuring the safety of the patient, in a sector well known for information asymmetry, when managing a prior authorisation system. Conversely, the refusal to grant prior authorisation may not be based on the ground that there are waiting lists on national territory intended to enable the supply of hospital care to be planned and managed on the basis of predetermined general clinical priorities, without carrying out an objective medical assessment.

(44) According to the constant case-law of the Court of Justice, the criteria for granting or refusing prior authorisation should be limited to what is necessary and proportionate in the light of these overriding reasons in the general interest. It should be noted that the impact on national health systems caused by patient mobility might vary between Member States or between regions within a Member State, depending on factors such as geographical location, language barriers, location of hospitals in border regions or the size of the population and healthcare budget. It should therefore be for Member States to set such criteria for refusing prior authorisation that are necessary and proportionate in that specific context, also taking into account which healthcare falls within the scope of the prior authorisation system, since certain treatments of a highly specialised nature will be more easily affected even by a limited patient outflow than others. Consequently, Member States should be able to set up different criteria for different regions or other relevant administrative levels for the organisation of healthcare, or indeed for different treatments, as long as the system is transparent and easily accessible and the criteria are made public in advance.

(45) Where the patient is entitled to healthcare and that healthcare cannot be provided within a time limit which is medically justifiable, the Member State of affiliation should in principle be obliged to grant prior authorisation. However, in certain circumstances, cross-border healthcare may expose the patient or the general public to a risk which overrides the interest of the patient to receive the cross-border healthcare sought. In such instances, the Member State of affiliation should be able to refuse the request for prior authorisation, in which case the Member State of affiliation should direct the patient towards alternative solutions.

(46) In any event, if a Member State decides to establish a system of prior authorisation for assumption of costs of hospital or specialised care provided in another Member State in accordance with the provision of this Directive, the costs of such care provided in another Member State should also be reimbursed by the Member State of affiliation up to the level of costs that would have been assumed had the same healthcare been provided in the Member State of affiliation, without exceeding the actual costs of healthcare received. However, when the conditions set out in Regulation (EEC) No 1408/71 or Regulation (EC) No 883/2004 are fulfilled, the authorisation should be granted and the benefits provided in accordance with Regulation (EC) No 883/2004 unless otherwise requested by the patient. This should apply in particular in instances where the authorisation is granted after an administrative or judicial review of the request and the person concerned has received the treatment in another Member State. In that event, Articles 7 and 8 of this Directive should not apply. This is in line with the case-law of the Court of Justice which has specified that patients who were refused prior authorisation on grounds that were subsequently held to be unfounded, are entitled to have the cost of the treatment obtained in another Member State reimbursed in full according to the provisions of the legislation in the Member State of treatment.

(47) Procedures regarding cross-border healthcare established by the Member States should give patients guarantees of objectivity, non-discrimination and transparency, in such a way as to ensure that decisions by national authorities are made in a timely manner and with due care and regard for both those overall principles and the individual circumstances of each case. This should also apply to the actual reimbursement of costs of healthcare incurred in another Member State after the patient has received treatment. It is appropriate that, under normal circumstances, patients be entitled to receive decisions regarding cross-border healthcare within a reasonable period of time. However, that period should be shortened where warranted by the urgency of the treatment in question.

(48) Appropriate information on all essential aspects of cross-border healthcare is necessary in order to enable patients to exercise their rights on cross-border healthcare in practice. For cross-border healthcare, one of the mechanisms for providing such information is to establish national contact points within each Member State. Information that has to be provided compulsorily to patients should be specified. However, the national contact points may provide more information voluntarily and also with the support of the Commission. Information should be provided by national contact points to patients in any of the official languages of the Member State in which the contact points are situated. Information may be provided in any other language.

(49) The Member States should decide on the form and number of their national contact points. Such national contact points may also be incorporated in, or build on, activities of existing information centres provided that it is clearly indicated that they are also national contact points for cross-border healthcare. National contact points should be established in an efficient and transparent way and they should be able to consult with patient organisations, healthcare insurers and healthcare providers. The national contact points should have appropriate facilities to provide information on the main aspects of cross-border healthcare. The Commission should work together with the Member States in order to facilitate cooperation regarding national contact points for cross-border healthcare, including making relevant information available at Union level. The existence of national contact points should not preclude Member States from establishing other linked contact points at regional or local level, reflecting the specific organisation of their healthcare system.

(50) Member States should facilitate cooperation between healthcare providers, purchasers and regulators of different Member States at national, regional or local level in order to ensure safe, high-quality and efficient cross-border healthcare. This could be of particular importance in border regions, where cross-border provision of services may be the most efficient way of organising health services for the local population, but where achieving such cross-border provision on a sustained basis requires cooperation between the health systems of different Member States. Such cooperation may concern joint planning, mutual recognition or adaptation of procedures or standards, interoperability of respective national information and communication technology (hereinafter 'ICT') systems, practical mechanisms to ensure continuity of care or practical facilitating of cross-border provision of healthcare by health professionals on a temporary or occasional basis. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [1] stipulates that free provision of services of a temporary or occasional nature, including services provided by health professionals, in another Member State is not, subject to specific provisions of Union law, to be restricted for

[1] OJ L 255, 30.9.2005, p. 22.

any reason relating to professional qualifications. This Directive should be without prejudice to Directive 2005/36/EC.

(51) The Commission should encourage cooperation between Member States in the areas set out in Chapter IV of this Directive and may, in accordance with Article 168(2) TFEU, take, in close contact with the Member States, any useful initiative to facilitate and promote such cooperation. In that context, the Commission should encourage cooperation in cross-border healthcare provision at regional and local level, particularly by identifying major obstacles to collaboration between healthcare providers in border regions, and by making recommendations and disseminating information and best practices on how to overcome such obstacles.

(52) The Member State of affiliation may need to receive confirmation that the cross-border healthcare will be, or has been, delivered by a legally practising health professional. It is therefore appropriate to ensure that information on the right to practise contained in the national or local registers of health professionals, if established in the Member State of treatment, are, upon request, made available to the authorities of the Member State of affiliation.

(53) Where medicinal products are authorised within a Member State and have been prescribed in that Member State by a member of a regulated health profession within the meaning of Directive 2005/36/EC for an individual named patient, it should, in principle, be possible for such prescriptions to be medically recognised and for the medicinal products to be dispensed in another Member State in which the medicinal products are authorised. The removal of regulatory and administrative barriers to such recognition should be without prejudice to the need for appropriate agreement of the patient's treating physician or pharmacist in every individual case, if this is warranted by protection of human health and is necessary and proportionate to that objective. The recognition of prescriptions from other Member States should not affect any professional or ethical duty that would require pharmacists to refuse to dispense the prescription. Such medical recognition should also be without prejudice to the decision of the Member State of affiliation regarding the inclusion of such medicinal products among the benefits covered by the social security system of affiliation. It should further be noted that the reimbursement of medicinal products is not affected by the rules on mutual recognition of prescriptions, but covered by the general rules on reimbursement of cross-border healthcare in Chapter III of this Directive. The implementation of the principle of recognition should be facilitated by the adoption of measures necessary for safeguarding the safety of a patient, and avoiding the misuse or confusion of medicinal products. These measures should include the adoption of a non-exhaustive list of elements to be included in prescriptions. Nothing should prevent Member States from having further elements in their prescriptions, as long as this does not prevent prescriptions from other Member States that contain the common list of elements from being recognised. The recognition of prescriptions should also apply for medical devices that are legally placed on the market in the Member State where the device will be dispensed.

(54) The Commission should support the continued development of European reference networks between healthcare providers and centres of expertise in the Member States. European reference networks can improve the access to diagnosis and the provision of high-quality healthcare to all patients who have conditions requiring a particular concentration of resources or expertise, and could also be focal points for medical training and research, information dissemination and evaluation, especially for rare diseases. This Directive should therefore give incentives to Member States to reinforce the continued development of European reference networks. European reference networks are based on the voluntary participation of their members, but the Commission should develop criteria and conditions that the networks should be required to fulfil in order to receive support from the Commission.

(55) Rare diseases are those that meet a prevalence threshold of not more than five affected persons per 10 000, in line with Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products [1], and they are all serious, chronic and often life threatening. Some patients affected by rare diseases face difficulties in their quest for a diagnosis and treatment to improve their quality of life and to increase their life expectancy, difficulties which were also recognised by the Council Recommendation of 8 June 2009 on an action in the field of rare diseases [2].

(56) Technological developments in cross-border provision of healthcare through the use of ICTs may result in the exercise of supervisory responsibilities by Member States being unclear, and can thus hinder the free movement of healthcare and give rise to possible additional risks to health protection. Widely different and incompatible formats and standards are used for provision of healthcare using ICTs throughout the Union, creating both obstacles to this mode of cross-border healthcare provision and possible risks to health protection. It is therefore necessary for Member States to aim at interoperability of ICT systems. The deployment of health ICT systems, however, is entirely a national competence. This Directive therefore should recognise the importance of the work on interoperability and respect the division of competences by providing for the Commission and Member States to work together on developing measures which are not legally binding but provide additional tools that are available to Member States to facilitate greater interoperability of

[1] OJ L 18, 22.1.2000, p. 1.
[2] OJ C 151, 3.7.2009, p. 7.

ICT systems in the healthcare field and to support patient access to eHealth applications, whenever Member States decide to introduce them.

(57) The interoperability of eHealth solutions should be achieved whilst respecting national regulations on the provision of healthcare services adopted in order to protect the patient, including legislation on Internet pharmacies, in particular national bans on mail order of prescription-only medicinal products to the extent that they are compatible with the case-law of the Court of Justice and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts ([1]) and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ([2]).

(58) The constant progress of medical science and health technologies presents both opportunities and challenges to the health systems of the Member States. Cooperation in the evaluation of new health technologies can support Member States through economies of scale and avoid duplication of effort, and provide a better evidence base for optimal use of new technologies to ensure safe, high-quality and efficient healthcare. Such cooperation requires sustained structures involving all the relevant authorities of the Member States, building on existing pilot projects and consultation of a wide range of stakeholders. This Directive should therefore provide a basis for continued Union support for such cooperation.

(59) According to Article 291 TFEU, rules and general principles concerning mechanisms for the control by Member States of the Commission's exercise of implementing powers are to be laid down in advance by a regulation adopted in accordance with the ordinary legislative procedure. Pending the adoption of that new Regulation, Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ([3]) continues to apply, with the exception of the regulatory procedure with scrutiny, which is not applicable.

(60) The Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU in respect of measures that would exclude specific categories of medicinal products or medical devices from the recognition of prescriptions, as provided for in this Directive. In order to identify the reference networks which should benefit from support by the Commission, the Commission should also be empowered to adopt delegated acts in respect of the criteria and conditions that European reference networks have to fulfil.

(61) It is of particular importance that, when empowered to adopt delegated acts in accordance with Article 290 TFEU, the Commission carry out appropriate consultations during its preparatory work, including at expert level.

(62) In accordance with point 34 of the Interinstitutional Agreement on better law-making ([4]), Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(63) The European Data Protection Supervisor has also delivered his opinion on the proposal for this Directive ([5]).

(64) Since the objective of this Directive, namely providing rules for facilitating the access to safe and high quality cross-border healthcare in the Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

## GENERAL PROVISIONS

### *Article 1*

### Subject matter and scope

1. This Directive provides rules for facilitating the access to safe and high-quality cross-border healthcare and promotes cooperation on healthcare between Member States, in full respect of national competencies in organising and delivering healthcare. This Directive also aims at clarifying its relationship with the existing framework on the coordination of social security systems, Regulation (EC) No 883/2004, with a view to application of patients' rights.

([1]) OJ L 144, 4.6.1997, p. 19.
([2]) OJ L 178, 17.7.2000, p. 1.
([3]) OJ L 184, 17.7.1999, p. 23.
([4]) OJ C 321, 31.12.2003, p. 1.
([5]) OJ C 128, 6.6.2009, p. 20.

2. This Directive shall apply to the provision of healthcare to patients, regardless of how it is organised, delivered and financed.

3. This Directive shall not apply to:

(a) services in the field of long-term care the purpose of which is to support people in need of assistance in carrying out routine, everyday tasks;

(b) allocation of and access to organs for the purpose of organ transplants;

(c) with the exception of Chapter IV, public vaccination programmes against infectious diseases which are exclusively aimed at protecting the health of the population on the territory of a Member State and which are subject to specific planning and implementation measures.

4. This Directive shall not affect laws and regulations in Member States relating to the organisation and financing of healthcare in situations not related to cross-border healthcare. In particular, nothing in this Directive obliges a Member State to reimburse costs of healthcare provided by healthcare providers established on its own territory if those providers are not part of the social security system or public health system of that Member State.

*Article 2*

**Relationship with other Union provisions**

This Directive shall apply without prejudice to:

(a) Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems ([1]);

(b) Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the Member States relating to active implantable medical devices ([2]), Council Directive 93/42/EEC of 14 June 1993 concerning medical devices ([3]) and Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices ([4]);

(c) Directive 95/46/EC and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ([5]);

(d) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ([6]);

(e) Directive 2000/31/EC;

(f) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ([7]);

(g) Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use ([8]);

(h) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use ([9]);

(i) Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components ([10]);

(j) Regulation (EC) No 859/2003;

(k) Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells ([11]);

(l) Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency ([12]);

(m) Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems ([13]);

(n) Directive 2005/36/EC;

(o) Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) ([14]);

([1]) OJ L 40, 11.2.1989, p. 8.
([2]) OJ L 189, 20.7.1990, p. 17.
([3]) OJ L 169, 12.7.1993, p. 1.
([4]) OJ L 331, 7.12.1998, p. 1.
([5]) OJ L 201, 31.7.2002, p. 37.
([6]) OJ L 18, 21.1.1997, p. 1.
([7]) OJ L 180, 19.7.2000, p. 22.
([8]) OJ L 121, 1.5.2001, p. 34.
([9]) OJ L 311, 28.11.2001, p. 67.
([10]) OJ L 33, 8.2.2003, p. 30.
([11]) OJ L 102, 7.4.2004, p. 48.
([12]) OJ L 136, 30.4.2004, p. 1.
([13]) OJ L 284, 30.10.2009, p. 1.
([14]) OJ L 210, 31.7.2006, p. 19.

(p) Regulation (EC) No 1338/2008 of the European Parliament and of the Council of 16 December 2008 on Community statistics on public health and health and safety at work [1];

(q) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2], Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [3] and other Union rules on private international law, in particular rules related to court jurisdiction and the applicable law;

(r) Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation [4];

(s) Regulation (EU) No 1231/2010.

*Article 3*

**Definitions**

For the purposes of this Directive, the following definitions shall apply:

(a) 'healthcare' means health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices;

(b) 'insured person' means:

(i) persons, including members of their families and their survivors, who are covered by Article 2 of Regulation (EC) No 883/2004 and who are insured persons within the meaning of Article 1(c) of that Regulation; and

(ii) nationals of a third country who are covered by Regulation (EC) No 859/2003 or Regulation (EU) No 1231/2010, or who satisfy the conditions of the legislation of the Member State of affiliation for entitlement to benefits;

(c) 'Member State of affiliation' means:

(i) for persons referred to in point (b)(i), the Member State that is competent to grant to the insured person a prior authorisation to receive appropriate treatment outside the Member State of residence according to Regulations (EC) No 883/2004 and (EC) No 987/2009;

(ii) for persons referred to in point (b)(ii), the Member State that is competent to grant to the insured person a prior authorisation to receive appropriate treatment in another Member State according to Regulation (EC) No 859/2003 or Regulation (EU) No 1231/2010. If no Member State is competent according to those Regulations, the Member State of affiliation shall be the Member State where the person is insured or has the rights to sickness benefits according to the legislation of that Member State;

(d) 'Member State of treatment' means the Member State on whose territory healthcare is actually provided to the patient. In the case of telemedicine, healthcare is considered to be provided in the Member State where the healthcare provider is established;

(e) 'cross-border healthcare' means healthcare provided or prescribed in a Member State other than the Member State of affiliation;

(f) 'health professional' means a doctor of medicine, a nurse responsible for general care, a dental practitioner, a midwife or a pharmacist within the meaning of Directive 2005/36/EC, or another professional exercising activities in the healthcare sector which are restricted to a regulated profession as defined in Article 3(1)(a) of Directive 2005/36/EC, or a person considered to be a health professional according to the legislation of the Member State of treatment;

(g) 'healthcare provider' means any natural or legal person or any other entity legally providing healthcare on the territory of a Member State;

(h) 'patient' means any natural person who seeks to receive or receives healthcare in a Member State;

(i) 'medicinal product' means a medicinal product as defined by Directive 2001/83/EC;

(j) 'medical device' means a medical device as defined by Directive 90/385/EEC, Directive 93/42/EEC or Directive 98/79/EC;

(k) 'prescription' means a prescription for a medicinal product or for a medical device issued by a member of a regulated health profession within the meaning of Article 3(1)(a) of Directive 2005/36/EC who is legally entitled to do so in the Member State in which the prescription is issued;

[1] OJ L 354, 31.12.2008, p. 70.
[2] OJ L 177, 4.7.2008, p. 6.
[3] OJ L 199, 31.7.2007, p. 40.
[4] OJ L 207, 6.8.2010, p. 14.

(l) 'health technology' means a medicinal product, a medical device or medical and surgical procedures as well as measures for disease prevention, diagnosis or treatment used in healthcare;

(m) 'medical records' means all the documents containing data, assessments and information of any kind on a patient's situation and clinical development throughout the care process.

CHAPTER II

**RESPONSIBILITIES OF MEMBER STATES WITH REGARD TO CROSS-BORDER HEALTH CARE**

*Article 4*

**Responsibilities of the Member State of treatment**

1. Taking into account the principles of universality, access to good quality care, equity and solidarity, cross-border healthcare shall be provided in accordance with:

(a) the legislation of the Member State of treatment;

(b) standards and guidelines on quality and safety laid down by the Member State of treatment; and

(c) Union legislation on safety standards.

2. The Member State of treatment shall ensure that:

(a) patients receive from the national contact point referred to in Article 6, upon request, relevant information on the standards and guidelines referred to in paragraph 1(b) of this Article, including provisions on supervision and assessment of healthcare providers, information on which healthcare providers are subject to these standards and guidelines and information on the accessibility of hospitals for persons with disabilities;

(b) healthcare providers provide relevant information to help individual patients to make an informed choice, including on treatment options, on the availability, quality and safety of the healthcare they provide in the Member State of treatment and that they also provide clear invoices and clear information on prices, as well as on their authorisation or registration status, their insurance cover or other means of personal or collective protection with regard to professional liability. To the extent that healthcare providers already provide patients resident in the Member State of treatment with relevant information on these subjects, this Directive does not oblige healthcare providers to provide more extensive information to patients from other Member States;

(c) there are transparent complaints procedures and mechanisms in place for patients, in order for them to seek remedies in accordance with the legislation of the Member State of treatment if they suffer harm arising from the healthcare they receive;

(d) systems of professional liability insurance, or a guarantee or similar arrangement that is equivalent or essentially comparable as regards its purpose and which is appropriate to the nature and the extent of the risk, are in place for treatment provided on its territory;

(e) the fundamental right to privacy with respect to the processing of personal data is protected in conformity with national measures implementing Union provisions on the protection of personal data, in particular Directives 95/46/EC and 2002/58/EC;

(f) in order to ensure continuity of care, patients who have received treatment are entitled to a written or electronic medical record of such treatment, and access to at least a copy of this record in conformity with and subject to national measures implementing Union provisions on the protection of personal data, in particular Directives 95/46/EC and 2002/58/EC.

3. The principle of non-discrimination with regard to nationality shall be applied to patients from other Member States.

This shall be without prejudice to the possibility for the Member State of treatment, where it is justified by overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources, to adopt measures regarding access to treatment aimed at fulfilling its fundamental responsibility to ensure sufficient and permanent access to healthcare within its territory. Such measures shall be limited to what is necessary and proportionate and may not constitute a means of arbitrary discrimination and shall be made publicly available in advance.

4. Member States shall ensure that the healthcare providers on their territory apply the same scale of fees for healthcare for patients from other Member States, as for domestic patients in a comparable medical situation, or that they charge a price calculated according to objective, non-discriminatory criteria if there is no comparable price for domestic patients.

This paragraph shall be without prejudice to national legislation which allows healthcare providers to set their own prices, provided that they do not discriminate against patients from other Member States.

5. This Directive shall not affect laws and regulations in Member States on the use of languages. Member States may choose to deliver information in other languages than those which are official languages in the Member State concerned.

*Article 5*

**Responsibilities of the Member State of affiliation**

The Member State of affiliation shall ensure that:

(a) the cost of cross-border healthcare is reimbursed in accordance with Chapter III;

(b) there are mechanisms in place to provide patients on request with information on their rights and entitlements in that Member State relating to receiving cross-border healthcare, in particular as regards the terms and conditions for reimbursement of costs in accordance with Article 7(6) and procedures for accessing and determining those entitlements and for appeal and redress if patients consider that their rights have not been respected, in accordance with Article 9. In information about cross-border healthcare, a clear distinction shall be made between the rights which patients have by virtue of this Directive and rights arising from Regulation (EC) No 883/2004;

(c) where a patient has received cross-border healthcare and where medical follow-up proves necessary, the same medical follow-up is available as would have been if that healthcare had been provided on its territory;

(d) patients who seek to receive or do receive cross-border healthcare have remote access to or have at least a copy of their medical records, in conformity with, and subject to, national measures implementing Union provisions on the protection of personal data, in particular Directives 95/46/EC and 2002/58/EC.

*Article 6*

**National contact points for cross-border healthcare**

1. Each Member State shall designate one or more national contact points for cross-border healthcare and communicate their names and contact details to the Commission. The Commission and the Member States shall make this information publicly available. Member States shall ensure that the national contact points consult with patient organisations, healthcare providers and healthcare insurers.

2. National contact points shall facilitate the exchange of information referred to in paragraph 3 and shall cooperate closely with each other and with the Commission. National contact points shall provide patients on request with contact details of national contact points in other Member States.

3. In order to enable patients to make use of their rights in relation to cross-border healthcare, national contact points in the Member State of treatment shall provide them with information concerning healthcare providers, including, on request, information on a specific provider's right to provide services or any restrictions on its practice, information referred to in Article 4(2)(a), as well as information on patients' rights, complaints procedures and mechanisms for seeking remedies, according to the legislation of that Member State, as well as the legal and administrative options available to settle disputes, including in the event of harm arising from cross-border healthcare.

4. National contact points in the Member State of affiliation shall provide patients and health professionals with the information referred to in Article 5(b).

5. The information referred to in this Article shall be easily accessible and shall be made available by electronic means and in formats accessible to people with disabilities, as appropriate.

CHAPTER III

**REIMBURSEMENT OF COSTS OF CROSS-BORDER HEALTHCARE**

*Article 7*

**General principles for reimbursement of costs**

1. Without prejudice to Regulation (EC) No 883/2004 and subject to the provisions of Articles 8 and 9, the Member State of affiliation shall ensure the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation.

2. By way of derogation from paragraph 1:

(a) if a Member State is listed in Annex IV to Regulation (EC) No 883/2004 and in compliance with that Regulation has recognised the rights to sickness benefits for pensioners and the members of their families, being resident in a different Member State, it shall provide them healthcare under this Directive at its own expense when they stay on its territory, in accordance with its legislation, as though the persons concerned were residents in the Member State listed in that Annex;

(b) if the healthcare provided in accordance with this Directive is not subject to prior authorisation, is not provided in accordance with Chapter 1 of Title III of the Regulation (EC) No 883/2004, and is provided in the territory of the Member State that according to that Regulation and Regulation (EC) No 987/2009 is, in the end, responsible for reimbursement of the costs, the costs shall be assumed by that Member State. That Member State may assume the costs of the healthcare in accordance with the terms, conditions, criteria for eligibility and regulatory and administrative formalities that it has established, provided that these are compatible with the TFEU.

3. It is for the Member State of affiliation to determine, whether at a local, regional or national level, the healthcare for which an insured person is entitled to assumption of costs and the level of assumption of those costs, regardless of where the healthcare is provided.

4. The costs of cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided in its territory without exceeding the actual costs of healthcare received.

Where the full cost of cross-border healthcare exceeds the level of costs that would have been assumed had the healthcare been provided in its territory the Member State of affiliation may nevertheless decide to reimburse the full cost.

The Member State of affiliation may decide to reimburse other related costs, such as accommodation and travel costs, or extra costs which persons with disabilities might incur due to one or more disabilities when receiving cross-border healthcare, in accordance with national legislation and on the condition that there be sufficient documentation setting out these costs.

5. Member States may adopt provisions in accordance with the TFEU aimed at ensuring that patients enjoy the same rights when receiving cross-border healthcare as they would have enjoyed if they had received healthcare in a comparable situation in the Member State of affiliation.

6. For the purposes of paragraph 4, Member States shall have a transparent mechanism for calculation of costs of cross-border healthcare that are to be reimbursed to the insured person by the Member State of affiliation. This mechanism shall be based on objective, non-discriminatory criteria known in advance and applied at the relevant (local, regional or national) administrative level.

7. The Member State of affiliation may impose on an insured person seeking reimbursement of the costs of cross-border healthcare, including healthcare received through means of telemedicine, the same conditions, criteria of eligibility and regulatory and administrative formalities, whether set at a local, regional or national level, as it would impose if this healthcare were provided in its territory. This may include an assessment by a health professional or healthcare administrator providing services for the statutory social security system or national health system of the Member State of affiliation, such as the general practitioner or primary care practitioner with whom the patient is registered, if this is necessary for determining the individual patient's entitlement to healthcare. However, no conditions, criteria of eligibility and regulatory and administrative formalities imposed according to this paragraph may be discriminatory or constitute an obstacle to the free movement of patients, services or goods, unless it is objectively justified by planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.

8. The Member State of affiliation shall not make the reimbursement of costs of cross-border healthcare subject to prior authorisation except in the cases set out in Article 8.

9. The Member State of affiliation may limit the application of the rules on reimbursement for cross-border healthcare based on overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.

10. Notwithstanding paragraph 9, Member States shall ensure that the cross-border healthcare for which a prior authorisation has been granted is reimbursed in accordance with the authorisation.

11. The decision to limit the application of this Article pursuant to paragraph 9 shall be restricted to what is necessary and proportionate, and may not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of goods, persons or services. Member States shall notify the Commission of any decisions to limit reimbursement on the grounds stated in paragraph 9.

*Article 8*

**Healthcare that may be subject to prior authorisation**

1. The Member State of affiliation may provide for a system of prior authorisation for reimbursement of costs of cross-border healthcare, in accordance with this Article and Article 9. The system of prior authorisation, including the criteria and the application of those criteria, and individual decisions of refusal to grant prior authorisation, shall be restricted to what is necessary and proportionate to the objective to be achieved, and may not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of patients.

2. Healthcare that may be subject to prior authorisation shall be limited to healthcare which:

(a) is made subject to planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources and:

(i) involves overnight hospital accommodation of the patient in question for at least one night; or

(ii) requires use of highly specialised and cost-intensive medical infrastructure or medical equipment;

(b) involves treatments presenting a particular risk for the patient or the population; or

(c) is provided by a healthcare provider that, on a case-by-case basis, could give rise to serious and specific concerns relating to the quality or safety of the care, with the exception of healthcare which is subject to Union legislation ensuring a minimum level of safety and quality throughout the Union.

Member States shall notify the categories of healthcare referred to in point (a) to the Commission.

3. With regard to requests for prior authorisation made by an insured person with a view to receiving cross-border healthcare, the Member State of affiliation shall ascertain whether the conditions laid down in Regulation (EC) No 883/2004 have been met. Where those conditions are met, the prior authorisation shall be granted pursuant to that Regulation unless the patient requests otherwise.

4. When a patient affected, or suspected of being affected, by a rare disease applies for prior authorisation, a clinical evaluation may be carried out by experts in that field. If no experts can be found within the Member State of affiliation or if the expert's opinion is inconclusive, the Member State of affiliation may request scientific advice.

5. Without prejudice to points (a) to (c) of paragraph 6, the Member State of affiliation may not refuse to grant prior authorisation when the patient is entitled to the healthcare in question in accordance with Article 7, and when this healthcare cannot be provided on its territory within a time limit which is medically justifiable, based on an objective medical assessment of the patient's medical condition, the history and probable course of the patient's illness, the degree of the patient's pain and/or the nature of the patient's disability at the time when the request for authorisation was made or renewed.

6. The Member State of affiliation may refuse to grant prior authorisation for the following reasons:

(a) the patient will, according to a clinical evaluation, be exposed with reasonable certainty to a patient-safety risk that cannot be regarded as acceptable, taking into account the potential benefit for the patient of the sought cross-border healthcare;

(b) the general public will be exposed with reasonable certainty to a substantial safety hazard as a result of the cross-border healthcare in question;

(c) this healthcare is to be provided by a healthcare provider that raises serious and specific concerns relating to the respect of standards and guidelines on quality of care and patient safety, including provisions on supervision, whether these standards and guidelines are laid down by laws and regulations or through accreditation systems established by the Member State of treatment;

(d) this healthcare can be provided on its territory within a time limit which is medically justifiable, taking into account the current state of health and the probable course of the illness of each patient concerned.

7. The Member State of affiliation shall make publicly available which healthcare is subject to prior authorisation for the purposes of this Directive, as well as all relevant information on the system of prior authorisation.

*Article 9*

**Administrative procedures regarding cross-border healthcare**

1. The Member State of affiliation shall ensure that administrative procedures regarding the use of cross-border healthcare and reimbursement of costs of healthcare incurred in another Member State are based on objective, non-discriminatory criteria which are necessary and proportionate to the objective to be achieved.

2. Any administrative procedure of the kind referred to in paragraph 1 shall be easily accessible and information relating to such a procedure shall be made publicly available at the appropriate level. Such a procedure shall be capable of ensuring that requests are dealt with objectively and impartially.

3. Member States shall set out reasonable periods of time within which requests for cross-border healthcare must be dealt with and make them public in advance. When considering a request for cross-border healthcare, Member States shall take into account:

(a) the specific medical condition;

(b) the urgency and individual circumstances.

4. Member States shall ensure that individual decisions regarding the use of cross-border healthcare and reimbursement of costs of healthcare incurred in another Member State are properly reasoned and subject, on a case-by-case basis, to review and are capable of being challenged in judicial proceedings, which include provision for interim measures.

5. This Directive is without prejudice to Member States' right to offer patients a voluntary system of prior notification whereby, in return for such notification, the patient receives a written confirmation of the amount to be reimbursed on the basis of an estimate. This estimate shall take into account the patient's clinical case, specifying the medical procedures likely to apply.

Member States may choose to apply the mechanisms of financial compensation between the competent institutions as provided for by Regulation (EC) No 883/2004. Where a Member State of affiliation does not apply such mechanisms, it shall ensure that patients receive reimbursement without undue delay.

CHAPTER IV

**COOPERATION IN HEALTHCARE**

*Article 10*

**Mutual assistance and cooperation**

1. Member States shall render such mutual assistance as is necessary for the implementation of this Directive, including cooperation on standards and guidelines on quality and safety and the exchange of information, especially between their national contact points in accordance with Article 6, including on provisions on supervision and mutual assistance to clarify the content of invoices.

2. Member States shall facilitate cooperation in cross-border healthcare provision at regional and local level as well as through ICT and other forms of cross-border cooperation.

3. The Commission shall encourage Member States, particularly neighbouring countries, to conclude agreements among themselves. The Commission shall also encourage the Member States to cooperate in cross-border healthcare provision in border regions.

4. Member States of treatment shall ensure that information on the right to practise of health professionals listed in national or local registers established on their territory is, upon request, made available to the authorities of other Member States, for the purpose of cross-border healthcare, in accordance with Chapters II and III and with national measures implementing Union provisions on the protection of personal data, in particular Directives 95/46/EC and 2002/58/EC, and the principle of presumption of innocence. The exchange of information shall take place via the Internal Market Information system established pursuant to Commission Decision 2008/49/EC of 12 December 2007 concerning the implementation of the Internal Market Information System (IMI) as regards the protection of personal data [1].

*Article 11*

**Recognition of prescriptions issued in another Member State**

1. If a medicinal product is authorised to be marketed on their territory, in accordance with Directive 2001/83/EC or Regulation (EC) No 726/2004, Member States shall ensure that prescriptions issued for such a product in another Member State for a named patient can be dispensed on their territory in compliance with their national legislation in force, and that any restrictions on recognition of individual prescriptions are prohibited unless such restrictions are:

(a) limited to what is necessary and proportionate to safeguard human health, and non-discriminatory; or

(b) based on legitimate and justified doubts about the authenticity, content or comprehensibility of an individual prescription.

[1] OJ L 13, 16.1.2008, p. 18.

The recognition of such prescriptions shall not affect national rules governing prescribing and dispensing, if those rules are compatible with Union law, including generic or other substitution. The recognition of prescriptions shall not affect the rules on reimbursement of medicinal products. Reimbursement of costs of medicinal products is covered by Chapter III of this Directive.

In particular, the recognition of prescriptions shall not affect a pharmacist's right, by virtue of national rules, to refuse, for ethical reasons, to dispense a product that was prescribed in another Member State, where the pharmacist would have the right to refuse to dispense, had the prescription been issued in the Member State of affiliation.

The Member State of affiliation shall take all necessary measures, in addition to the recognition of the prescription, in order to ensure continuity of treatment in cases where a prescription is issued in the Member State of treatment for medicinal products or medical devices available in the Member State of affiliation and where dispensing is sought in the Member State of affiliation.

This paragraph shall also apply to medical devices that are legally placed on the market in the respective Member State.

2. In order to facilitate implementation of paragraph 1, the Commission shall adopt:

(a) measures enabling a health professional to verify the authenticity of the prescription and whether the prescription was issued in another Member State by a member of a regulated health profession who is legally entitled to do so through developing a non-exhaustive list of elements to be included in the prescriptions and which must be clearly identifiable in all prescription formats, including elements to facilitate, if needed, contact between the prescribing party and the dispensing party in order to contribute to a complete understanding of the treatment, in due respect of data protection;

(b) guidelines supporting the Member States in developing the interoperability of ePrescriptions;

(c) measures to facilitate the correct identification of medicinal products or medical devices prescribed in one Member State and dispensed in another, including measures to address patient safety concerns in relation to their substitution in cross border healthcare where the legislation of the dispensing Member State permits such substitution. The Commission shall consider, inter alia, using the International Non-proprietary Name and the dosage of medicinal products;

(d) measures to facilitate the comprehensibility of the information to patients concerning the prescription and the instructions included on the use of the product, including an indication of active substance and dosage.

Measures referred in point (a) shall be adopted by the Commission no later than 25 December 2012 and measures in points (c) and (d) shall be adopted by the Commission no later than 25 October 2012.

3. The measures and guidelines referred to in points (a) to (d) of paragraph 2 shall be adopted in accordance with the regulatory procedure referred to in Article 16(2).

4. In adopting measures or guidelines under paragraph 2, the Commission shall have regard to the proportionality of any costs of compliance with, as well as the likely benefits of, the measures or guidelines.

5. For the purpose of paragraph 1, the Commission shall also adopt, by means of delegated acts in accordance with Article 17 and subject to the conditions of Articles 18 and 19 and no later than 25 October 2012 measures to exclude specific categories of medicinal products or medical devices from the recognition of prescriptions provided for under this Article, where necessary in order to safeguard public health.

6. Paragraph 1 shall not apply to medicinal products subject to special medical prescription provided for in Article 71(2) of Directive 2001/83/EC.

*Article 12*

**European reference networks**

1. The Commission shall support Member States in the development of European reference networks between healthcare providers and centres of expertise in the Member States, in particular in the area of rare diseases. The networks shall be based on voluntary participation by its members, which shall participate and contribute to the networks' activities in accordance with the legislation of the Member State where the members are established and shall at all times be open to new healthcare providers which might wish to join them, provided that such healthcare providers fulfil all the required conditions and criteria referred to in paragraph 4.

2. European reference networks shall have at least three of the following objectives:

(a) to help realise the potential of European cooperation regarding highly specialised healthcare for patients and for healthcare systems by exploiting innovations in medical science and health technologies;

(b) to contribute to the pooling of knowledge regarding sickness prevention;

(c) to facilitate improvements in diagnosis and the delivery of high-quality, accessible and cost-effective healthcare for all patients with a medical condition requiring a particular concentration of expertise in medical domains where expertise is rare;

(d) to maximise the cost-effective use of resources by concentrating them where appropriate;

(e) to reinforce research, epidemiological surveillance like registries and provide training for health professionals;

(f) to facilitate mobility of expertise, virtually or physically, and to develop, share and spread information, knowledge and best practice and to foster developments of the diagnosis and treatment of rare diseases, within and outside the networks;

(g) to encourage the development of quality and safety benchmarks and to help develop and spread best practice within and outside the network;

(h) to help Member States with an insufficient number of patients with a particular medical condition or lacking technology or expertise to provide highly specialised services of high quality.

3. Member States are encouraged to facilitate the development of the European reference networks:

(a) by connecting appropriate healthcare providers and centres of expertise throughout their national territory and ensuring the dissemination of information towards appropriate healthcare providers and centres of expertise throughout their national territory;

(b) by fostering the participation of healthcare providers and centres of expertise in the European reference networks.

4. For the purposes of paragraph 1, the Commission shall:

(a) adopt a list of specific criteria and conditions that the European reference networks must fulfil and the conditions and criteria required from healthcare providers wishing to join the European reference network. These criteria and conditions shall ensure, inter alia, that European reference networks:

(i) have knowledge and expertise to diagnose, follow-up and manage patients with evidence of good outcomes, as far as applicable;

(ii) follow a multi-disciplinary approach;

(iii) offer a high level of expertise and have the capacity to produce good practice guidelines and to implement outcome measures and quality control;

(iv) make a contribution to research;

(v) organise teaching and training activities; and

(vi) collaborate closely with other centres of expertise and networks at national and international level;

(b) develop and publish criteria for establishing and evaluating European reference networks;

(c) facilitate the exchange of information and expertise in relation to the establishment of European reference networks and their evaluation.

5. The Commission shall adopt the measures referred to in paragraph 4(a) by means of delegated acts in accordance with Article 17 and subject to the conditions of Articles 18 and 19. The measures referred to in points (b) and (c) of paragraph 4 shall be adopted in accordance with the regulatory procedure referred to in Article 16(2).

6. Measures adopted pursuant to this Article shall not harmonise any laws or regulations of the Member States and shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care.

*Article 13*

**Rare diseases**

The Commission shall support Member States in cooperating in the development of diagnosis and treatment capacity in particular by aiming to:

(a) make health professionals aware of the tools available to them at Union level to assist them in the correct diagnosis of rare diseases, in particular the Orphanet database, and the European reference networks;

(b) make patients, health professionals and those bodies responsible for the funding of healthcare aware of the possibilities offered by Regulation (EC) No 883/2004 for referral of patients with rare diseases to other Member States even for diagnosis and treatments which are not available in the Member State of affiliation.

*Article 14*

**eHealth**

1. The Union shall support and facilitate cooperation and the exchange of information among Member States working within a voluntary network connecting national authorities responsible for eHealth designated by the Member States.

2. The objectives of the eHealth network shall be to:

(a) work towards delivering sustainable economic and social benefits of European eHealth systems and services and interoperable applications, with a view to achieving a high level of trust and security, enhancing continuity of care and ensuring access to safe and high-quality healthcare;

(b) draw up guidelines on:

(i) a non-exhaustive list of data that are to be included in patients' summaries and that can be shared between health professionals to enable continuity of care and patient safety across borders; and

(ii) effective methods for enabling the use of medical information for public health and research;

(c) support Member States in developing common identification and authentication measures to facilitate transferability of data in cross-border healthcare.

The objectives referred to in points (b) and (c) shall be pursued in due observance of the principles of data protection as set out, in particular, in Directives 95/46/EC and 2002/58/EC.

3. The Commission shall, in accordance with the regulatory procedure referred to in Article 16(2), adopt the necessary measures for the establishment, management and transparent functioning of this network.

*Article 15*

**Cooperation on health technology assessment**

1. The Union shall support and facilitate cooperation and the exchange of scientific information among Member States within a voluntary network connecting national authorities or bodies responsible for health technology assessment designated by the Member States. The Member States shall communicate their names and contact details to the Commission. The members of such a health technology assessment network shall participate in, and contribute to, the network's activities in accordance with the legislation of the Member State where they are established. That network shall be based on the principle of good governance including transparency, objectivity, independence of expertise, fairness of procedure and appropriate stakeholder consultations.

2. The objectives of the health technology assessment network shall be to:

(a) support cooperation between national authorities or bodies;

(b) support Member States in the provision of objective, reliable, timely, transparent, comparable and transferable information on the relative efficacy as well as on the short- and long-term effectiveness, when applicable, of health technologies and to enable an effective exchange of this information between the national authorities or bodies;

(c) support the analysis of the nature and type of information that can be exchanged;

(d) avoid duplication of assessments.

3. In order to fulfil the objectives set out in paragraph 2, the network on health technology assessment may receive Union aid. Aid may be granted in order to:

(a) contribute to the financing of administrative and technical support;

(b) support collaboration between Member States in developing and sharing methodologies for health technology assessment including relative effectiveness assessment;

(c) contribute to the financing of the provision of transferable scientific information for use in national reporting and case studies commissioned by the network;

(d) facilitate cooperation between the network and other relevant institutions and bodies of the Union;

(e) facilitate the consultation of stakeholders on the work of the network.

4. The Commission shall, in accordance with the regulatory procedure referred to in Article 16(2), adopt the necessary measures for the establishment, management and transparent functioning of this network.

5. Arrangements for granting the aid, the conditions to which it may be subject and the amount of the aid, shall be adopted in accordance with the regulatory procedure referred to in Article 16(2). Only those authorities and bodies in the network designated as beneficiaries by the participating Member States shall be eligible for Union aid.

6. The appropriations required for measures provided for in this Article shall be decided each year as part of the budgetary procedure.

7. Measures adopted pursuant to this Article shall not interfere with Member States' competences in deciding on the implementation of health technology assessment conclusions and shall not harmonise any laws or regulations of the Member States and shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care.

CHAPTER V

**IMPLEMENTING AND FINAL PROVISIONS**

*Article 16*

**Committee**

1. The Commission shall be assisted by a Committee, consisting of representatives of the Member States and chaired by the Commission representative.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at 3 months.

*Article 17*

**Exercise of the delegation**

1. The powers to adopt delegated acts referred to in Articles 11(5) and 12(5) shall be conferred on the Commission for a period of 5 years from 24 April 2011. The Commission shall make a report in respect of the delegated powers not later than 6 months before the end of the five-year period. The delegation of powers shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article 18.

2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions laid down in Articles 18 and 19.

*Article 18*

**Revocation of the delegation**

1. The delegation of power referred to in Articles 11(5) and 12(5) may be revoked at any time by the European Parliament or by the Council.

2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated powers which could be subject to revocation and possible reasons for a revocation.

3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the *Official Journal of the European Union*.

*Article 19*

**Objections to delegated acts**

1. The European Parliament or the Council may object to the delegated act within a period of 2 months from the date of notification.

At the initiative of the European Parliament or the Council this period shall be extended by 2 months.

2. If, on expiry of the period referred to in paragraph 1, neither the European Parliament nor the Council has objected to the delegated act, it shall be published in the *Official Journal of the European Union* and shall enter into force on the date stated therein.

The delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If the European Parliament or the Council objects to a delegated act within the period referred to in paragraph 1, it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.

*Article 20*

**Reports**

1. The Commission shall by 25 October 2015 and subsequently every 3 years thereafter, draw up a report on the operation of this Directive and submit it to the European Parliament and to the Council.

2. The report shall in particular include information on patient flows, financial dimensions of patient mobility, the implementation of Article 7(9) and Article 8, and on the functioning of the European reference networks and national contact points. To this end, the Commission shall conduct an assessment of the systems and practices put in place in the Member States, in the light of the requirements of this Directive and the other Union legislation relating to patient mobility.

The Member States shall provide the Commission with assistance and all available information for carrying out the assessment and preparing the reports.

3. Member States and the Commission shall have recourse to the Administrative Commission established pursuant to Article 71 of Regulation (EC) No 883/2004, in order to address the financial consequences of the application of this Directive on the Member States which have opted for reimbursement on the basis of fixed amounts, in cases covered by Articles 20(4) and 27(5) of that Regulation.

The Commission shall monitor and regularly report on the effect of Article 3(c)(i) and Article 8 of this Directive. A first report shall be presented by 25 October 2013. On the basis of these reports, the Commission shall, where appropriate, make proposals to alleviate any disproportionalities.

*Article 21*

**Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 October 2013. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 22*

**Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

*Article 23*

**Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 9 March 2011.

| *For the European Parliament* | *For the Council* |
|---|---|
| *The President* | *The President* |
| J. BUZEK | GYŐRI E. |

# LECTURE 8

## Nature conservation

8 March 2012

EUROPEAN COMMISSION

Brussels, 02.VII.2009
C(2009) 5080 final

**PUBLIC VERSION**

**WORKING LANGUAGE**

**This document is made available for information purposes only.**

**Subject:** **State aid NN 8/2009 - Germany**
**Nature conservation areas**

Dear Sir,

The Commission wishes to inform Germany that, having examined the information supplied by your authorities on the matter referred to above, it has decided to raise no objections to the proposed aid measure.

## 1. Procedure

(1) The measure was notified by letter dated 7 March 2007, in accordance with Article 88(3) of the EC Treaty. Additional information was sent by letters dated 4 June 2007 and 20 July 2007. A meeting with the German authorities took place on 24 October 2007. Additional information was provided by Germany by letters of 21 November 2007, 21 January 2008, 9 May 2008 and 14 April 2009.

(2) As one of the measures (the large-scale nature conservation projects) is already being applied, the notification has been entered in the register of non-notified measures.

## 2. Description

### 2.1. Measures

(3) The programme consists of two measures:

Seiner Exzellenz Herrn Frank-Walter STEINMEIER
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin

Commission européenne, B-1049 Bruxelles – Europese Commissie, B-1049 Brussel – Belgium
Telephone: 00 32 (0) 2 299.11.11

1. the gratuitous transfer of federally-owned natural heritage sites (hereinafter referred to as "*land transfer*");

2. the funding of large-scale nature conservation projects.

(4) The two measures may overlap, as a large-scale nature conservation project may involve the transfer of federally-owned land.

### 2.2. Budget

(5) The budget allocated to large-scale nature conservation projects is EUR 14 million/year. The transfer of land does not entail budgetary expenditure.

### 2.3. Duration

(6) The measures are not subject to precise time limits. The "land transfer" measure will come to an end when all the areas concerned have been transferred. The measure concerning large-scale conservation projects is of unlimited duration. The projects themselves have a duration of 8-10 years.

### 2.4. Legal basis

(7) *Haushaltsgesetz* 2006, Vermerk Nr. 60.1 zu Kap. 0807 Tit. 12101 (Budget Act); *Koalitionsvertrag zwischen CDU, CSU und SPD für die 16. Legislaturperiode vom 11. November 2005,* Pkt. 7.4; *Förderrichtlinien für Naturschutzgrossprojekt*e of 28 June 1993 (Guidelines for large-scale nature conservation projects).

### 2.5. Detailed description of the measures

#### 2.5.1. Land transfer

(8) Valuable natural heritage sites exist on federally-owned land in Germany, notably in national parks, UNESCO-biosphere reserves, core zones (*Kernzonen*) of large-scale nature conservation projects, former military training grounds and on land reclaimed from mining.

(9) According to a study carried out in 2005 by the Deutsche Naturschutzring (DNR)[1], due to budgetary constraints the German authorities find it increasingly difficult to finance the long-term upkeep and development of these areas. In the past, valuable nature protection areas were sold, in certain cases with environmental constraints designed to guarantee the preservation of the naturalistic value of the areas. However, experience gathered has shown that, where such areas were sold to private individuals, even if they were classified as natural protection areas (for example Natura 2000), their naturalistic value was significantly degraded over the years. Besides, nature conservation organizations do not have the financial means to purchase the 125.000 ha of federally-owned land that need to be transferred to ensure their proper upkeep, and to pay for follow-on costs (*Folgekosten*). These follow-on

[1] Langfristige Finanzierungsansätze zur Sicherung des nationalen Naturerbe, Berlin, March 2005.

costs, which take the form of taxes, contributions to water and land associations (*Wasser and Bodenverbände*), insurance etc, may be substantial (they have been approximately estimated at 50 € per hectare) but are still considerably lower than the administrative costs the State would incur if it continued to manage the areas concerned.

(10) Germany has therefore decided not to sell the areas concerned, but to transfer responsibility for the conservation of these areas of outstanding naturalistic value to the *Länder* and the *Deutsche Bundesstiftung Umwelt* (DBU, German Environment Foundation). The *Länder* may further transfer these areas gratuitously to nature conservation organizations (which may be in private or mixed ownership). 125 000 ha of German federal nature conservation areas will be transferred under this measure.

(11) The natural heritage sites to be transferred are selected according to the following nature conservation criteria:

- land in national parks,
- land in UNESCO-biosphere reserves,
- land in core zones of large-scale nature conservation projects in Germany,
- former military training grounds and land reclaimed from mining as large, uninterrupted expanses,
- land in NATURA 2000 sites,
- nature conservation areas larger than 50 ha,
- land in areas of importance for the biotope network and species protection.

(12) The transfer of property rights over the land is linked to contractually defined obligations which concern nature conservation obligations the recipients are required to comply with. Such nature conservation duties are assigned either by the German Federal Government (in the case of the *Deutsche Bundesstiftung Umwelt)* or by the *Länder* governments (in the case of the other conservation organizations) by an administrative or legal act[2].

(13) Transfers to nature conservation associations and foundations take place on proposal from the *Länder*, which select the beneficiaries in an open and non-discriminatory procedure, based on the candidates' technical qualifications.

(14) While ownership of the land is transferred to the recipients free of charge, all other costs related to the transfer (for example surveying costs and taxes) as well as maintenance costs and inherited pollution risks (*Altlasten*) are borne by the recipients of the areas. If income generated by the exploitation of the land exceeds costs, the balance must be used exclusively for the preservation and improvement of the national natural heritage or, in alternative, must be paid back to the transferring federal institution. Recipients must submit an annual report showing how revenue was used. The environmental restrictions on land use are permanent,

[2] Verwaltungs- oder Rechtsakte

and the recipients may not alienate the land without authorization from the competent Ministry.

(15) For land transfer, the German authorities could not provide examples of contracts or cadastral records (*Grundbucheintragung*), since the measure has not yet been implemented. However, the authorities have explained that the environmental restrictions on land use will follow the same lines as those applied to the large-scale conservation projects (see points (20) to (22) *infra*).

### 2.6. Large-scale nature conservation projects

(16) The federal programme for the "establishment and protection of valuable natural areas and landscapes of national importance", set out in the *Förderrichtlinien für Naturschutzgrossprojekt*e (Guidelines for large-scale nature conservation projects) of 28 June 1993, aims to finance projects for the conservation of landscapes and natural heritage sites. The programme has been going on since 1979. Until now, in the vast majority of cases the beneficiaries have been public entities, and only exceptionally private nature conservation organizations.

(17) The programme aims to ensure the sustainable maintenance of natural landscapes and "cultural landscapes" with particularly valuable habitats for protected animal and plant species. The aim of the measures is in particular the maintenance of biodiversity (diversity of species, diversity of ecosystems and genetic diversity within species). The programme thus contributes to the attainment of supranational nature conservation objectives such as those set in the Convention on Biodiversity, the related EU-target to stop biodiversity loss by 2010, as well as the long-term preservation of Natura 2000 areas.

(18) The projects to be financed are selected on the basis of nature conservation criteria such as representativeness, scale, closeness to natural state, exemplary character and endangerment. Any interested organization may, in cooperation with the competent *Land*, submit proposals for a conservation project.

(19) Project managers (*Projektträger*) must be State institutions (district authorities, municipalities, communal associations) or nature conservation associations, foundations or groupings thereof. EUR 14 million of government funding are provided each year for implementation of the programme. Project managers are proposed by the *Länder*, which make their selection on the basis of the candidates' technical qualifications.

(20) The obligations for recipients are project-specific and are set out in administrative or legal acts issued by the authorities. The parameters for calculation of the grants are indicated in the *Förderrichtlinien*. The grant amount for each project is then stipulated contractually in the grant act *(Zuwendungsbescheid*[3]). This act specifies the type and duration of the obligations, the geographic coverage, the scope, type, duration and method of calculation of the financial grants, and includes provisions on monitoring and modification of the grant amounts. It is complemented by a care and management plan.

[3] Zuwendungsbescheid, §44 Bundeshaushaltsordnung, BGBl I 1969, 1248

(21) The care and management plan provides a detailed description of the nature conservation tasks involved in each project. The plan, which is drawn up under the control of a Committee, must be in line with a set of guidelines, which typically include criteria such as those outlined below.

a) The standards for future development of the core areas must be those of an environment with unspoiled natural flora and fauna, taking account of the general socio-economic conditions. The habitats of the animal and plant species which occur in such areas, in particular endangered and typical species as well as target and dominant species in the core areas, must be safeguarded and developed;
b) integrated, site-specific protection and management concepts must be developed taking particular care to preserve, optimise and develop valuable habitats;
c) conservation-oriented visitor management must be introduced to ensure the environmentally-friendly use of the project's core areas for the purpose of leisure and recreation;
d) Evaluation tools must be developed to assess the long-term success of the project;
e) Use for hunting and recreational purposes must not be in conflict with the nature conservation objectives and the need for protection and tranquillity in the areas.

(22) The conservation tasks may thus take different forms, which are defined specifically for each area. For example, the organizations may be required to create or expand natural ecosystems such as wetlands, restore the original water regimes, encourage the development of self-regulating flora and fauna, reduce the quantities of nutrients or create total reserves.

(23) The Federal Government covers a maximum of 75% of eligible project expenditure. The remaining expenditure must be financed by the competent *Land* and by the project manager. In particular, there is a requirement that at least 10% of the costs incurred during the project, (net of income), as well as the totality of follow-on costs (the long-term costs to be sustained after completion of the projects) must be borne by project managers.

(24) The German authorities have provided assurances that the public funding provided cannot exceed the costs incurred by the project managers to fulfil the obligations, net of any income generated by the projects. The projects are of limited duration (10 years on average).

(25) Typically, in the case of private conservation entities, the own-contribution is raised through donations. However, it is possible for the conservation entities to draw revenue from the land they manage. Such sources of revenue are, however, limited by the restrictions on land use imposed by the German government. Revenue may be obtained, in particular but not exclusively, through hunting leases, fishing leases, sales of wood obtained from forestry upkeep activities and tourism. This revenue is offset against the costs of the projects. The German authorities point out that, if the conservation organizations were precluded from exercising any revenue-generating activities, the cost of conservation projects would be higher, and this would infringe the principle, enshrined in the budgetary law, that support measures should be implemented at the least cost for the State[4].

[4] Sparsamkeitsgebot, §7 Bundeshaushaltsordnung (BHO) of 16.5.2001.

(26) The following description of the activities that may be carried out in the framework of large-scale conservation projects is based on the information provided by the German authorities and on a sample contract[5], and is therefore not exhaustive.

(27) The sample contract sets out environmental constraints which are modulated according to the area concerned (core zones are subject to more stringent constraints than other zones). For example, in the core zones it is forbidden to build, carry out mining activities, create tourism infrastructure or construct new roads. Generally speaking, activities should not perturb the quiet of the protected areas. Limited tourist activities such as visitors' management *(Besucherlenkung*) are possible provided they comply with the environmental criteria set out in the care and management plan. In the example provided, fishing activities are possible subject to conditions (the long-term objective being the development of autochthonous fish populations). Hunting is also possible, with limitations concerning fixed hunting facilities and baiting/feeding. According to the German authorities, hunting may be necessary to protect forests and should therefore be viewed as a conservation task. As regards forestry, the German authorities have indicated that some particularly valuable forests must be left to natural dynamics (no exploitation), whereas others may be exploited, provided this is done in a non-intensive, environmentally friendly way. Sales of wood are possible. If land is purchased in the framework of a project, existing leases may continue until their expiry but cannot be renewed. New leases of land for extensive exploitation (outside the core areas) are possible.

(28) As shown by the above example, the sources of revenue at the organizations' disposal are limited by the restrictions on land use imposed by the authorities, but are not defined in an exhaustive way, and the revenue-generating potential of the areas may differ widely. Therefore, the exact financial amount required to cover the recipients' costs cannot be established on an *ex ante* basis, since it has to take into account all revenue accruing to the recipients. In any event, if revenue exceeds costs, the balance must be paid back to the federal institution which awarded the grant, so as to ensure that the conservation entities do not receive more than is strictly necessary to carry out the project.

(29) The two measures (land transfer and conservation projects) are independent from one another. However, there may be a degree of overlap, as federally-owned land in core areas of large-scale conservation projects may be transferred free of charge to the conservation entities. Besides, project costs may include the purchase of privately-owned land, if this is indispensable to discharge the conservation tasks. The ownership of such land is also transferred to the conservation entities.

*Further transfer or resale of the land*

(30) Land which is either transferred free-of-charge or purchased with federal funds cannot, in principle, be alienated. However, alienation of land may, under certain circumstances, be authorized by the competent authorities[6]. The German authorities have provided assurances that a resale of the land would be authorized only for land consolidation purposes (*Arrondierung*). The proceeds of the sale would have to be reinvested fully in the care and

[5] In particular, the description of the project "Pfrunger-Burgweiler Ried" of Land Baden-Württemberg.
[6] Zuwendungsbescheid, § 44 Bundeshaushaltsordnung, BGB1 I 1969, 1248.

development of the nature protection areas or used for the acquisition of land with the same or higher naturalistic value. Otherwise, the proceeds would have to be paid back to the State. For both measures (land transfer and conservation projects), the permanent nature of the environmental constraints and the obligation to either reinvest the proceeds of a sale in nature conservation or return them to the State are laid down in the cadastral records of the land parcels concerned.

(31) Further transfer of the land to a different recipient organization is also possible, in principle. In this case, the land will retain all its existing environmental constraints, and will be transferred to the new owner in such a manner that neither the original recipient, nor the new recipient, can draw any economic benefit from the transfer while the new owner will maintain the nature conservation responsibilities.

## 3. Assessment

### 3.1. Presence of aid pursuant to Article 87(1) of the EC Treaty

#### 3.1.1. Transfer of competences and assets from the Federal Government to the Länder

(32) In some cases the transfer of nature conservation areas consists in the mere transfer of ownership from the German Federal Government to the *Länder*. The Commission considers that this transaction constitutes a shift of property rights and responsibility for nature conservation *within* the State structure and does not involve a transfer of State resources to undertakings. Therefore, insofar as the *Länder* are concerned, the notified measure is not caught by Article 87(1) of the EC Treaty.

(33) The German authorities have indicated that the *Deutsche Bundesstiftung Umwelt* (DBU) should be considered part of the State structure. However, according to available information, the DBU has created a subsidiary foundation (*DBU Naturerbe GmbH*) which will carry out directly some major nature conservation projects. The Commission takes the view that this subsidiary cannot be considered part of the State structure, but should be viewed as a publicly owned conservation entity. The analysis developed in points (34) to (41) therefore also appliesto all entities entrusted with the tasks under scrutiny, whether public or private. This includes DBU Naturerbe GmbH and, potentially, DBU, if they carry out the same tasks

#### 3.1.2. Nature conservation entities are undertakings

(34) The Länder may delegate the discharge of the conservation tasks attributed to them and, in particular, transfer land ownership to nature conservation foundations, associations or societies, which may be in private, public or mixed ownership.

(35) The prohibition of State aid enshrined in Article 87(1) of the EC Treaty applies only insofar as the beneficiaries are undertakings. The German authorities consider that the nature conservation organizations concerned by the scheme cannot be classified as undertakings since they are non profit-making and carry out activities which are not economic in nature and have

been defined as services of general interest[7]. According to Germany, this conclusion would be corroborated by the fact that, under German law, such entities are exempt from company tax. In its letter of 9 May 2008, the German authorities also refer to Commission Decision NN 41/2005 (*Green Funds*, Netherlands)[8] where the Commission came to the conclusion that the Dutch nature protection organizations concerned did not exercise economic activities and underline that the same conclusion should apply to the German entities.

(36) The Commission does not share this view. The Court of Justice has consistently ruled that the notion of undertaking encompasses all entities exercising an economic activity, irrespective of their legal form and of how they are financed.[9] Therefore, the conclusion as to whether the conservation entities carry out economic activities cannot be based on their general aim, profit-making orientation or fiscal treatment under national law, but must be grounded on an analysis of the activities such entities are liable to carry out under the notified measure[10]. Therefore, the position taken by the Commission in Case NN 41/2005 cannot be generalized and construed as a precedent, since it simply reflects the Commission's conclusion that, based on the information provided by the Netherlands, the Dutch organizations did not carry out any economic activities under that specific scheme.

(37) It is also common ground that, where economic activities are involved, no distinction should be made between those nature conservation entities which are publicly owned and those which are privately owned or in mixed ownership[11].

(38) The German authorities point out that the revenue-generating activities may be the inevitable result of the conservation tasks. For example, trees may need to be felled for environmental reasons (e.g. in order to remove foreign tree species), and certain animal populations may need to be reduced by hunting in order to protect forest ecosystems. Likewise, tourism and recreational activities will not be primarily oriented towards business exploitation and will be restricted by the need to avoid disturbing the local fauna. Tourism may be carried out by specialized undertakings.

(39) The Commission notes that nature conservation entities may carry out a variety of tasks, which are not defined exhaustively *ex ante*, either in the legal basis (the *Förderrichtlinien*) or in the notification itself[12]. While it cannot be excluded that some of the conservation tasks globally defined by Germany as Services of General Interest will be purely non-economic in nature, in other cases the conservation objective will be achieved through the imposition of environmental constraints on activities such as forest and pasture management, leases of land and tourism. Even though these activities may be limited in scope and not particularly

[7] Aufgaben der Daseinsvorsorge.
[8] Commission Decision of 25 August 2006, C(2006) 3886.
[9] Judgments of the Court of Justice: C-41/90, *Höfner und Elser*, [1991] ECR 1979, paragraph 21, C-244/94, *Fédération française des sociétés d'assurance and Others*, [1995] ECR I-4013, paragraph 14, and C-55/96, *Job Centre*, [1997] ECR I-7119, paragraph 21.
[10] For non-profit making organizations, see for example Joined cases 209/78 to 215/78 and 218/79 *Van Landewyck* [1980] ECR 03125 and Case C-244/94, *FFSA and others* [1995] ECR I-4013.
[11] The EC Treaty (Article 295) is neutral as regards private v. public ownership of undertakings.
[12] Point 6.1 of the Förderungsrichtlinien merely states: "*exploitation, hunting, fishing and recreational activities are authorized insofar as they are not contrary to the nature protection objectives of the project*".

profitable due to the environmental constraints, profitability is not a relevant criterion for the classification of an activity as economic in nature.

(40) Such classification cannot be based, either, on the teleological argument put forward by the German authorities according to which the "focus" of the activities would be environmental protection rather than the generation of revenue. The Commission notes that, regardless of the environmental objectives pursued, the conservation organizations have an interest in generating sufficient revenue to cover the costs related to land ownership and/or those related to project implementation (10% of project costs must be borne by the organizations themselves). Therefore, the environmental objective will always coexist with the economic objective.

(41) According to settled case-law, any activity consisting in supplying goods or services on a given market is an economic activity[13]. The Commission considers that, in the case at hand, activities like sales of wood, leases of land and tourism must be classified as economic in nature. The German nature conservation entities concerned by the notified measures should therefore be considered as undertakings within the meaning of Article 87(1) of the EC Treaty insofar as they exercise these activities (and as such, they should be subject to State aid control).

(42) This finding is in line with previous Commission decisions approving under the State aid rules very similar German measures involving the gratuitous transfer of forestry land to the *Länder* and nature conservation organizations (C 17/1998, N 506/1999 and N 277/2003), where the revenue-producing activities carried out were equally considered economic in nature, and the entities were qualified as undertakings.

### 3.1.3. Criteria to identify the presence of State aid

(43) Under Article 87(1) of the EC Treaty, a measure constitutes State aid if the four following conditions are cumulatively met. First, it must be a State measure or involve State resources. Second, the measure must confer an advantage on its recipients. Third, it must be granted selectively by favouring only certain undertakings. Fourth, it must affect trade between Member States and distort or threaten to distort competition.

#### *3.1.3.1. Transfer of State resources*

(44) Under the land transfer measure, the German State transfers the ownership of the selected natural sites free-of-charge. The long-term restrictions on land use linked to nature conservation objectives reduce its sales value, but do not bring it down to zero. The potential sales value of the land is difficult to quantify as it depends on factors such as the suitability of the area for income-generating activities or the extent of follow-on costs (which include land tax, water and land fees, insurance and other administrative costs). A study carried out in 2005 by the *DNR-Strategiegruppe Naturschutzflächen* and submitted by the German authorities underlines the difficulties of valuating the land, but makes no suggestion that the market value of the land would be zero. On the contrary, the study puts forward tentative cost

[13] Judgment of the Court of 10 January 2006 in Case C-222/04 *Cassa di Risparmio di Firenze et al.* [2006] ECR I-289.

figures for certain types of areas. Moreover, in the past this type of land was sold to nature conservation entities and private individuals for consideration.

(45) According to the Commission Communication concerning State aid elements in sales of land and buildings by public authorities[14], State aid can only be excluded if a sale is concluded at market value. Since the land is transferred free-of-charge despite the fact that it has a positive market value, the German State is transferring State resources to the recipients in the form of foregone revenue.

(46) As regards the large-scale conservation projects, the State intervenes by providing 90% of project costs (thorough federal and *Länder* resources). Therefore, this measure also involves a transfer of State resources.

#### *3.1.3.2. Economic advantage*

(47) Both measures confer an economic advantage on the recipients, since the land is put free-of-charge at the disposal of the beneficiaries, who may exploit it commercially and obtain revenue, even though such revenue may be limited by environmental constraints. Besides, when ownership is transferred free-of-charge or at a reduced cost for the recipient (e.g. in the framework of a conservation project), there is arguably a further element of potential advantage consisting in the value of the land. The relevance of this advantage for the assessment of the measures at issue will be examined in greater detail in points (79) to (81) below.

#### *3.1.3.3. Selectivity*

(48) The beneficiaries are selected nature conservation organizations. Therefore, the measures are selective in scope.

#### *3.1.3.4. Impact on trade and distortion of competition*

(49) The beneficiaries of the measures exercise activities in sectors such as forestry, tourism and hunting/fishing. These sectors are open to competition and there is intra-community trade in all of them. Admittedly, these activities are likely to be limited in scope, both geographically and in terms of value.

(50) As regards value, modest amounts of aid complying with the conditions set out in Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de *minimis aid*[15] fall outside the scope of Article 87(1) of the Treaty. In the case at hand, however, no limit is set to the value of the aid which may be granted to the recipients.

(51) As regards the geographical scope of the activities, the Commission has accepted that state support did not affect trade only in a very limited number of cases involving purely local services, unlikely to attract custom from other Member States, such as a German swimming

[14] OJ C 209, 10.7.1997, p. 3.
[15] OJ L 379, 28.12.2006, p. 5.

pool[16]. The Community courts have likewise interpreted the notion of impact on trade in a strict way.

(52) In the case at hand, at least one of the activities (wood sales) does not concern the provision of a service, but the sale of goods (forestry products), which are clearly capable of being exported within the EU. As regards the other activities, also given the geographical location of the areas, which are scattered on the whole German territory, it cannot be ruled out that the transferred land would be suitable for international tourism, or that the hunting leases would attract interest internationally. Besides, the German scheme does not define exhaustively the activities which may be carried out on the land. Therefore, despite the fact that the impact of the measures is likely to be limited, the Commission considers that intra-community trade should be considered affected.

### 3.1.4. Conservation tasks as Services of General (Economic) Interest

(53) The German authorities take the view that the nature conservation tasks carried out under the notified measures should be viewed as non-economic Services of General Interest ("*SGI*").

(54) However, as explained in points (36) to (42) *supra*, the Commission considers that at least some of the activities carried out by the conservation entities and defined as services of general interest are indeed economic in nature. Therefore, the Commission has assessed whether the tasks at issue can be viewed as Services of General *Economic* Interest ("SGEI") instead.

(55) As the ECJ repeatedly confirmed, also in the recent *BUPA*[17] judgment, Member States have wide discretion in defining a SGEI mission and the conditions of its implementation. The Commission can question the Member States' definition only in case of manifest error. Member States must, however, indicate the reasons why they consider that the service in question, because of its specific nature, deserves to be characterized as a SGEI[18].

(56) Environmental protection tasks of the type proposed by Germany have never so far been defined as a SGEI by a Member State. SGEI missions have typically concerned network industries such as telecommunications, water and electricity distribution, postal services, transport services as well as certain airport or port services. On the other hand, the notion of SGEI cannot be a static one, since the perception of what services should be guaranteed through the intervention of the State is liable to develop over time. In its 2004 White Paper on Services of General Interest[19] the Commission already recognized that "s*ervices of general interest and the context in which they are provided, including the European Union itself, are constantly evolving and will continue to evolve*".

[16] Commission decision N 258/2000 of 21.12.2000, Germany – leisure pool Dorsten, OJ C 172, 16.6.2001, p. 16.
[17] See judgment of the CFI of 12 February 2008 in Case T-289/03 *BUPA*, paragraphs 166 to 169, not yet published.
[18] *BUPA* case-law, ibidem, paragraph 172.
[19] Communication of the Commission of 12.5.2004 COM(2004)374 final, available at http://eurlex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf

(57) The Commission White Paper, while focusing on the more typical public service missions, also considered the environment to be an area where services of general interest might be established: in section 3.4 of the Paper, it is stated that, "*in line with the Union's policy on sustainable development, due consideration has to be taken also of the role of services of general interest for the protection of the environment and of the specific characteristics of services of general interest directly related to the environmental field, such as the water and waste sectors*".

(58) The Commission considers, however, that a necessary precondition for qualifying a measure as a SGEI is that it genuinely serves the interest of citizens. The conservation tasks entrusted by Germany to the nature conservation entities pursue objectives which are in the interest of society as a whole, namely the preservation of intact habitats of outstanding naturalistic value for future generations. These tasks, which can be construed as services rendered to all citizens, clearly fall within the remit of the State acting as public authority, which however may find it appropriate to entrust them to other entities, for example for budgetary reasons. In that sense, the scheme differs from a classical environmental aid measure: in the latter case the activities which are beneficial for the environment cannot be carried out by the State, but can only be carried out by undertakings on a voluntary basis. Therefore, the Commission accepts that the conservation tasks at issue may constitute a service of general interest.

(59) However, it should be noted that SGEIs established by the Member States in sectors of the economy which have been the object of harmonization at the EU level must be examined with particular care in order to avoid contradictions. In particular, the forestry sector is harmonized, and State aid for forestry is covered by the Community Guidelines for State aid in the Agriculture and Forestry Sector 2007-2013[20] ("the 2007 Agriculture Guidelines"). Therefore, the Commission has examined whether agricultural rules should be applied to the case at hand. The 2007 Agriculture Guidelines (notably point 175, letters (a) to (g)) would allow aid aimed to promote the ecological, protective and recreational function of forests, as well as aid in the form of transfer of forestry land for permanent protection purposes.

(60) However, in the case at hand, forestry land constitutes only a fraction of the natural protection areas at issue (and only 0.8% of all exploited forested land in Germany). Besides, the organizations concerned will also carry out other activities to be assessed as compensation for an SGEI, and a global analysis of the absence of overcompensation would necessarily need to include revenue from forestry activities.

(61) In the light of the above, the Commission considers that it would not be appropriate to carve out forestry and carry out a separate analysis on the basis of the sectoral rules, and that an analysis based on compensation for an SGEI is the most correct approach for the measures put in place by Germany, which must be assessed globally.

[20] OJ C 319 of 27.12.2006, p. 1.

### 3.1.5. The Altmark criteria are not cumulatively fulfilled

(62) The German authorities have provided information aiming to demonstrate that the measures do not constitute aid on the basis of the *Altmark*[21] case-law. The Commission has examined and dismissed this argument.

(63) In its judgment in the *Altmark* case, the Court of Justice held that, public service compensation (that is, compensation for an SGEI) does not constitute State aid within the meaning of Article 87 of the Treaty provided four conditions are cumulatively met.

(64) In particular, the fourth *Altmark* condition is that, in order not to constitute State aid, the amount of compensation must be defined either through an open, transparent and non discriminatory public tender procedure (the "tender method") *which would allow for the selection of the tenderer capable of providing those services at the least cost to the community*[22], or the public authorities have to define the amount of compensation on the basis of an analysis of the costs of a typical undertaking, well run and adequately equipped (the "benchmarking method").

(65) Under the notified measures, the conservation organisations are selected in an open and transparent public procedure. However, the bidding process is not based on the lowest price of the services, or on the most economically advantageous offer[23], but rather on the qualifications of the organizations and –only for the nature conservation projects - on the environmental merits of the projects. The amount of compensation is therefore not fixed as a result of a bidding process, contrary to what the *Altmark* case-law requires, and the system does not ensure that the services will be provided at the least cost for the State. Even though the German authorities have assured that, in the event of two organizations presenting offers for the same project, the more economic of the two offers would be selected, this possibility seems purely theoretical (since projects will typically be different) and would in any event only cover a fraction of projects. The amount of compensation is not fixed through benchmarking, either. Therefore, the conclusion must be drawn that the fourth *Altmark* condition is not fulfilled, and therefore the *Altmark* case-law cannot be relied upon to classify the measures as non-aid.

(66) Since all the criteria of Article 87(1) are met, the measure constitutes State aid.

(67) Even though the criteria applied here are different, the State aid finding is consistent, in substance, with the Commission's previous decision-making practice: a number of German schemes involving the gratuitous transfer of federally-owned forestry land to the *Länder* and to nature conservation organizations (notified to and authorized by the Commission in cases C 17/1998, N 506/1999 and N 277/2003) were also found to constitute State aid[24].

---

[21] Judgment of the Court of 24 July 2003 in Case C 280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] ECR I-7747.

[22] Ibidem, point 93.

[23] This notion is wider than that of the lowest price and also takes into account qualitative factors

[24] In its decision approving case N 277/2003 (Decision of 26 April 2006 COM (2006) 1579 fin) the Commission stated that it was unable carry out an analysis based on the notion of compensation for services of general interest because the German authorities had not provided sufficient information to substantiate the claim.

### 3.2. Legality of the aid

(68) In its letter of 11 April 2008, the German authorities confirmed that the large-scale conservation project measure has been ongoing since 1979. The land transfer measure has not been implemented. Therefore, the aid is unlawful insofar as the conservation projects measure is concerned.

### 3.3. Compatibility of the aid on the basis of the post-Altmark package

#### 3.3.1. Applicability of the SGEI Decision

(69) Small amounts of compensation granted to undertakings providing services of general economic interest whose turnover is limited may be considered compatible aid (and exempted from the notification requirement) pursuant to Commission Decision of 28 November 2005 on the application of Article 86(2) of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest[25] (the "*SGEI Decision"*). In particular, the SGEI Decision applies to compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million.

(70) The German authorities have clarified that, according to the information at their disposal (which relates to possible future recipients of federal land and current recipients of funds in the framework of nature conservation projects), the turnover of the recipient organizations does not exceed the threshold of EUR 100 million laid down in the SGEI Decision. As regards the amounts of compensation involved, for the land transfer measure it is expected that the revenue drawn from the land will not exceed the EUR 30 million threshold (but exact figures will only be available after the land has been transferred). As regards the conservation projects, the grants cannot exceed the threshold of the SGEI Decision, considering that the total budget allocated to the measure (EUR 14 million) is shared between 20-30 recipients.

(71) On the basis of this information, the Commission concludes that all aid granted in the past for conservation projects falls within the scope of the SGEI Decision.

(72) As regards the future, it is likely that, in the vast majority of cases, aid granted towards both measures (land transfer and conservation projects) will fall within the scope of the SGEI Decision. However, in the absence of an explicit limitation of the scheme to measures fulfilling the conditions of the SGEI Decision, there may be situations in which the thresholds are exceeded. It is therefore appropriate also to check compliance of the scheme with the SGEI Framework. Since the rules of the SGEI Decision and Framework are, in substance, the same (the Decision is just narrower in its scope of application) there is no need for a separate assessment.

[25] OJ L 312 of 29.11.2005, p. 67.

### 3.3.2. Compatibility on the basis of the SGEI Framework

(73) Public service compensation which cannot be qualified as non-aid on the basis of the Altmark criteria may, however, be found compatible if it complies with the conditions laid down in the Community Framework for State aid in the form of public service compensation[26] ("*the SGEI Framework*").

#### *3.3.2.1. Genuine SGEI*

(74) In the light of the analysis developed in points (55) to (58), the Commission is satisfied that it is in the public interest to ensure that valuable natural heritage sites are protected and enhanced, and that such public interest justifies the establishment of public service obligations.

#### *3.3.2.2. Entrustment*

(75) Public service obligations for which compensation is granted must be clearly defined. According to point 12 of the SGEI Framework, this means that responsibility for operation of the SGEI must be entrusted to the undertaking concerned by way of one or more official acts, which must specify:

a) the precise nature and duration of the public service obligations;

b) the undertakings and the territory concerned;

c) the nature of any exclusive or special rights assigned to the undertaking;

d) the parameters for calculating, controlling and reviewing the compensation;

e) the arrangements for avoiding and repaying any overcompensation.

(76) As regards the transfer of land, the entrustment to undertakings of the conservation tasks takes place through the donation contract (*Schenkungsvertrag*), in conjunction with the modification of the relevant cadastral data (*Grundbucheintragung*). No special or exclusive rights are granted. The donation contract describes the exact environmental obligations recipients of the land must comply with. These constraints are reflected in the cadastral data, which establish land use and resale restrictions for the concerned areas. The parameters of the transaction are established beforehand and mechanisms are put in place to ensure the avoidance of overcompensation. Therefore, for the land transfer measure, it can be considered that the environmental tasks have been duly entrusted by Germany to the recipient organizations.

(77) As regards the financing of large nature conservation projects, the entrustment is enshrined in the legally binding *Zuwendungsbescheid* issued by the Länder, in conjunction with the management and development plan of each project. The *Zuwendungsbescheid* prescribes that the public resources made available for the project must be used exclusively to discharge tasks of general interest[27]. These tasks are then specified in detail in the project-specific

[26] OJ C 297 of 29.11.2005, p. 4.
[27] defined by reference to the *Förderrichtlinien.*

management and development plan. No special or exclusive rights are granted. The temporal, geographic and financial parameters of the transaction are specified and mechanisms are put in place to avoid overcompensation. Therefore, it can be considered that the environmental tasks related to this measure have also been duly entrusted.

#### *3.3.2.3 Amount of compensation*

(78) The amount of compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable margin of profit (point 14 of the SGEI Framework). Compensation must actually be used for the operation of the SGEI (point 15 of the SGEI Framework).

a) *Land transfer*

(79) The potential economic advantage accruing to the conservation organizations can be defined as the revenue streams obtained through the commercial exploitation of the land, plus the sales value of the land. However, the element of advantage incorporated in the sales value of the land will, *de facto*, materialize only in the event of a sale. It should be noted that, in principle, the land transferred to the conservation entities cannot be freely alienated by the recipients. Even where alienation is authorized, the proceeds of the sale cannot be retained by the recipient, but must be either reinvested in environmental conservation, or paid back to the State. The environmental obligations cannot be reverted, and in case of non-compliance with such obligations, the transferred land is to be returned to the State.

(80) In this situation, the only advantage accruing to the recipients consists in the revenue streams obtained through the exercise of the economic activities which may be carried out on the land. Therefore, for the purpose of analysing the absence of overcompensation in the light of the Framework, the Commission considers it appropriate to base its assessment not on the potential sales value of the land, but on the revenue that can be drawn from it.

(81) According to the information provided by the German authorities, the proceeds from the economic activities at issue will typically not exceed the costs arising from the environmental tasks imposed on the recipients and the costs related to the ownership of the land (e.g. taxes, remediation of inherited pollution (*Altlasten*) and other contributions). Since each area has a different potential for generating income, it is impossible to provide *ex ante* figures. However, the German authorities have provided a description of the general accounting principles to be used. Should revenues exceed costs, the balance must be either reinvested in the protection of the natural heritage, or be transferred back to the State. Therefore, it is considered that the compensation (the revenue which can be obtained from the land) will be used entirely to discharge the SGEI obligations, as foreseen by the SGEI Framework.

(82) Overcompensation can also be ruled out, since the revenue must be entirely allocated to the conservation tasks or paid back. It is worth noting that this method excludes the possibility for the recipients to retain any margin of profit from their activities, even though a reasonable margin of profit would be allowed by the SGEI Framework (cfr. point 18).

(83) The SGEI Framework also sets out requirements aiming to ensure the absence of cross-subsidization in cases where the undertakings also carry out activities falling outside the scope of the service of general economic interest, for example by means of cost/revenue

allocation mechanism or the keeping of separate accounts for SGEI and non-SGEI activities. In the case at hand, both the conservation activities and the revenue-generating activities can be considered to fall within the scope of the SGEI. For these activities, there is a financial settlement whereby the costs of the conservation measures are set against the costs and revenues from the economic activities. However, the conservation entities may carry out other activities, unrelated to the measure at issue. In this case it is necessary to ensure that the costs arising from such activities cannot be imputed to the SGEI and taken into account in the financial settlement.

(84) The German authorities have confirmed that the accounting principles applicable to the measure[28] guarantee transparency and a clear segregation between costs and revenues related to the various activities carried out by the conservation entities.

(85) It should also be noted that the absence of cross-subsidization is the natural corollary of the mechanism chosen by Germany. Cross-subsidization can be defined as the ability of an undertaking to use the subsidy obtained for the operation of the SGEI in order to offer artificially low prices in its other commercial activities. In this case the proceeds of the commercial activities are the only instrument for the conservation organizations to cover the costs arising from the environmental obligations (again, the activities cannot benefit from a subsidy, but the possibility to exercise them for free constitutes the subsidy). No incentive exists, *de facto*, for the organizations to price their commercial services at a level which would undercut competitors.

(86) Besides, it is noted that this mechanism reflects point 17 of the SGEI Framework, stating that "*the Member State may also decide that the profits accruing from other activities outside the scope of the service of general economic interest must be allocated in whole or in part to the financing of the service of general economic interest*".

b) *Major nature conservation projects*

(87) The project funding agreement is also based on the principle that any revenue drawn by the conservation organizations from the economic exploitation of the land must be used to finance the project and any excess revenue should be either reinvested in nature protection or handed back. The considerations developed *supra* in points (82) to (85) on the absence of overcompensation and cross-subsidization equally apply to this measure.

(88) As regards the potential advantage incorporated in the value of the land transferred free-of-charge to the project managers (in case of overlap with the land transfer measure) and in the value of the land purchased as part of project costs (for which recipients will pay only 10% of the purchase price), the considerations developed in points (79) and (80) equally apply to this measure.

(89) It can therefore be concluded that the compensation provided under both notified measures does not exceed what is necessary to discharge the public service obligations entrusted to the beneficiaries.

[28] See para. 6.2.2 ANBestP in VV zu § 44 BHO.

#### *3.3.2.4 Reporting*

(90) The German authorities have agreed to provide a report on the implementation of the scheme every three years. The report will take the form of a table showing, for each measure, the revenue drawn from the land, the expenditure incurred and the use to which any excess revenue was put. Germany will also indicate cases in which the alienation of land was authorized by the competent authorities.

#### *3.3.2.5 Conclusion*

(91) In the light of the above analysis, the Commission concludes that the relevant rules of the post-Altmark package are complied with. Since, as explained *supra* in point (71), the substantive rules of the SGEI Decision and the SGEI Framework do not differ, individual instances of aid which, in view of their characteristics, fall within the scope of the SGEI Decision are considered to comply with the Decision on the basis of the analysis developed above.

## 4. DECISION

(92) In the light of the above, the Commission considers that the measure is compatible with the common market pursuant to Article 86(2) of the EC Treaty.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://ec.europa.eu/community_law/state_aids

Your request should be sent by registered letter or by fax to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels
Fax No: 00-32-2-296-12-42

Yours faithfully,

For the Commission

Neelie KROES
Member of the Commission

Important legal notice

**Case T-347/09: Action brought on 31 August 2009 — Germany v Commission**

*Official Journal C 267 , 07/11/2009 P. 0075 - 0076*

Action brought on 31 August 2009 — Germany v Commission

Parties

Applicant: Federal Republic of Germany (represented by: M. Lumma and B. Klein)

Defendant: Commission of the European Communities

Form of order sought

- Declare Commission Decision SG-Greffe (2009) D/3985 on State aid No NN 8/2009 of 2 July 2009 null and void, to the extent that the measures notified are categorised as State aid within the meaning of Article 87(1) EC;

- Order the defendant to pay the costs.

Pleas in law and main arguments

The applicant challenges Commission Decision K(2009) 5080, definitive since 2 July 2009, concerning aid rules which consist of, first, the free transfer of federally-owned national nature reserves and, second, support for large conservation projects (State aid NN 8/21009 — Germany — Conservation areas). In that decision, the Commission takes the view that the aid rules notified are compatible with the common market under Article 86(2) EC. The applicant challenges the contested decision, to the extent that the measures notified are categorised as State aid within the meaning of Article 87(1) EC.

As the basis of its action, the applicant claims that the defendant incorrectly applied Article 87 (1) EC in a number of respects. In that regard, it is submitted, inter alia, that the defendant wrongly categorises conservation organisations as undertakings and wrongly failed to carry out the necessary overall assessment of the measures referred to. Furthermore, the conservation organisations have obtained no material advantage for State aid purposes from the measures referred to. The applicant further complains of an incorrect application of the fourth criterion laid down by the Court of Justice in Case C-280/00 Altmark Trans und Regierungspräsidium Magdeburg [2003] ECR I-7747.

In the alternative, a breach of the duty to state reasons laid down in Article 253 EC is claimed.

---

Managed by the Publications Office

EUROPEAN COMMISSION

Brussels, 20.04.2011
C(2011)2631 final

**PUBLIC VERSION**

**WORKING LANGUAGE**

**This document is made available for information purposes only.**

**Subject: State aid SA.31494 (N 376/2010) – NL – Subsidies for nature management**

## 1. PROCEDURE

1. On 30 August 2010 the Dutch authorities notified the abovementioned aid measure. By letter of 8 September 2010 the Dutch authorities extended the scope of the notified measure. Requests for further information were sent on 9 November 2010 and 21 January 2011 which were answered by letters of 23 November 2010 and 22 February 2011[1].

## 2. DESCRIPTION OF THE NOTIFIED MEASURE

### *Objective*

2. The main objective of the measure is to maintain and develop biodiversity through support to nature management. The policy of the Dutch government concerning nature management is guided by the Convention on Biological Diversity, the Millennium Development Goals and European Union policy.

Zijne Excellentie de Heer Uri ROSENTHAL
Minister van Buitenlandse Zaken
Bezuidenhoutseweg 67
Postbus 20061
NL - 2500 EB Den Haag

[1] By letter of 22 February 2011 the Dutch authorities amended the scope of the notified measure. The Dutch authorities withdrew from the notification specific (additional) subsidies, the so called *´provinciale pakketten´*, available for landscape management within nature conservation areas. These subsidies could be allocated in special circumstances (e.g. protection of particular provincial landscape elements) that were not covered by the general (national) subsidies. Furthermore, the Dutch authorities withdrew the tax exemption for subsidies granted under the notified measure.

3. In this respect the Dutch authorities refer to the conclusions by the Environment Council on 15 and 16 March 2010 which confirms that biodiversity is also a high priority in Europe[2]. Furthermore, it is referred to the conclusions of the European Council of 25 and 26 March 2010[3] which also demonstrate the importance of biodiversity within the European Union, emphasising the urgent need to remedy biodiversity loss and ecosystem degradation and endorsing the long-term objective and 2020 target included in the above mentioned conclusions of the Council of the European Union.

4. According to the Dutch authorities, the granting of nature management support has a demonstrable and significant positive environmental effect on the improvement of biodiversity, water quality and soil quality. The policy of the Dutch government aims to carry out nature management in such a way that the various nature conservation areas in the Netherlands operate together. To this end, a National Ecological Network (EHS), a network of linked nature conservation areas that connect habitats and thereby promotes biodiversity, was developed.

***The measure***

5. The notified measure concerns certain categories of aid which may be granted under the Nature and Landscape Management Grant Scheme[4] (*Subsidieverordening Natuur en Landschapsbeheer*, hereafter: SNL), which is a model framework scheme on the basis of which provincial authorities or provincial executives in each province will adopt provincial schemes. For the purposes of implementing the SNL, the provinces draw up a nature management plan[5] (*natuurbeheerplan*) for their territory which defines for each of the areas covered by the plan the use of the area. In that way the plan determines for each area which subsidy may be granted for managing the area.

6. The notification at hand concerns *nature management subsidies* in so far as it does not concern forest areas and *subsidies for landscape management in nature conservation areas*[6]:

---

2 The Dutch authorities indicate that the Council set a new EU target for the protection of biodiversity for 2020 to stop the loss of biodiversity and the degradation of ecosystem services by 2020 and stressed that protected areas and ecological networks are a cornerstone of efforts to preserve biodiversity. The Council also agreed on a long-term objective that by 2050 the biodiversity in the European Union should be appropriately restored, protected and valued (reference: 7536/10).

3 EUCO 7/10.

4 This scheme replaces a previous system approved by the Commission by a decision in case NN 47/2004. The new system is designed to make grant applications simpler (digital), improve the quality of nature and the landscape and focus on local needs.

5 On the basis of Article 2.1 of the SNL

6 The Commission approved subsidies for agricultural nature management (the provincial packages) and for nature management in so far as it concerned forest areas by its decisions concerning cases SA.29568 (nature and landscape management, dated 31 January 2011) and SA.32622 (nature and landscape management – modification, dated 21 March 2011). The remaining measures available under the SNL are part of the Rural Development Programme 2007-2013.

– Firstly, *subsidies for nature management* relate to subsidies for maintaining a nature management type within a nature conservation area[7]. The nature management type is a certain kind of nature and subject of this notification are large scale dynamic nature (e.g. sea areas), rivers, brooks and wells, dead water, marshlands (eg. cut reed land), bogs and moors, dunes, salting, dry, damp, rich and bird grasslands. The subsidy for nature management may be increased by a compensation for maintaining a recreational package (*recreatiepakket*) in the area concerned. The recreational package is described in Annex 2 of the SNL and consists of obligations to enable the use of nature conservation areas for recreational purposes. For instance, the area should be sufficiently accessible and contain sufficient roads and paths to enable recreational use which the beneficiary should maintain.

– Secondly, *subsidies for landscape management in nature conservation areas* relate to subsidies to maintain a landscape element within a nature conservation area[8]. The landscape elements subject of this notification are for instance puddles and little (historic) lakes, wooded banks, certain hedges, certain tree structures, ´avenues´, pollard willows and artificial dwelling mound/dike/quarry[9].

7. The SNL describes how to manage and develop nature conservation areas (*natuurgebieden*) and landscape elements (*landschapselementen*) and this is supported. For nature management subsidies the SNL requires inter alia that the beneficiary:
   – will ensure that all the management activities are carried out as required for the maintenance of the nature management type present within the nature conservation area and that no actions are carried out or permitted which affect that maintenance;
   – will ensure that at the request of Provincial Executives, they are allowed to inspect the management activities carried out or to be carried out in connection with the maintenance of the nature management type present within the nature conservation area;
   – will ensure that if a subsidy is granted for the nature conservation area or part thereof for carrying out the recreational package, annex 2 of the SNL is complied with;
   – will ensure that in principle the nature conservation area is opened free of charge and remains accessible for at least 358 days a year;

8. For landscape management subsidies the SNL requires for instance that the beneficiary:
   – will ensure that the landscape element present within the nature conservation area is conserved by complying with the management requirements as specified in Annex 6 of the SNL for the equivalent landscape management package and that no actions are carried out or permitted which affect the conservation of the landscape element in question;
   – will ensure that at the request of Provincial Executives, they are allowed to inspect the management activities carried out or to be carried out in

[7] A nature management type is a kind of nature as included in Annex 1 of the SNL and described in more detail in the Nature and Landscape Index. The nature types subject of the current notification are numbered as N01, N02, N03, N04, N05, N06, N07, N08, N09, N10, N11, N12 and N13 in the Index.

[8] These are included in Annex 6, part A.1 of the SNL. The landscape management types, a group of landscape elements, subject of this notification are defined as L01.01 up to and including L01.09 and L03.01.

[9] In particular regulated by chapter 5.1.1 and 5.1.2 of the SNL.

connection with the conservation of the landscape element present within the nature conservation area;

9. The Nature and Landscape Index includes a description of specific nature management types and landscape management types. For instance, for the area *Vechtplassen*, the Index describes for cut reed land (subcategory N05.02 of marshlands), that it is reed land which is largely cut in winter every year. It can be either be for harvesting the reed or for maintaining species depending on open land. It is important for reed to grow that some nutrition is supplied through water to avoid sour (acid) soil. This management type concerns reed vegetation which is cut annually, including the removal of reed. Up to 10% of the area may consist of brushwood (*struweel*).

10. For the landscape type ´cut hedges´ (*knip- of scheerheg*) (L.01.05), the Index describes that these traditionally exist in the Netherlands, but is being replaced by barbed wire (*prikkeldraad*). Hedges are important both as living area and migration route to provide for protection of wild life (*fauna*) in the cultural landscape (*cultuurlandschap*). A cut hedge is a free line-shaped landscape element of connected cut indigenous trees/bush grown of minimum 25 meter. Cutting has to take place either annually in which case the size should be at least 0,8 meter high or cutting has to take place at least once every 3 years if the hedge consists of hawthorn (*meidoorn*) for at least 40% in which case the hedge should be at least 1 meter high and 0,8 meter wide.

11. The examples provided in the Index show that the nature management types and landscape management types are located throughout the Netherlands, but also in the centre of the Netherlands (eg. *Veluwe*, *Oostvaardersplassen*) and the coastal areas (*Waddenzee*, *Oosterschelde*) including the Waddeneilanden (*Oostpunt van Schiermonnikoog*). Accordingly, subsidies are available for the management of these areas.

***Eligible costs***

12. For each nature management type and landscape management type an average package of management measures is established for which a single standard net cost price is calculated. The calculation of the management costs for each area is based on standard costs (*standaardkostprijs*). The net standard costs are laid down in the documents ´Standard costs for nature management types´ (*standaardkosten voor natuurbeheertypen*) and ´Standard costs for landscape management types´ (*standaardkosten voor landschapsbeheertypen*).

13. These documents set out, for each nature and landscape management type, the measures the manager would need to take and the corresponding activities to be carried out, the labour units involved, the circumstances determining the standard, the source of that standard, the number of hours per hectare required, the standard amount per hectare, the annual frequency and the percentage of the area to be worked on. Any revenues are taken into account in determining the net standard costs, by deducting the expected revenues[10] from the calculated costs before arriving at the (net) standard costs.

[10] For example, the net standard cost calculations include revenues for reed land and moors from sale of reed and wood chips.

14. The standard costs are determined following several steps. Initially, standard costs were established on the basis of experience and by reference to the nature, forestry and landscape standards book[11]. Subsequently, these costs were reviewed by several advisory committees[12] which led to some adjustments.

15. Following advice from these committees on the calculation and compensation method, the Dutch government decided to determine the subsidy amount at 84% of the standard costs[13]. The aid is awarded for six consecutive calendar years[14] (six annual payments, Articles 3.7 and 5.1.2.4 SNL). The remaining expenditure must be financed by nature managers. The Dutch authorities explained that due to the qualification of each area in the nature management plan, only one type of management subsidy under the SNL can be obtained for a specific area.

16. For instance, taking the example of cut reed land (see point 9), the standard costs are - simplified - determined as follows (nature management type N.05.02) [15]:

| **measure** | **activity** | **cost per hectare** |
|---|---|---|
| regulating water level | increase/decrease flood, control dam | EUR 9,46 |
| cultivate/manage land | milling/draining | EUR 66,04 + EUR 29,52 |
| cutting/harvest | cutting/compost | EUR 432,83 + 68,72 + 41,73 |
| maintenance/replacing | carrying out maintenance | EUR 20,98 |
| maintaining water courses | cutting/compost | EUR 38,69 + EUR 100,20 |
| maintaining roads | cutting/milling | EUR 5,24 |
| **Total costs** | | **EUR 813,41** |
| reed (own control) (*in eigen regie*) | sale of reed | EUR 216,3 |
| reed (given in use) (*in gebruik geving*) | Lease | EUR 8,03 |
| **Total revenues** | | **EUR 224,33** |
| Net result (standard costs) | | EUR 589,08 |
| **Compensation** | (84%) | **EUR 494,09** |

*Source: Dutch authorities*

[11] This is established by Alterra, a knowledge centre for the green living environment which carries out strategic and applied research for policy, management and design of the green environment at local, regional, national and international level. Alterra is part of Wageningen University and Research Centre (http://www.normenboek.nl).

[12] The committee Brabers assessed whether the standard costs were reasonable, complete, consistent and applicable on which basis the Committee Verheijen made proposals for adjusting the measures and standard costs of the management types. Subsequently, the Committee Van Dijk reviewed which aid amounts could be applied.

[13] This would reflect compensating only the direct costs related to the management activities and not the indirect costs (eg. overhead costs).

[14] A subsidy is granted for six years (six annual payments, Articles 3.7 and 5.1.2.4 SNL).

[15] It is noted that the standard costs for moors are calculated in a similar way by deducting revenues from the sale of wood chips from the management costs.

***Beneficiaries***

17. On the basis of the SNL aid may be granted to natural or legal persons authorised to manage the nature conservation area for which the application is made[16]. Eligible for the aid are both land management organisations (TBOs), which are foundations and associations such as *Natuurmonumenten* and *Provinciale Landschappen* and to non-TBOs that manage nature conservation areas such as individuals, foundations and municipalities.

***National legal basis, Duration and Budget***

18. The national legal basis for the SNL is the Rural Area Development Act[17] (*Wet inrichting landelijk gebied*; hereafter: "WILG"). The SNL is a regulation as referred to in Article 11(3) of the WILG, which will be applied by all provinces.

19. The scheme is notified for the period 1 January 2011 to 31 October 2017. The Dutch authorities provided the following overview of the aid budget:

| ***Aid type*** | ***Annual budget*** | ***Total budget*** |
|---|---|---|
| *Subsidies for nature management* (types N01 up to and including N13) | EUR 25 million | EUR 150 million |
| *Subsidies for landscape management in nature conservation areas* (types L01.01 up to and including L01.09 and L03.01) | EUR 3,5 million | EUR 21 million |

*Source: Dutch authorities*

20. The Dutch authorities confirmed that the aid cannot be cumulated with aid granted under other local, regional, national or EU rules to cover the same eligible costs[18]. Aid will only be granted for activities which have started after the aid application. The application period runs from 15 November to 31 December of the year preceding the year for which aid for management activities is requested.

***Considerations by the Dutch authorities***

21. The Dutch authorities do not consider nature management and activities to promote nature ´experience´ (making nature areas accessible for people by opening the areas for walking and tours) to constitute an economic activity and thus the beneficiaries to be undertakings. According to the Dutch authorities, the revenues directly linked to such activities (e.g. revenues from crops or lease of land) shall not be considered as economic activities and these revenues are also not subject to Dutch taxes. The Dutch authorities were therefore doubtful as to whether the notified support would be State aid within the meaning of Article 107(1) TFEU.

22. At the same time, the Dutch authorities acknowledged that it could not be excluded that the beneficiaries, even if not profit oriented, may also engage in commercial activities. The Dutch authorities referred by way of example to recreational services to the public, issuing of (association) magazines and other products in line with their environmental objective. The Dutch authorities further clarified that associations which may be beneficiaries, carry out commercial activities such as

16 Articles 3.3 and 5.1.2.1 SNL.

17 Act of 7 December 2006, setting out rules for the development of rural areas, Stb. 2006, 666.

18 Article 1.10 SNL. In this context, the Dutch authorities explicitly confirmed that aid under the aid measure cannot be combined with aid granted on the basis of the aid measure notified under SA.31243 (N308/2010) concerning subsidies for the acquisition of land for the same eligible costs.

operating a bar, selling calendars and books. These activities are reportedly carried out and administered in separate companies and by separate people (not nature managers). At the same time, the Dutch authorities submitted that beneficiaries are not obliged to maintain separate accounts between commercial and non-commercial activities. In addition, according to the Dutch authorities, such activities would only be secondary to the main activity, nature management, and mainly locally orientated.

23. Finally, the Dutch authorities consider that, if the measure does constitute State aid, it is compatible with the internal market on the basis of Article 107(3)(c) TFEU, because the aid is necessary for the development and maintenance of biodiversity in order to protect the environment.

## 3. ASSESSMENT

### 3.1. Nature conservation entities as undertakings

24. The prohibition of State aid enshrined in Article 107(1) of the TFEU applies only insofar as the beneficiaries are undertakings. The Dutch authorities do not consider that the natural or legal persons performing nature management are involved in an economic activity and thus the beneficiaries to be undertakings.

25. According to settled case-law, any activity consisting in supplying goods or services on a given market is an economic activity[19]. The Court of Justice has consistently ruled that the notion of an undertaking encompasses all entities exercising an economic activity, irrespective of their legal form and of how they are financed.[20] Therefore, the conclusion whether nature managers carry out economic activities cannot be based on their general aim, profit-making orientation or fiscal treatment under national law, but must be grounded on an analysis of the activities such entities are liable to carry out under the notified measure[21].

26. The Dutch authorities submitted that nature management activities include activities to promote nature ´experience´ which aim to attract people to the areas involved, and include activities directly linked to nature management activities which may lead to revenues (e.g. revenues from crops and lease). However, as mentioned, they do not consider these activities as economic activities.

27. The Commission notes that nature managers, including nature conservation entities, may carry out a variety of tasks, which are not defined exhaustively ex ante. While it cannot be excluded that some of the conservation tasks will be purely non-economic in nature, in other cases the conservation objective will be, at least partially, achieved through tasks involving economic activities, such as e.g. the sale of crops, leases of land and activities attracting tourism. In this respect, the Commission notes that the standard cost calculations take into account revenues when determining the net standard costs, by deducting the expected revenues from

---

19 Judgment of the Court of 10 January 2006 in Case C-222/04 *Cassa di Risparmio di Firenze et al.* [2006] ECR I-289.

20 Judgments of the Court of Justice: C-41/90, Höfner und Elser, [1991] ECR 1979, paragraph 21, C-244/94, Fédération française des sociétés d'assurance and Others, [1995] ECR I-4013, paragraph 14, and C-55/96, Job Centre, [1997] ECR I-7119, paragraph 21.

21 For non-profit making organizations, see for example Joined cases 209/78 to 215/78 and 218/79 *Van Landewyck* [1980] ECR 03125 and case C-244/94, *FFSA and others* [1995] ECR I-4013.

the calculated costs before arriving at the net standard costs. For example, the standard cost calculations for reed land and moors include revenues from the sale of reed and wood chips. According to settled case-law, any activity consisting in supplying goods or services on a given market is an economic activity. The Commission considers that, in the case at hand, activities like the sale of wood chips and reed, leases of land and attracting tourism must be classified as economic in nature.

28. Moreover, even if the Dutch authorities submit that benefitting associations carry out commercial activities through separate companies, at the same time they submit that beneficiaries are not obliged to maintain separate accounts between commercial and non-commercial activities. Therefore, it cannot be excluded that the beneficiaries are involved in such commercial activities.

29. Even though the above described activities may be limited in scope and not particularly profitable due to the environmental constraints imposed on activities in the nature conservation areas, profitability is not a relevant criterion for the classification of an activity as economic in nature. Such classification cannot be based only on the main objective or focus of the measure (i.e. environmental protection rather than the generation of revenue). The Commission notes that, regardless of the environmental objectives pursued, the nature managers, including conservation organisations, have an interest in generating sufficient revenue to cover the costs related to land ownership and/or those related to project implementation (16% of project costs must be borne by the beneficiaries themselves). Therefore, the environmental objective will always coexist with the economic objective

30. Finally, the Commission notes that it appears that in certain cases the nature managers, including nature conservation organisations, might at the same time administer forestry land which is eligible for subsidies for forestry nature management under a State aid scheme approved by the Commission decisions SA.29568 and SA.32622[22]. In such a case, these entities are also involved in economic activities in the forestry sector.

31. The Commission therefore considers that the Dutch nature managers, including the nature conservation organisations concerned by the notified measures should be considered as undertakings within the meaning of Article 107(1) TFEU insofar as they exercise these activities (and as such, they should be subject to State aid control).

### 3.2. Presence of State aid pursuant to Article 107(1) TFEU

32. Under article 107(1) Treaty on the Functioning of the European Union ("TFEU")[23] , "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.*"

---

22 See footnote 6.

23 With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU; the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

33. The aid under scrutiny is granted by government bodies (provinces) and is financed through State resources within the meaning of Article 107 TFEU. As the measure only benefits nature managers of certain nature conservation areas, the areas covered by the nature management plan, the measure is selective in scope.

34. The measure provides an advantage to the beneficiaries as it provides for a financial benefit the beneficiary would otherwise not have received. The State compensates 84% of the standard costs (i.e. net expected costs) incurred by the beneficiary.

35. The beneficiaries exercise nature management activities which, as submitted by the Dutch authorities, include revenue generating activities directly linked to nature management, such as e.g. the sale of crops (in particular the sale of reed and wood chips), lease of land or attracting tourism. In addition, as mentioned in point 30 above, the beneficiaries may also be active in the forestry sector. The sectors in which such activities are carried out are open to competition and trade between Member States.

36. The Commission notes that such activities may be limited in amount and geographical scope. As regards the amounts involved, modest amounts of aid complying with the conditions set out in Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid[24] fall outside the scope of Article 107(1) of the Treaty. In the case at hand, however, the subsidy amounts are not limited.

37. As regards the geographical scope of the activities, the Union courts have likewise interpreted the notion of impact on trade in a strict way. Consequently, the Commission has accepted that State support did not affect trade only in a very limited number of cases involving purely local services, unlikely to attract custom from other Member States, such as a German swimming pool[25]. In the case at hand, revenues include reed and wood chips sales which do not concern the provision of a service, but the sale of goods and may be exported within the EU. Forestry sector is a competitive sector open to competition at EU level. Also in case of the other activities, given the geographical location of the areas e.g. along the coastline of the Netherlands, it cannot be excluded that the measure would attract international tourism. Therefore, despite the fact that the impact of the measures is likely to be limited, the Commission considers that EU trade should be considered affected.

38. Thus, the aid granted under the measure constitutes State aid pursuant to Article 107(1) of the TFEU[26].

### 3.3. Compatibility of the State Aid Pursuant to Article 107(3)c TFEU

39. Under Article 107(3)(c) of the TFEU, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

---

24 OJ L 379/05.

25 Commission decision N 258/2000 of 21.12.2000, Germany – leisure pool Dorsten, OJ C 172, 16.6.2001, p. 16.

26 The Commission came to the same conclusion in cases SA.29568 (nature and landscape management) and SA.32622 (nature and landscape management - modification) concerning other State aid measures on the basis of the SNL notified on the basis of the Community guidelines for state aid in the agricultural and forestry sector 2007-2013.

40. The Commission has wide discretion in matters falling under Art. 107(3) TFEU.[27] Exercising this discretion, it has issued guidelines and notices setting forth criteria for declaring certain types of aid compatible with the internal market based on Art. 107(3) TFEU. It is constant jurisprudence that the Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid inasmuch as they do not depart from the rules in the Treaty and are accepted by the Member States. It is therefore necessary to first assess whether the notified aid falls into the scope of application of one or more guidelines or notices. If this is the case, the Commission is bound for the exercise of its discretion under Art. 107(3) of the TFEU by the respective text. If this is not the case, the Commission needs to verify whether the aid can be declared compatible directly based on Art. 107(3)(c) TFEU.

41. In view of its objective, the Commission first assessed whether the notified measures falls within the scope of the Environmental Aid Guidelines[28]. The Environmental Aid Guidelines apply to State aid for environmental protection and their scope is defined in point 58 to 60 of the Environmental Aid Guidelines. Environmental protection is defined in point 70(1) of the Environmental aid Guidelines as "any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary's own activities, to reduce the risk of such damage or to lead to more efficient use of natural resources, including energy saving measures and the use of renewable sources of energy[29]". As in the case at hand the measure neither aims to remedy damage by the beneficiary's own activities nor to improve the use of natural resources, the present case falls outside the scope of the Environmental Aid Guidelines.

42. The Commission further assessed whether the measure would fall within the scope of the State aid in the agriculture and forestry sector 2007 to 2013 (Agricultural Aid Guidelines)[30]. The scope of the Agricultural Aid Guidelines is set out in points 5 to 9 of these Guidelines. They apply to "all State aid granted in connection with activities related to production, processing and marketing of agricultural products falling within the scope of Annex 1 of the Treaty" and include also special rules for the forestry sector. However, the aid is given to managers of nature conservation areas for the conservation of nature types such as marshlands or hedges as opposed to agricultural land or forests. Therefore, the measure does not fall within the scope of point 5 of these Guidelines[31].

43. Given that the measure does not fall within the scope of existing guidelines for application of Article 107(3)(c) TFEU, the measure must be assessed directly under this Treaty provision. In order to be compatible under article 107(3)(c), an aid must pursue an objective of common interest in a necessary and proportionate way. In this regard, the Commission considers it appropriate to assess the following questions:

---

27 Case C 142/87 Belgium v Commission, 1990, ECR I 959, , paragraph 56, and Case C 39/94 SFEI and Others [1996] ECR I 3547, paragraph 36.

28 OJ C 82, page 1, 1.4.2008

29 See point 58 and 70(1)

30 OJ C 319, page 32, 27.12.2006

31 The Commission recalls that the Commission approved aid on the basis of the Community guidelines for state aid in the agricultural and forestry sector 2007-2013 by decisions in cases SA.29568 and SA.32622 (see footnote 6).

(1) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?

(2) Is the aid well-designed to deliver the objective of common interest? In particular:

(a) Is the aid measure an appropriate instrument?

(b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?

(c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?

(3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

*3.3.1. Well-defined objective of common interest*

44. The aid measure should pursue a well-defined objective of common interest. An objective of common interest is an objective which has been recognised by the European Union as being in the common interest of the EU Member States.

45. The measure, as submitted by the Dutch authorities, aims to maintain and develop biodiversity. To this end the measure supports nature management activities in areas which are covered by a nature management plan. Most of these areas are part of the National Ecological Network (EHS).

46. The EU institutions have recognised on many occasions the importance to protect biodiversity. In particular, the European Council noted in its conclusions of 25/26 March that *´There is an urgent need to reverse continuing trends of biodiversity loss and ecosystem degradation. The European Council is committed to the long term biodiversity 2050 vision and the 2020 target set out in the Council's conclusions of 15 March 2010´*. The Council of the European Union affirmed in its conclusions of 15 March 2010 *that protected areas and ecological networks are a cornerstone of efforts to preserve biodiversity*.

47. It can thus be concluded that the proposed measure aims at a well-defined objective of common interest.

*3.3.2. Appropriate instrument*

48. An instrument is appropriate if there are no other less distortive instruments to achieve the same results. As submitted by the Dutch authorities, in order to develop a coherent nature management structure to keep biodiversity at an acceptable level, it is important that nature managers manage their land in accordance with the nature plan laid down by the Dutch Government.

49. The measure grants payment to nature managers to maintain the land as defined for each category of nature type or landscape type. The payments are linked to standard costs calculated to maintain the land as explained above (point 12 - 15). This ensures that the amount paid reflects the efforts required from managers to maintain the land and the costs incurred.

50. Therefore in the current situation, it can be concluded that the State aid constitutes an appropriate instrument.

### *3.3.3. Incentive effect*

51. State aid must be necessary and have an incentive effect. To demonstrate this, the notifying Member State must prove that the investment would not have been made without the aid. The Commission considers that aid does not have an incentive effect in all cases in which the project has already started prior to the aid application by the beneficiary.

52. The Dutch authorities confirmed that the aid will only be granted for activities which have started after the aid application.

53. As submitted by the Dutch authorities, the nature managers would not maintain the nature management types as required under the measure on their own initiative in view of the costs related to the activities to be undertaken (with limited revenues). The Dutch authorities recall that the government is contributing to the costs related to nature management already for some time, also under the predecessor scheme as approved by Commission decision NN 47/2004.

54. As the Commission acknowledges that the nature management activities would in all likelihood not be undertaken as required by the nature management plan without public support, it can be concluded that the proposed measure has an incentive effect.

### *3.3.4. Proportionality of the aid*

55. A State aid measure is proportional if the measure is designed in a way that the aid as such is kept to the minimum.

56. In the case at hand the Dutch authorities determined the standard costs related to the activities envisaged to be carried in order to maintain each nature or landscape management type as defined in the Index on the basis of several studies. The initially established management costs on the basis of a standards book and experience were verified and adjusted following review by several independent committees (see points 12 - 15). The resulting net standard costs take into account both the foreseen costs and revenues related to the management activities. Furthermore, the Dutch authorities limited the aid intensity (compensation) to 84% of the determined net standard cost which would result in compensating only costs directly related to the nature management activities Accordingly, it is considered that the compensation system does not to lead to overcompensation[32].

57. It can thus be concluded that the State aid granted for the envisaged measure is proportional.

[32] The Commission approved a similar calculation method for determining the standard costs and aid intensity in its approval concerning cases SA.29568 (nature and landscape management) and SA.32622 (nature and landscape management - modification) on the basis of the SNL notified on the basis of the Community guidelines for state aid in the agricultural and forestry sector 2007-2013.

*3.3.5. Impact on competition and trade between Member States*

58. In the case at hand, the beneficiaries may carry out activities such as the sale of reed, wood chips, lease of land and activities attracting tourism. As set out in point 27 - 30, such activities must be classified as economic activities. The Commission notes that even if the markets in which the economic activities are carried out are open to competition from different Member States, as already mentioned, the activities at hand may be of a limited geographical scope and amount. Accordingly, it is not likely that the measure will have an important effect on competition and trade between Member States.

*3.3.6. Conclusion*

59. Any possible distortion of competition or adverse effect on trade between Member States resulting from the envisaged measure can only be limited, so that the overall balance with regard to the objective of common interest is positive.

60. The Commission concludes therefore that the notified aid measure is compatible with 107(3)(c) TFEU.

## 4. DECISION

61. On the basis of the foregoing assessment, the Commission has decided not to raise objections against the notified measure, since it fulfils the conditions to be considered compatible with the internal market, pursuant to Article 107(3)(c) of the TFEU.

62. The Commission reminds the Dutch authorities, in accordance with Article 108(3) of the TFEU, plans to refinance, alter or change this scheme have to be notified to the Commission pursuant to provisions of Commission Regulation (EC) No 794/2004[33].

63. If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days from the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://ec.europa.eu/eu_law/state_aids/state_aids_texts_nl.htm

Your request should be sent by registered letter or fax to:
European Commission
Directorate-General of Competition
State Aid Greffe
B-1049 BRUSSELS
Fax nº: 00-32-2-296 1242

[33] Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 [now 88] of the EC Treaty; OJ L 140, 30.4. 2004, p.1.

Yours faithfully,
For the Commission

*Joaquín ALMUNIA*
Vice-President of the Commission

EUROPEAN COMMISSION

Brussels,
C(2011)

**PUBLIC VERSION**

**WORKING LANGUAGE**

**This document is made available for information purposes only.**

**Subject:** **State aid SA.31243 (N 308/2010) – Subsidy scheme for acquisition of land for nature conservation (NL)**

Dear Sir,

The Commission wishes to inform the Netherlands that, having examined the information supplied by your authorities on the matter referred to above, it has decided not to raise objections to the proposed aid measure.

## 1. PROCEDURE

(1) Following pre-notification contacts, the measure was notified by letter dated 9 July 2010, in accordance with Article 108(3) of the Treaty on the Functioning of the European Union ("TFEU"). Further clarifications or information requested by the Commission were received on 12, 14 and 25 October 2010, 7 February 2011 and 20 May 2011.

## 2. DESCRIPTION

### 2.1. Measure

(2) The proposed measure concerns a subsidy for the acquisition of land (in ownership or leasehold) for sustainable nature conservation[1]. The aim of the

[1] The eligible costs for the acquisition are limited to the "real market value", defined as the value established by an independent valuer, article 1(j) of the draft grant scheme for land purchase for the National Ecological Network (*Ontwerp subsidieregeling voor grondverwerving ten behoeve van de ecologische hoofdstructuur*), hereinafter "draft grant scheme". The Dutch authorities have explained that this value is established on the basis of generally accepted market indicators and valuation criteria. The use of the land – often agricultural – is the starting point for the valuation. In the valuation, the development of the

measure[2] is to enhance the National Ecological Network ("EHS"), a coherent network of nature areas in the Netherlands[3]. Accordingly, the land in question is mainly located in the EHS. However, the scheme also provides for the option to acquire land in other areas that are considered by the Dutch provinces as being areas with important natural features or woodland and countryside elements that have been laid out as part of land development projects. In addition, it is possible to be eligible for a grant for land that, although not situated in the EHS, will be used within a time limit to be determined by the provinces as land that can be converted to become part of the EHS. The land concerned can be either agricultural land that is to be converted into nature sites or an existing nature site[4].

### 2.2. Beneficiary

(3) The draft grant scheme defines as the beneficiary to whom a grant may be awarded anyone who carries out sustainable nature management or makes a sufficiently reasonable case that he can and will carry out sustainable nature management[5] in accordance with the type of nature management stipulated in the nature management plan, which is adopted by each province under the Provincial Ordinance on Nature and Landscape Management (*Provinciale Verordening Natuur- en Landschapsbeheer*)[6].

(4) The beneficiary shall consult and cooperate with the managers of the surrounding nature conservation areas to achieve consistent management[7]. The grant recipient shall not sell the land or leasehold except with the consent of the Provincial

---

price of the land in the area is central; this is determined on the basis of the land transactions which have taken place in the area concerned. The value established by the independent valuation expert is the minimum purchase price that is expected to be realised in the market and at the same time the maximum amount in relation to which a subsidy can be granted.

2 The Dutch authorities also submitted the explanatory memorandum (*Toelichting*) to the draft grant scheme (dated 9 July 2010), page 9 and 10.

3 The EHS comprises: (i) existing nature reserves, including 20 national parks, reserves and nature areas; (ii) more than 6 million acres of waters, including lakes, rivers, coastal North Sea and the Wadden Sea; (iii) agricultural land managed as nature areas. Further details can be found at: http://www.rijksoverheid.nl/onderwerpen/natuur/ecologische-hoofdstructuur.

4 Draft grant scheme, article 2.

5 Draft grant scheme, article 3 (*beneficiaries*). The Dutch authorities have explained in this context that this means that the grant applicant himself must possess the necessary expertise or that he will call in external expertise. This is, according to the authorities, in the interests not only of the public authority (ensuring that nature is developed as desired with public funds), but also of the applicant. If the latter does not succeed in achieving the prescribed type of nature management (article 18(1)(b) of the draft grant scheme), he will have to repay the grant.

6 The nature management plan is adopted by each province under the Provincial Ordinance on Nature and Landscape Management (*Provinciale Verordening Natuur- en Landschapsbeheer*) and forms the basis for the award of provincial grants for nature management (see also State aid cases N545/2009 and N376/2010, Commission decisions of 31.01.2011 and 20.04.2011 respectively. Topographical maps in the nature management plan indicate the parcels of land and the types of nature management which are eligible for a grant for the *management* of existing nature sites. The nature management plan also describes the desirable situation for the future, together with the objectives of nature management in the longer term. To this end, the nature management plan stipulates which parcels are eligible for grants for the development of which nature management types. *This also includes the designation of parcels which can be purchased or converted to the prescribed nature management type with a grant under the present scheme.*

7 Draft grant scheme, article 18(1)(c).

Executive[8]. On the basis of a qualitative obligation that the nature manager/owner must enter into and file in the public registers, the permanent use of the land as nature land will be guaranteed[9]. If land acquired with a subsidy under the notified scheme is sold, the grant must be paid back to the public authorities (Provincial Executive) within six months[10]. Eligibility for the grant entails the requirement that any revenues from the land to be acquired with a grant will be spent on sustainable nature management in relation to that land[11].

### 2.3. Budget

(5) The budget allocated to such nature conservation projects is EUR 55 million annually. The total budget foreseen is EUR 276 million. The amount of EUR 276 million relates at least to the period to 2015, according to the Dutch authorities.

### 2.4. Duration

(6) The measure will run for as long as is needed to facilitate the development the EHS. The date envisaged for the entry into force of the grant scheme was 1 January 2011, subject to Commission approval of the aid. The measure is not subject to a precise time limit. The Dutch authorities have however given the commitment that the scheme will be re-notified after 10 years, should they wish to continue to grant aid after this period.

### 2.5. Legal basis

(7) The national legal basis for the aid is the provincial grant scheme for land purchase for the National Ecological Network (*Provinciale Subsidieregeling Grondaankoop Ecologische Hoofd Structuur*) as well as the national grant scheme for land purchase for the National Ecological Network (*Rijkssubsidieregeling Grondaankoop EHS*).

### 2.6. Cumulation

(8) Aid granted under the notified measure cannot be cumulated with aid received from other local, regional, national or Union sources to cover the same eligible costs.

---

8 Draft grant scheme, article 18(1)(d).

9 In the case of the acquisition of leasehold, this qualitative obligation is part of an agreement between the State and the owner of the land, draft scheme, article 17(3).

10 Draft grant scheme, article 18(4). In the *Toelichting* explaining the draft grant scheme, the Dutch authorities have clarified that this only arises in exceptional situations. For instance, where there is a question of change of classification for the general benefit (*bestemmingswijziging ten algemenen nutte*). Furthermore, land may be sold if the amicable acquisition is to prevent expropriation. And, where the land is sold to a party which would be eligible for the grant under article 3 of the scheme, in general, this will not give rise to objections.

11 Draft grant scheme, article 18(1)(g). The Dutch authorities expect that the following forms of revenue will arise: revenue from visitors' centres, excursions, parking charges, hunting fees, sales of game, but indicate however that such revenue is likely to be limited in extent.

## 3. VIEW OF THE DUTCH AUTHORITIES

(9) The Dutch authorities are primarily of the view that nature management should be considered as a non-economic activity, reasoning that nature management serves a public aim and is important for maintaining biodiversity and quality of life in the Netherlands. The fact that in the implementation of nature management activities that can generate revenue may be carried on does not alter this fact. These activities cannot be separated from the non-economic core activity, namely nature management. Therefore the beneficiary of the proposed measure cannot be considered as an undertaking within the meaning of EU law, according to the authorities.

(10) Subsidiarily, should the Commission be of the opinion that the measure constitutes State aid, the Dutch authorities are of the view that only the parts of nature management which can be considered as economic activities and which can be separated from the core activities need to be scrutinised for compatibility with the European competition provisions. In that context, the Dutch authorities state that the subsidisation of land purchased to complete the EHS does not affect or threaten to affect trade between Member States as regards these economic activities and that the nature manager does not receive an advantage from the grant for the purchase of land for nature conservation.

(11) Also subsidiarily, the Dutch authorities consider that the Altmark criteria are fulfilled and that therefore the subsidies granted do not constitute State aid[12].

(12) Alternatively, should the Commission consider that the subsidies do constitute aid, the Dutch authorities argue that the aid would be compatible on the basis of the Framework for State aid in the form of public service compensation ("SGEI Framework")[13], with reference to the decision in State aid case NN8/2009[14].

(13) The Dutch authorities submit that the measure serves the wider purpose of nature management which includes the completion of the EHS. According to the Dutch authorities the acquisition of land is needed in order to use (or maintain) the land as nature. Nature management within the Netherlands can be divided into three phases. The first phase is the creation of nature where nature managers acquire land not previously used for that purpose. The second phase is the development of nature where land is developed if the ecological features as desired by the central government/provinces do not exist on the land acquired. The third phase consists of the management of nature (the land acquired).

(14) For each phase subsidies may be available. The measure at hand only compensates for costs incurred in the first phase for the acquisition of land for sustainable nature conservation. However, a beneficiary may, for instance, in the third phase apply for a nature management subsidy. The Dutch authorities submitted in this context that, to the extent that revenues occur from nature management (of the acquired land), such revenues will be deducted from any nature management subsidy.

---

12 Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

13 OJ C 297 of 29.11.2005, p. 4.

14 Case NN8/2009, Commission decision of 19 June 2009.

## 4. ASSESSMENT

### 4.1. Lawfulness of the aid

(15) By notifying the aid measure before its implementation and subjecting its entry into force to Commission approval, the Dutch authorities fulfilled their obligation according to Article 108(3) TFEU.

### 4.2. Presence of aid pursuant to Article 107(1) TFEU

(16) A measure constitutes State aid under Article 107(1) TFEU if it fulfils four conditions. Firstly, the funding stems from the State or from State resources. Secondly, the measure confers an advantage on certain undertakings or economic activities. Thirdly, the measure is selective. And fourthly, the measure affects trade between Member States and distorts or threatens to distort competition in the internal market. However, the prohibition on granting State aid contained in Article 107(1) TFEU applies only insofar as the beneficiaries are undertakings.

#### *4.2.1. Undertaking*

(17) The Dutch authorities contest the nature of the activities concerned as economic. However, with reference to the reasoning in paragraphs 24 to 31 of the Commission Decision of 20 April 2011 in case N376/2010 concerning the subsidies for nature management, the Commission considers that Dutch nature managers eligible for a grant under the notified scheme are undertakings within the meaning of Article 107(1) TFEU and as such are subject to State aid control.

#### *4.2.2. State resources*

(18) The aid stems from State resources since it is funded by the national budget and will, in part, be borne by the general budget of the provinces. The proposed measure is imputable to the State, as it follows directly from the proposed draft legislation.

#### *4.2.3. Economic advantage*

(19) The measure confers an economic advantage on the recipients, since at most 100% of the real market value of the land (either ownership or leasehold) is compensated (if the commercial price for the land, as agreed between the seller and the purchaser, remains below the "real market value" as determined by the independent valuer, then only the commercial price is taken into account for the purposes of the grant). In addition, a limited number of related costs are regarded as eligible for compensation under the proposed scheme, including among other things the costs of the land registry duty and registration fee, auction costs, notary fees, real estate transfer tax, costs of soil testing and valuation and mediation costs[15].

(20) However, the Dutch authorities have provided information aiming to demonstrate that the measure does not constitute an aid on the basis of the *Altmark* case law, by which the Court of Justice ruled that public service

[15] Draft grant scheme, article 15.

compensation does not constitute State aid within the meaning of Article 107 of the Treaty provided that four conditions are cumulatively met.

*Conservation tasks as Services of General Economic Interest ("SGEI")*

(21) As confirmed by the Union courts, Member States have wide discretion in defining an SGEI mission and the conditions of its implementation. The Commission can question a Member State's definition only in case of manifest error[16]. Member States must, however, indicate the reasons why they consider that the service in question, because of its specific nature, deserves to be characterised as a SGEI[17].

(22) SGEIs have typically concerned the big network industries such as transport, postal services, energy and communications. However, in its 2004 White Paper on Services of General Interest[18] the Commission recognised that "s*ervices of general interest and the context in which they are provided, including the European Union itself, are constantly evolving and will continue to evolve*". While focusing on the more typical public service missions, the Paper also considered the environment to be an area where services of general interest might be established: section 3.4 states that, "*in line with the Union's policy on sustainable development, due consideration has to be taken also of the role of services of general interest for the protection of the environment and of the specific characteristics of services of general interest directly related to the environmental field, such as the water and waste sectors*".

(23) Against this background, the Commission accepted, in case NN8/2009 regarding State aid for the conservation of nature areas in Germany, that *environmental protection tasks in the interest of society as a whole* may constitute a service of general interest, whereby it was considered appropriate to carry out a global analysis of the absence of overcompensation so as to include all possible revenues (including those stemming from economic activities). The Commission accepts that there may be a need to acquire land to be used as nature in line with a national policy of developing a coherent national ecological network and, in view of the required obligation for the permanent use of the land as nature, does not challenge the classification of the notified scheme as part of a wider SGEI. Given that the Dutch scheme at hand shows significant similarities with the German situation, the Commission considers it appropriate to follow the same global approach in respect of the notified measure in the case at hand.

*The Altmark criteria are not cumulatively fulfilled*

(24) In particular, the fourth *Altmark* condition is that, in order not to constitute State aid, the amount of compensation must be defined either through an open, transparent and non discriminatory public tender procedure which would allow for the selection of the tenderer capable of providing those services *at the least cost to the community*[19], or the public authorities have to define the amount of

16 See for instance Case T-289/03 *BUPA* [2008] ECR II-81, paragraphs 166-169.

17 Case T-289/03 *BUPA*, cited above, paragraph 172.

18 Communication of the Commission of 12.5.2004 COM(2004)374 final, available at http://eurlex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf.

19 Ibidem, point 93.

compensation on the basis of an analysis of the costs of a typical undertaking, well run and adequately equipped (the "*benchmarking method*").

(25) The Commission notes the following in relation to the application procedure and, more particularly, the selection of the beneficiary[20]. Under the proposed scheme, a grant can be awarded only when the Provincial Executive has opened up the possibility to submit applications for the award of a grant by setting a budget for the grant and a period for submitting applications[21]. The Provincial Executive shall rank grant applications submitted in one and the same application period per grant budget in the order in which they are received, with applications received on the same day being ranked by drawing lots if the grant budget is exceeded on that day. According to the ranking, the highest ranked application shall be the first to be eligible for a grant. It is not necessary for the applicant to provide specific information as standard with his application. Where appropriate, and notably depending on the type of nature management to be achieved, the provincial authorities can request this, for example in the form of an action plan.

(26) The Commission concludes that, on the basis of the information provided by the Dutch authorities regarding the public tender procedure as described above, the fourth Altmark criterion cannot be regarded as being fulfilled.

(27) The tender procedure under the notified scheme does not require the authorities to select the beneficiary who has demonstrated to be able to provide nature conservation management services *at the least cost to the community*. The eligibility is rather based on the qualifications of the applicant. Decisive is whether the grant applicant qualifies as someone who carries out sustainable nature management or makes a sufficiently reasonable case that he can and will carry out sustainable nature management in accordance with the type of nature management stipulated in the nature management plan.

(28) Indeed, the selection procedure appears not to take any account of whether the potential beneficiary is a well run undertaking able to provide an efficient service. There is therefore no scope for applying the benchmarking method.

(29) Hence, the Commission is of the view that the Altmark case law cannot be relied upon to classify the measure as no aid. Given that the fourth criterion is not fulfilled, the Commission considers that there is no need to separately assess the first three Altmark criteria, as set forth in point 95 of the *Altmark* judgment.

#### *4.2.4. Selectivity*

(30) The measure is considered to be selective, as only certain parties will benefit from the measure, notably those undertakings that will be eligible for a grant under the proposed draft legislation.

#### *4.2.5. Impact on trade and Distortion of competition*

---

[20] Draft regulation, article 4 (*Budget for grant and opening-up of period for submitting applications*) and article 5 (*ranking: order of receipt*).

[21] The decision of the Provincial Executive shall be advertised in the Provincial Bulletin at the latest six weeks before the start of the period for submitting applications (article 4(2) of the draft grant scheme).

(31) The Dutch authorities have confirmed that beneficiaries may receive revenues for land management and expect that such revenues will arise from e.g. visitors' centres, excursions, parking charges, hunting fees and sales of game, revenues from the sale of wood. It is noted that activities in sectors such as tourism, hunting or forestry are open to competition and intra-community trade. Admittedly, these activities are likely to be limited in scope, both geographically and in terms of value.

(32) As regards value, modest amounts of aid complying with the conditions set out in Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid[22] fall outside the scope of Article 107(1) TFEU. However, although the Dutch authorities estimate that in the majority of cases beneficiaries would not receive aid in excess of approximately EUR 100 000, the scheme does not set a limit on the amount of aid which may be granted to a recipient.

(33) In the case at hand, at least one of the activities (wood sales) does not concern the provision of a service, but the sale of goods (forestry products), which are capable of being exported within the EU. As regards the other activities, it cannot be ruled out that the subsidised land would be suitable for international tourism. Therefore, despite the fact that the impact of the measure is likely to be limited only, the Commission considers that it cannot be excluded that intra-EU trade will be affected.

#### *4.2.6. Conclusion*

(34) Since all criteria of Article 107(1) TFEU are met, the Commission concludes that the notified measure constitutes State aid.

### 4.3. Compatibility of the aid on the basis of the post-Altmark package

#### 4.3.1 Applicability of the SGEI Decision

(35) Small amounts of compensation granted to undertakings providing services of general economic interest whose turnover is limited may be considered compatible aid (and are exempt from the notification requirement) pursuant to Commission Decision (EC) N° 842/2005 of 28 November 2005 on the application of Article 86(2) of the EC Treaty [now Article 106(2) TFEU] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (the "*SGEI Decision*")[23]. In particular, the SGEI Decision applies to compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million.

(36) The Dutch authorities have clarified that a large proportion of the beneficiaries will fall within the scope of Decision 2005/842/EC, but indicated that some nature

[22] OJ L 379 of 28.12.2006, p. 5.
[23] OJ L 312 of 29.11.2005, p. 67.

managers may fall outside it. It is not possible for the authorities to determine in advance which grant amounts will be allocated to which beneficiaries.

(37) The Commission notes that, in the absence of an explicit limitation of the scheme to measures fulfilling the conditions of the SGEI Decision, there may be situations in which the thresholds are exceeded. The Commission finds it therefore appropriate to also check compliance of the scheme with the SGEI Framework. Since the rules of the SGEI Decision and Framework are, in substance, the same (the Decision being narrower in its scope of application) there is no need for a separate assessment.

### 4.3.2 Compatibility on the basis of the SGEI Framework

(38) Public service compensation which cannot be qualified as no aid on the basis of the Altmark criteria may, however, be compatible if it complies with the conditions laid down in the SGEI Framework.

#### *4.3.2.1 Genuine SGEI*

(39) In its case practice[24] the Commission has accepted that it may be in the public interest to ensure that valuable natural heritage sites are protected and enhanced. In the case at hand, in the light of the analysis described in points (21) - (23), the Commission is satisfied that the acquisition of land for nature management for sustainable nature conservation forms part of that wider purpose and justifies the establishment of public service obligations.

#### *4.3.2.2 Entrustment*

(40) Public service obligations for which compensation is granted must be clearly defined. According to point 12 of the SGEI Framework this means that responsibility for operation of the SGEI must be entrusted to the undertaking concerned by way of one or more official acts, which must specify:

a) the precise nature and duration of the public service obligations;

b) the undertakings and the territory concerned;

c) the nature of any exclusive or special rights assigned to the undertaking;

d) the parameters for calculating, controlling and reviewing the compensation;

e) the arrangements for avoiding and repaying any overcompensation.

(41) The Commission considers that these conditions are fulfilled for the following reasons.

Regarding criterion a), the public service obligation for which compensation is granted concerns the acquisition of the unencumbered ownership or leasehold of land for the completion of the EHS and focuses on the sustainable preservation and sustainable management of the land acquired. The relevant acts for this public service obligation are the draft grant scheme and the grant decisions to be based on the grant scheme. As already indicated in point 3, under the draft subsidy

[24] State aid case NN8/2009

scheme a grant may be awarded to anyone who carries out sustainable nature management, or makes a sufficiently reasonable case that he can and will carry out sustainable nature management, in accordance with the type of nature management stipulated in the nature management plan governing the land acquired, and provided that any revenues are reinvested in sustainable nature conservation. More particularly, the nature and duration of the public service obligation are laid down in Articles 17 and 18 of the draft scheme. Namely, within two weeks of the awarding of the grant the grant recipient and the Provincial Executive shall conclude an agreement, including the obligation that the person to whom the land belongs shall manage the land in accordance with the type of nature management stipulated in the prevailing nature management plan. Furthermore, on the basis of a qualitative obligation that the nature manager must enter into and file in the public registers, the permanent use of the land as nature land will be guaranteed. It is therefore concluded that the environmental tasks have been duly entrusted by the Netherlands to the grant recipients, and as such criterion a) is considered to be fulfilled.

(42) The draft scheme specifies (in Article 3) which general requirements are to be met by beneficiaries. The grant decision will determine which beneficiary will receive a grant for the purchase of which land. Hence, criterion b) must be regarded as fulfilled.

(43) Criterion c) - the nature of any exclusive or special rights assigned to the undertaking - is also considered to be fulfilled as, with the grant, the beneficiary is obliged to acquire the full ownership/leasehold of the land for the purposes of sustainable nature management.

(44) Regarding criterion d), the level of the grant is determined on the basis of Articles 15 and 19 of the draft grant scheme and the provisions included in the *Algemene wet bestuursrecht* (General Administrative Law Act) in relation to grants. Only costs actually incurred in acquiring the land are compensated, including any costs of buying leases and additional eligible costs connected with the acquisition, such as valuation costs, notary fees or real estate transfer tax[25]. The subsidy amount paid in order to purchase the land or acquire the leasehold is limited to the real market value. Moreover, if the grant results in the accretion of capital, the Provincial Executive may under certain circumstances (specified in the General Administrative Law Act) claim compensation from the beneficiary[26]. A grant application must be accompanied by a summary and estimate of eligible costs and a valuation report by an independent valuer concerning the land to be acquired[27]. In the case of a request to determine the definitive amount of the grant, the grant recipient must submit a statement of the costs incurred together with the substantiating documents.

(45) Regarding criterion e), as indicated previously, the level of the grant for acquiring the land is linked to the real market value. For additional costs (as specified in point ((44), only costs actually incurred may be compensated.

---

25 Draft grant scheme, article 15.

26 Draft grant scheme, article 16.

27 Draft grant scheme, article 14.

#### *4.3.2.3 Amount of compensation*

(46) The amount of compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable margin of profit[28]. Compensation must actually be used for the operation of the SGEI, but the undertaking receiving public service compensation may enjoy a reasonable profit[29]. When a company carries out activities falling both inside and outside the scope of the service of general economic interest, the internal accounts must show separately the costs and receipts associated with the service of general economic interest and those associated with other services, as well as the parameters for allocating costs and revenues[30].

(47) The Commission has taken note of the submission of the Dutch authorities that nature management is a loss-making activity. A nature manager can however apply for a management grant for land acquired under the notified scheme on the basis of the Provincial Ordinance on Nature and Landscape Management[31]. The Dutch authorities confirmed that revenues from nature management are deducted from the nature management subsidy. Consequently, the Commission concluded in its decision of 20 April 2011 in case N376/2010 that no overcompensation is implied by that subsidy scheme for nature management.

(48) The Commission notes that the grant under the notified scheme is limited to the costs incurred in acquiring the full ownership/leasehold of the land, including any costs of buying leases and additional costs connected with the acquisition, such as valuation costs, notary fees or real estate transfer tax[32]. The compensation for the costs of acquiring the land will not exceed 100% of the real market value (as defined) and certain additional costs, such as valuation costs and notary fees, upon production of supporting documents.

(49) Furthermore, beneficiaries must use revenues from the acquired nature land for nature conservation purposes[33]. If land acquired by means of a grant under the subject scheme is sold, the beneficiary must, within a period of six months, repay the value of the land[34]. The Dutch authorities have confirmed that the value of the land corresponds to the proceeds of the sale of the nature land. In addition, a qualitative obligation is vested on the nature land, which means that a purchaser must carry out nature conservation activities on the land in accordance with the type of nature management stipulated in the nature management plan, adopted by each province under the Provincial Ordinance on Nature and Landscape Management. Neither the original nor the new owner shall gain any advantage in the case of a land transfer.

---

28 SGEI Framework, point 14.
29 SGEI Framework, point 15.
30 SGEI Framework, point 19.
31 State aid cases N545/2009 and N376/2010, Commission decisions of 31.01.2011 and 20.04.2011 respectively.
32 Draft grant scheme, article 15.
33 Draft grant scheme, article 18 (1)(g).
34 Draft grant scheme, article 18 (4).

(50) Against this background, the Commission considers that the amount of compensation granted for the acquisition of the land does not exceed what is necessary to cover the costs incurred in discharging that part of the public service obligation in question.

(51) The grant does not include any profit component.

(52) A beneficiary may carry out other activities, unrelated to the measure at issue. In this case it is necessary to ensure that the costs arising from such activities cannot be imputed to the SGEI. The Dutch authorities have accepted that they will make the granting of a subsidy under the subject scheme conditional on the keeping of separate accounts by the aid recipient, in conformity with the condition laid down in point 19 of the SGEI Framework.

(53) On the basis of the foregoing, the Commission concludes that the compensation provided under the notified measure does not exceed what is necessary to discharge the public service obligations entrusted to the beneficiaries. This decision in no way prejudges any possible further analysis by the Commission as far as the respect for the EU public procurement rules is concerned.

### 4.4. Reporting

(54) The Dutch authorities have agreed to provide a report on the implementation of the scheme every three years. The report will take the form of a table showing, for each measure, the subsidy that was granted. The Netherlands will also indicate cases in which land was acquired (i) by transfer through change of classification for the general benefit (*bestemmingswijziging ten algemenen nutte*) or (ii) by amicable acquisition to prevent expropriation.

## 5. SUBMISSIONS FROM INTERESTED PARTY

(55) The Commission has received submissions from an interested party who has raised concerns about certain aspects of the proposed scheme.

(56) The interested party expressed *inter alia* concerns that, because of its scope, the proposed scheme fails to address alleged discrimination between the provincial nature conservation societies which have so far been eligible for grants under the so-called PNB schemes and other (private) landowners[35]. In particular, the

[35] This notified scheme amends the provincial grant schemes for private land management nature protection organisations (*provinciale subsidieregelingen voor particuliere terreinbeherende natuurbeschermingsorganisaties*), which provide for subsidisation of acquisition of land and compensation for the costs of terminating farming leases (the so-called PNB schemes). To avoid fragmentation and to promote unity of management, it was decided when setting up the PNB scheme in 1993 to consider a limited number of land management organisations as beneficiaries (PNBs). At that time, the *Vereniging Natuurmonumenten* (Society for the Preservation of Nature Reserves) and the 12 *Provinciale Landschappen* (Provincial Nature Conservation Societies) were chosen, as these organisations had included nature and landscape conservation in their statutes and their nature management was guaranteed to be sustainable. However, in view of the policy advances with regard to the completion of the EHS and nature management, drawing a distinction between these PNBs and the other nature conservation

interested party pointed in this context to the definition of eligible beneficiaries, i.e. anyone who carries out sustainable nature management or makes a sufficiently reasonable case that he can and will carry out sustainable nature management in accordance with the type of nature management stipulated in the nature management plan. The interested party alleged that this criterion leaves room for the Dutch authorities to implement the scheme in a discriminatory manner, to the disadvantage of private land owners.

(57) The Commission notes the following. Based on article 3a of the draft grant scheme (*beneficiaries*) anyone who carries out sustainable nature management or makes a sufficiently reasonable case that he can and will carry out sustainable nature management is in principle eligible for a grant. The Dutch authorities have explained that this means that either the grant applicant himself must possess the necessary expertise or that the grant applicant will have the possibility to call in external expertise.

(58) In addition, the Commission notes that the draft scheme, as originally proposed, was open only to foundations or associations with sustainable nature conservation as their objective. However, following submissions by the interested party voicing concerns as regards an alleged discriminatory implementation of the draft scheme, the Dutch authorities have addressed those concerns by broadening the scope of application of the measure, so as to allow *anyone* who carries out sustainable nature management or makes a sufficiently reasonable case that he can and will carry out sustainable nature management to benefit as potential beneficiary from the proposed scheme.

(59) As regards the selection of beneficiaries, the Dutch authorities have furthermore explained that the eligibility check will depend very much on the type of nature management prescribed for the parcel in question: complex types of nature management, such as the management of marshland, will make different demands on the manager than a type of nature management which is relatively simple to carry out. The authorities consider it not necessary for the subsidy applicant to provide specific information as standard with his application. Where appropriate, and notably depending on the type of nature management to be achieved, however, the provincial authorities can request further details from the applicant, for example in the form of an action plan. The Dutch authorities have submitted that they are of the view that the current selection criterion, set forth in article 3a of the draft grant scheme, strikes a good balance between, on the one hand, the need for legal certainty and, on the other hand, the desirability not to exclude any applicants upfront. The Commission notes that any concerns on an alleged discriminatory implementation of the scheme based on the type of nature management required, are addressed by the assurance from the Dutch authorities that the grant applicant will have the possibility to call in external expertise in the event that the applicant himself does not possess the necessary expertise.

(60) In light of the foregoing, the Commission is of the view that the proposed scheme has been designed in an objective and non-discriminatory manner. The

---

organisations is considered to be outmoded. The Dutch authorities consider it desirable to place the PNBs and other similar organisations on the same footing (Explanatory Memorandum attached to the draft grant scheme), by way of the notified scheme.

Commission has not found any indication that the proposed scheme would not be implemented in an open and non-discriminatory manner. The Commission has taken note of the submission from the Netherlands in this context, that the provincial authorities are very aware of the need to make the subsidy scheme accessible to anyone who can and will carry out sustainable nature management in line with the nature management type as set out in the nature management plan, and of the importance of not excluding applicants beforehand. The Dutch authorities also stressed that the current government is strongly committed to the achievement of the (reformulated) EHS, including via private nature management. Ensuring free access to the subsidy scheme for land acquisition for both land management organisations and private landowners is regarded by the authorities as an important precondition for achieving this goal.

(61) The interested party has also submitted that a separate subsidy arrangement already provides for indemnification to land owners for a decrease in the value of land as a result of the transformation of agricultural land into nature land, with reference to the '*model-Subsidieregeling Kwaliteitsimpuls Nature en Landschap*' (Provincial Ordinance on Quality Impulse Nature and Landscape), thereby implying that the proposed scheme could give rise to a cumulation of aid.

(62) The Commission notes that the said legislation, the *model-Subsidieregeling Kwaliteitsimpuls Nature en Landschap*, explicitly excludes the possibility to apply for a subsidy under that scheme if an applicant has already received a grant for the purchase of agricultural land[36]. Moreover, that scheme and another scheme to which the complainant has referred, the '*model-Subsidieverordening Natuur- en Landschapsbeheer*' (the Provincial Ordinance on Nature and Landscape Management) do not relate to the purchase of land or leasehold for nature conservation purposes, but concern grants for investments into and management of natural areas respectively. On the basis of the foregoing cumulation of aid can be excluded.

(63) The interested party has additionally emphasised that there is the risk of a price-increasing effect as a result of the subsidy scheme, to the benefit of private sellers (particularly farmers) and at the expense of the Dutch tax-payer. In particular, the interested party is concerned that different market participants would start bidding against one another for the same piece of land, thus leading to an inflated sales price.

(64) As indicated previously, the proposed measure concerns an open scheme: anyone who carries out sustainable nature management or makes a sufficiently reasonable case that he can and will carry out sustainable nature management is in principle eligible for a grant. Moreover, the value of the land established by the independent valuation expert is the purchase price that is expected to be realised in the market and constitutes at the same time the maximum for which a subsidy can be granted. Considering that the aid will never be more than the purchase price as determined by the independent valuer, the Commission does not consider it likely that the scheme as such would give rise to a price-increasing effect.

[36] *Model-Subsidieregeling Kwaliteitsimpuls Nature en Landschap*, article 16 sub b.

(65) Finally, the interested party has raised concerns about the 'tailor-made' (*maatwerk*) application of the exemption option of Article 18(4) of the draft grant scheme. That provision states that upon the sale of the subsidised land, the grant recipient is required to repay the Provincial Executive the subsidy within 6 months, except in the case where the Provincial Executive has exempted the beneficiary from reimbursement.

(66) The Commission accepts the reasoning of the Dutch authorities that, on transfer of title of land purchased with a grant, situations may arise in which it is not reasonable to reclaim the entire amount of the grant. As explained by the authorities, such a situation may be related to the change in function or the price trend of the land between the time of purchase and subsidisation and transfer of title. A case-by-case assessment is required by the authorities so as to establish the magnitude of the repayment obligation. However, as already noted in point 49 above, the beneficiary must, within a period of six months, repay at least the value of the land which corresponds to the proceeds of the sale of such nature land. The authorities have given the assurance that neither the original recipient nor the new recipient can draw any economic benefit from the transfer of land. In addition, the authorities have given the assurance that all parties – PNBs and private entities alike – shall be treated equally for the purpose of the implementation of this provision Article 18(4) of the draft grant scheme. In light of the foregoing, *prima facie* the Commission has no reason to believe that the exemption option laid down in Article 18(4) of the draft grant scheme would not be implemented in a non-discriminatory manner, nor that the the implementation of this provision would give rise to unlawful State aid in the sense of Article 107(1) TFEU.

## 6. DECISION

(67) In the light of the above, the Commission considers that the measure is compatible with the internal market pursuant to Article 106(2) TFEU.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://ec.europa.eu/eu_law/state_aids/state_aids_texts_en.htm

Your request should be sent by registered letter or by fax to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels
Fax No: 00-32-2-296-12-42

Yours faithfully,
For the Commission

*Joaquín ALMUNIA*
Vice-President

# LECTURE 9

## Public Procurement

12 March 2012

*Common Market Law Review* **46**: 805–846, 2009.
© 2009 *Kluwer Law International. Printed in the Netherlands.*

# PUBLIC PROCUREMENT LAW AND INTERNAL MARKET LAW

BEREND JAN DRIJBER AND HÉLÈNE STERGIOU*

## 1. Introduction

In the classification of the ECJ's case law, public procurement cases are ranked under the heading "law relating to undertakings" (*droit des enterprises*). This somewhat non-descript qualification does not say a great deal about the nature of public procurement litigation. Public procurement rules are in essence a concrete expression of the fundamental freedoms, in particular the free provision of services (Art. 49 EC). According to settled case law, "the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State."[1]

In legal practice, public procurement has gradually developed into a separate area of law. The technicality of procurement procedures and their intertwining with national law account to a large extent for this development. The number of court cases is increasing for several reasons.[2] First, there is a growing awareness of, and increased expertise in, the public procurement rules. Bidders as well as contracting authorities of a certain size employ professionals, experienced in handling tendering procedures. Fewer mistakes are made, but at the same time more sophisticated issues are raised, and defects in tendering arrangements are more easily detected. At a more general level, the growing

* Berend Jan Drijber is a member of the Bar of The Hague and a former member of the Legal Service of the Commission. Hélène M. Stergiou is PhD Fellow and lecturer in European Law at the department of International and European Law, Faculty of Law, Radboud University Nijmegen.

1. E.g. Case C-380/98, *University of Cambridge*, [2000] ECR I-8035, para 16; Case C-19/00, *SIAC Construction*, [2001] ECR I-7725, para 32; Case C-92/00, *Hl*, [2002] ECR I-5553, para 43; and Case C-507/03, *Commission* v. *Ireland (An Post)*, [2007] ECR I-9777, para 27.

2. This phenomenon is not limited to only certain Member States, since courts of many different Member States refer public procurement cases to the ECJ. The exact reasons for this increase in cases may however to a certain extent depend on national circumstances. In the Netherlands, for example, proven compliance by public bodies with procurement rules is a prerequisite for approval of expenditure by their accountants. In practice, this is a strong incentive to abide scrupulously by the public procurement rules.

importance attached to "good governance" and the proper spending of taxpayers' money explain why correct tendering is much more of a key concern than it was a decade ago. Secondly, the financial interests involved are often very substantial. As both sides of the market get more professional and business minded, the likely result is a growing number of disputes found to be worth fighting in courts.[3] Thirdly, the Commission has stepped up the efforts of monitoring compliance with public procurement law. This has resulted into a growing number of infringement proceedings in this area, some of which concern individual cases.

Community law "generalists" find it increasingly difficult to follow the flood of cases on public procurement matters. Yet rulings that ostensibly deal with technical issues may also be relevant for the evolution of the case law on the fundamental freedoms in general. On the other hand, public procurement specialists may not fully realize that "their" field of law is rooted almost exclusively in Community law. ECJ rulings often have a significant impact on their day-to-day practice. One only needs to think of the case law on service concessions and on public contracts below certain financial thresholds,[4] or of the numerous rulings defining and refining the "quasi in-house exception",[5] which is a purely praetorian exception.

This article will situate the "specialist" case law on public procurement in the wider context of the "general" case law on the free provision of services. The analysis of the interface between the two may help narrow the gap between two legal peninsulas. The core question is to what extent primary Community law may be a source of obligations to tender as well as of justifications for not tendering.

We start our analysis by summarizing the applicable legislation and recent cases on public procurement. Transparency obligations are at the heart of this case law (section 2). Some elements of this *Transparency* case law will subsequently be compared with other "internal market case law" (section 3). This

3. A substantial number of disputes, in particular cases involving highly technical issues, are decided by arbitration tribunals, which are not a "court or tribunal" for the purposes of Art. 234 EC.

4. Case C-324/98, *Telaustria*, [2000] ECR I-10745; Case C-59/00, *Vestergaard*, [2001] ECR I-9505; Case C-231/03, *Coname*, [2005] ECR I-7287; Case C-264/03, *Commission* v. *France*, [2005] ECR-I-8831; Case C-458/03, *Parking Brixen*, [2005] ECR I-8585; *Commission* v. *Ireland*, cited *supra* note 1; Case C-6/05, *Medipac-Kazantzides*, [2007] ECR I-4557 and Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* v. *Administración General del Estado (Correos)*, [2007] ECR I-12175.

5. Case C-107/98, *Teckal*, [1999] ECR I-8121; Case C-26/03, *Stadt Halle*, [2005] ECR I-1; Case C-84/03, *Commission* v. *Spain*, [2005] ECR I-139; *Parking Brixen*, cited *supra* note 4; Case C-340/04, *Carbotermo*, [2006] ECR I-4137; Case C-410/04, *ANAV*, [2006] ECR I-3303; Case C-295/05, *Asemfo*, [2007] ECR I-2999; Case C-324/07, *Coditel Brabant*, judgment of 13 Nov. 2008, nyr.

will then lead to a number of new questions concerning the relationship between public procurement and Article 86 EC and, particularly, the question whether the award of an exclusive right is subject to tendering obligations (section 4). Subsequently, we turn to possible justifications of a presumed infringement of transparency obligations, addressing the relevance of both Article 86(2) EC and the "rule of reason" exceptions (section 5). Finally, we deal with the "interaction" among possible derogations of transparency obligations, both under primary law and specific secondary law (section 6).[6]

The conclusion will be both critical and optimistic. Although the growing body of case law on public procurement issues has given rise to a certain amount of legal uncertainty, it does not constitute a *Fremdkörper* within the wider body of case law relative to the fundamental freedoms in general. In legal terms too, public procurement is an integral part of the internal market.

## 2. EU Public Procurement Law: A short overview

### 2.1. *Directives 2004/17 and 2004/18*

The rules on contract award procedures are currently contained in two directives of 2004. Directive 2004/17/EC (hereinafter: "Utilities Directive") provides rules on the procurement procedures of entities operating in the water, energy, transport and postal services sectors.[7] For all other public contracts the rules are found in Directive 2004/18/EC (hereinafter: "Public Sector Directive").[8] Public contracts are divided into three main categories: public service contracts, public works contracts and public supply contracts. Public service contracts are negatively defined as public contracts other than public works or supply contracts.[9] A contract that *ratione materiae* falls under the scope of one of these Directives and the value of which exceeds the applicable financial thresholds[10] must be tendered by a contracting authority in accordance with the

6. For example, the four "*Altmark* criteria" (Case C-280/00, *Altmark,* [2003] ECR I-7747) for deciding whether public financing is State aid or merely a compensation of costs incurred in carrying out public service obligations were inspired by the then existing version of the Draft Regulation on public passenger transport services by rail and by road.

7. Directive 2004/17/EC on the coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors (O.J. 2004, L 134/1).

8. Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (O.J. 2004, L 134/114).

9. Art. 1(2) (d) Public Sector Directive.

10. New thresholds entered into force on 1 Jan. 2008. See Regulation (EC) No. 1422/2007, amending Directives 2004/17/EC and 2004/18/EC in respect of their application thresholds for the procedures for the award of contracts (O.J. 2007, L 317/34).

applicable Directive. The requirements set out in the Directives are both substantive and procedural in nature. For example, contracts must be published in the Official Journal of the EU.[11] Contracting authorities are obliged to award contracts following certain competitive award procedures[12] and they should allow certain time limits for each phase of the procurement procedure.[13] Finally, Member States must provide effective remedies for bidders who are victims of a violation of EU public procurement law. The Remedies Directive requires that effective remedies are available before an independent national review body.[14]

A number of public service contracts are excluded from the scope of the Public Sector Directive. This Directive does not apply, for example, to below-threshold contracts, to secret contracts and contracts requiring special security measures (Art. 14), employment contracts, research and development services, financial services (Art. 16) or service contracts awarded on the basis of an exclusive right (Art. 18). The so-called "II B-services", listed in Annex II B to the Directive, do fall within the scope of the Directive but they are subject to a "light" procurement regime, which only requires non-discriminatory technical specifications (Art. 23) and the *ex post* publication of the results of the award (Art. 35(4)). The Directive does not apply to service concessions,[15] which are defined in Article 1(4) as follows: "a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment."

Before the Public Sector Directive was adopted, the only definition of concessions to be found in secondary Community law was in the Works Directive, which laid down specific provisions for works concessions.[16] In its Interpretative Communication of 2000 on concessions under Community law, the Commission set out the specific characteristics of a service concession as compared to "ordinary" public service contracts.[17] In line with the elements of the works concession, the Commission stated that the concession holder is remunerated through income generated from the exploitation of the concession instead of

11. Art. 35 Public Sector Directive.

12. Ibid., Art. 28.

13. Ibid., Art. 38. For an overview of all relevant requirements see e.g. Arrowsmith, "The past and the future evolution of EC Procurement Law: From framework to common code?", 35 *Public Contract Law Journal*, 344.

14. Directive 89/665 (O.J. 1989, L 395/33), as recently amended by Directive 2007/66 (O.J. 2007, L 335/31).

15. Art. 17 Public Sector Directive.

16. Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts (O.J. 1993, L 199).

17. Interpretative Communication on concessions under Community law (O.J. 2000, C 121/3).

receiving payment from a contracting authority in consideration of a service rendered to that authority. In addition, the Commission stated that service concessions normally concern activities the nature and purpose of which, as well as the rules to which they are subject, are likely to be the "State's responsibility and may be subject to exclusive or special rights." This last element has given rise to a considerable amount of uncertainty. The ECJ held that the right to exploit and the risk-bearing aspect are the only decisive elements to determine whether a public contract qualifies as a service concession.[18] It follows that the "general interest" or "State's responsibility" of the activities involved is no longer a relevant condition. This is to be welcomed, not only for reasons of consistency with the definition contained in Article 1(4) of the Public Sector Directive, but also because the idea of what economic activities are considered as "the State's responsibility" may vary from one Member State to another.

### 2.2. *The emerging transparency principle: The case law on service concessions*

The EC Treaty contains general rules that prohibit Member States from discriminating against the industry of other Member States and that also forbid other barriers to market access (Arts. 28, 43 and 49 EC). By the same token, Article 2 of the Public Sector Directive stipulates that operators can benefit from opportunities in other Member States by stating that Member States have to comply with the principles of non-discrimination and transparency when awarding public contracts.[19] Initially it was lawful to grant service concessions, II B-service contracts and public service contracts without organizing any form of procurement procedure. In line with the view defended by the Commission in its Interpretative Communication, the ECJ has decided that that the award of service concessions must respect the principle of transparency, as a means of ensuring equal treatment of potentially interested parties.[20]

18. Case C-382/05, *Commission* v. *Italy*, [2007] ECR I-6657, para 34. The Court had to decide whether an agreement for the use of municipal waste qualified as an (ordinary) public service contract or as a service concession. First, it concluded that the method of remuneration in the agreements did not consist in a right to exploit for payment, nor did it involve the assumption by the operator of the risk connected with operating the services. This suffices to conclude that the agreements were not service concessions. The circumstance that the treatment of waste comes within the general interest does not change that conclusion (para 43). See also Stergiou, "The increasing influence of primary EU law on EU public procurement law: Must a concession to provide SGEI be tendered?" in Van de Gronden (Ed.), *EU and WTO Law on Services* (Kluwer, 2009), pp. 159–184.

19. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), p. 354.

20. The equal treatment principle was first mentioned in Case C-243/89, *Commission* v. *Denmark* (*Storebaelt*), [1993] ECR I-3353, para 33. It was further developed in Case C-21/03,

*Telaustria*, decided in 2000, was the first case on transparency obligations with regard to contracts not fully covered by the procurement Directives. According to the Court, transparency "consists in ensuring for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed."[21] Unfortunately, the ECJ did not specify in any detail what kind or degree of publicity is necessary; for example, whether it is sufficient to publish an announcement for a list of approved suppliers or if publicity must be Europe-wide.[22] Nor was it clear whether "a sufficient degree of advertising" implies an obligation to tender. One might argue that it does, since there would be little point in requiring transparency if no follow-up needs to be given after several parties have shown their interest.

In the Commission's Interpretative Communication on concessions, mentioned above, that institution observes that transparency could be ensured by any appropriate means, including advertising, depending on the particularities of the relevant sector. This type of advertising should generally contain "the information necessary to enable potential concessionaires to decide whether they are interested in participating (e.g. selection and award criteria etc.). This includes the subject of the concession and the nature and scope of the services expected from the concessionaire." As a result of *Telaustria* and the Communication, the pressure on Member States to ensure transparency was increasing, but so was the legal uncertainty. [23]

It was not until 2005 that the Court had an opportunity to clarify what "a sufficient degree of advertising" actually means. In *Coname*, it held that transparency does not necessarily involve "an obligation to hold an invitation to tender."[24] Rather it implies that the contracting authority is obliged to ensure that an undertaking located in the territory of another Member State has access to appropriate information regarding the concession before it is awarded. In other words, the contracting authority must ensure that any interested party has the opportunity to show its interest, but a full fledged procedure in accordance with the Directives is not required. This left open the question what kind of procedure *was* required.[25]

*Fabricom* v. *Belgian State*, [2005] ECR I-1559, para 14. The principle of equal treatment entails an obligation of transparency. See, for the first time, Case C-275/98, *Unitron Scandinavia and 3-S*, [1999] ECR I-8921, para 31.

21. *Telaustria*, cited *supra* note 4, para 62.

22. Arrowsmith, op. cit. *supra* note 19, p. 366.

23. See also Neergaard, "Public service concessions and related concepts – the increased pressure from Community law on Member States' use of concessions", 6 P.P.L.R. (2007), 387–409.

24. *Coname*, cited *supra* note 4.

25. Arrowsmith (op. cit. *supra* note 19, p. 367) points out that not only have the rulings created uncertainty (entities have almost no guidance on what specific procedures they must

*In the next relevant ruling, Parking Brixen*, the Court did not give any more guidance. It stressed that some kind of call for competition is necessary: "… a complete lack of any call for competition in the case of the award of a public service concession such as that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency."[26] Again, it was clear that doing nothing was not enough, but unclear what a contracting authority should positively be doing to satisfy the transparency principle.

In 2006, the Commission issued an Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Directives.[27] It observes that the principles of equal treatment and non-discrimination imply an obligation of transparency. The Commission considers this obligation to be applicable not only to the award of service concessions, but also to contracts below the financial thresholds and to contracts for the provision of II B-services, provided such contracts have "a sufficient connection with the functioning of the Internal Market." For example, if a very modest economic interest is at stake, a contract award will probably not be of any interest to economic operators located in other Member States. Individual circumstances determine whether a case has a sufficient connection with the Internal Market,[28] such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned, size and structure of the market, commercial practices etc. and the geographic location of the place of performance. It is clear that in spite of this Communication Member States were left with a lot of unresolved questions.[29]

### 2.3. *The "certain cross-border interest" test*

Shortly afterwards the Court developed a slightly different test to measure the "internal market relevance" of a public (service) contract. In *Commission* v. *Ireland* (*An Post*) it had to decide whether the award without any prior

follow), they also may be seen as affecting the carefully deliberated decisions made by the Community legislature when the Directives were adopted.

26. *Parking Brixen*, cited *supra* note 4, para 50.

27. Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Directives (O.J. 2006, C 179/2).

28. Ibid., at para 27.

29. See also McGowan, "Clarity at last? Low value contracts and transparency obligations", 16 P.P.L.R. (2007), 274–283. The Commission has been criticized by several Member States and the European Parliament for creating new rules on tendering, which go beyond the current obligations under Community law. Germany challenged the legality of the Communication (Case T-258/06, O.J. 2006, C 294/52, pending).

advertising of a II B-service contract was contrary to the EC Treaty.[30] The Court considered that service contracts come within the scope of the Treaty provisions on free movement only when these contracts present "certain cross-border interest" to an undertaking located in another Member State. It held that these provisions are breached if such undertaking "was unable to express its interest in that contract because it did not have access to adequate information before the contract was awarded."

Therefore, whereas the Commission held that transparency obligations apply to all contracts "having a sufficient connection with the functioning of the Internal Market" and that the lack of any advertising constitutes an infringement,[31] the Court seems to focus more on the likelihood that a company established in another Member State would have been interested in making an offer, had it been properly informed about the public contract through any form of advertisement. It is for the Commission to show that the criterion of "certain cross-border interest" is fulfilled.[32] In the case of *An Post*, the ECJ found that the Commission had not provided the required evidence: "A mere statement by it that a complaint was made to it in relation to the contract in question is not sufficient to establish that the contract was of certain cross-border interest." Consequently, the Commission's application was dismissed.

In *Commission* v. *Italy* the ECJ applied the same reasoning to contracts whose value falls below the thresholds of the Public Sector Directive.[33] Italian legislation provided, *inter alia*, for the possibility that public works contracts be awarded directly to the holder of a building permit. The Commission submitted that the principles of transparency and equal treatment must be observed, even if the estimated value of the contract is below the thresholds. In its defence, Italy argued that "it is unnecessary … to refer specifically to the rules of the Treaty on advertising and competition and the relevant case law of the Court interpreting them." Referring to *An Post* the ECJ decided however that if a contract is of certain cross-border interest, the absence of any transparency "amounts to a difference in treatment, which, by excluding all undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 and 49."[34] Nonetheless, the Court acknowledged that this treatment could be "justified by objective circumstances."

30. *An Post*, cited *supra* note 1.

31. See the 2006 Communication, cited *supra* note 27.

32. *An Post*, at para 33: "According to settled case law, it is the Commission's responsibility to provide the Court with the evidence necessary to enable it to establish that an obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption."

33. Case C-412/04, *Commission* v. *Italy*, [2008] ECR I-619.

34. Ibid., para 66.

The recent ruling in *SECAP* sheds further light on the meaning of "certain cross-border interest." The case concerns an Italian law requiring that bids for public works contracts below the threshold that are considered to be "abnormally low" must be automatically excluded from a procurement procedure.[35] The Court held that this law had the effect of depriving bidders of the opportunity to demonstrate that their bids are viable and genuine.[36] This could have consequences incompatible with Community law if, "in view of its particular characteristics, a given contract is likely to be of certain cross-border interest and therefore attract operators from other Member States." This depends, amongst other things, on "the estimated value [of the contract] in conjunction with its technical complexity or the fact that the works are to be located in a place which is likely to attract the interest of foreign operators." The automatic exclusion "may constitute indirect discrimination since, in practice, it places at a disadvantage operators from other Member States which, as they have different cost structures, may benefit from significant economies of scale or, intending to cut their profit margins in order to enter the market in question more effectively, would be in the position to make a bid that was competitive and at the same time genuine and viable but which the contracting authority would not be able to consider as a result of that legislation."[37]

There is not one single circumstance that determines whether a given contract is of certain cross-border interest. The test is inevitably a very factual one. The value of the contract and the place where it must be performed are clearly relevant factors.[38] The criterion may still give rise to differences of interpretation, if only because the language versions do not appear to be exactly identical.[39] In our view, the adverb "certain" should not be equated to any kind of

35. Joined Cases C-147/06 & C-148/06, *SECAP SpA and Santorso Soc. Coop. Arl* v. *Commune di Torino*, judgment of 15 May 2008, nyr.

36. Ibid., at para 24.

37. Ibid., at para 26. A.G. Colomer observed that collusive arrangements between undertakings operating in the territorial market of the contract may increase the price levels offered, the perverse effect being that bids submitted by "foreign outsiders" would be classified as "abnormally low" (Opinion, paras. 45–47). In our submission, it would rather be for the national competition authority to investigate where appropriate whether bid rigging or other anti-competitive practices may have occurred. This mere possibility should, however, not be a reason for considering public procurement rules unlawful. The Italian law is not caught by the case law on Arts. 10, 3(1)(g) and 81 EC either, since it does not as such encourage the conclusion of anti-competitive arrangements.

38. When service concessions have significant economic importance the presence of "certain cross-border interest" will be readily assumed, as is illustrated by the judgment of 17 July 2008, Case C-347/06, *ASM Brescia*, nyr, paras. 59 and 62.

39. The French (and Greek) language versions mention "*un interêt transfrontalier certain*", which suggests that there should be a real cross-border interest. In the Dutch and German language versions this phrase reads "*dat deze opdracht duidelijk van grensoverschrijdend belang*

*De Minimis* rule. It rather means that, on the basis of the features and value of the market involved, there is a clear likelihood that non-domestic parties could reasonably have an interest in taking part in the bidding process. If there is no such likelihood, the free movement provisions do not apply to the situation at hand. In our submission, the test is not fulfilled simply when it cannot be entirely excluded that companies located in another Member State might be interested in making an offer. Certain cross-border interest should be positively established, for example by reference to earlier comparable contracts for which companies from other Member States showed an interest.

The criterion also raises questions in relation to both the standard of proof and the burden of proof. In *SECAP*, the Court held that "it is in principle for the contracting authority concerned to assess whether there may be a cross-border interest."[40] In our submission, it does not follow that a public authority has a *duty* to assess whether the contract in question presents "certain cross-border interest", in the sense that the failure to do so would in itself be liable to sanctions under Community law. Judicial review will be relevant when a contracting authority has directly awarded a public contract below the thresholds and therefore implicitly held that certain cross-border interest is lacking. It will only be at the judicial stage that a contracting authority will have to state reasons for the absence of tendering. Indeed, when a contracting authority refrains from organizing any publicity there are no other parties it has to inform that they did not win the contract. However, in Member States where public procurement law is part of administrative law, a contracting authority may possibly have to give fairly extensive reasons.[41]

It follows from *An Post* and another case brought against Ireland, *DCC* (or *Ambulance services),* that it is for the Commission to demonstrate that there are grounds for applying the Treaty obligation of transparency to the arrangement in question. Both cases were infringement proceedings, in which the Commission has the onus of proof in any case.[42] When the Commission

*was*"/ "*eines eindeutigen grenzüberschreitenden Interesse*," which suggests even more that the contract should have a clear and unmistakable cross-border interest.

40. *SECAP*, cited *supra* note 35, at para 30.

41. In The Netherlands, public procurement law is part of civil law, the idea being that a public body is supposed to be on the same footing as service providers when the two sides enter into an agreement. The decision to accept or refuse a bid is therefore not an administrative act that must be prepared and reasoned in conformity with the general rules of administrative law. The application of typically Community law notions such as "effectiveness" and "*effet utile*" may be difficult to apply to civil law proceedings. For example, Directive 2007/66 (the modified Remedies Directive) provides in Art. 2f (2) that "alternative penalties" "shall be the imposition of fines on the contracting authority or the shortening of the duration of the contract." It is far from clear, however, whether civil courts can have competence to impose fines.

42. Case C-532/03, *Commission* v. *Ireland*, [2007] ECR I-11353. The Court was asked to hold that Ireland had failed to fulfil its obligations on the principle of transparency on the ground

challenges a national legislative or administrative measure, it normally does not have to show a cross-border element. The area of public procurement may in that respect be somewhat special in that the Commission regularly brings infringement proceedings for the failure of a contracting authority to comply with the public procurement rules in an *individual* case, irrespective of the compliance of the underlying national legislation with EU Public Procurement Law.[43] In proceedings regarding an individual situation, the "certain cross-border interest test" will however be one of the substantive elements determining whether there is an infringement. In litigation before national courts the burden of proof should logically be on the private complainant, who argues that the obligation of transparency has been violated.[44] The division of the burden of proof is however strictly speaking a matter of national law.

## 3. Analysis in the light of other "internal market case law"

In this section we put elements of the *Transparency* case law discussed in section 2 in a somewhat wider internal market perspective.

### 3.1. *"Certain cross-border interest" versus "affaire interne"*

Traditionally, the Court has refused to apply the rules on free movement to preliminary cases when it appeared that the case at hand did not involve any cross-border element. According to consistent case law, "the fundamental freedoms of the Treaty cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State."[45] Nowadays,

that the Dublin City Council ("DCC") had awarded a II B-service contract to provide emergency ambulance services without undertaking any prior advertising. In line with its reasoning in *An Post*, the Court ruled that "it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled." See for a case note, Browne in 17 P.P.L.R. (2008), 92–95.

43. Although this is not a unique feature of procurement cases (also environmental cases often concern individual situations) this circumstance may explain to a certain extent why in this area the Court has dismissed a proportionally large number of infringement applications.

44. In proceedings before the District Court of The Hague, applicant Compass Group submitted that the Dutch Ministry of Agriculture had acted in breach of the transparency principle. It alleged that the Minister should have publicly announced the procurement procedure. The District Court rejected this argument with reference to *An Post* and decided that Compass Group had not made sufficiently plausible that the contract at stake was of cross-border interest. President District Court The Hague, judgment of 21 Jan. 2008, on www.rechtspraak.nl at LJN BC 3144.

45. See recently, Case C-212/06, *Gouvernement de la Communauté française et Gouvernement wallon*, judgment of 1 April 2008, nyr, para 33. See van der Steen, "Zuiver interne situaties: geen omwenteling, wel inperking", (2008) NTER, 301–307.

## 5. Possible justifications of a violation of tendering obligations

In this section we will explore possible justifications of a *presumed violation* of the Public Sector Directive or of tendering obligations arising out of the *Transparency* case law. With regard to service concessions specifically we will argue that the exceptions and limitations provided for in the Public Sector Directive shall be applicable *mutatis mutandis* (5.1.). Then we will examine whether the failure to tender a public contract could be justified on the basis of Article 86(2) EC. The analysis will cover all public contracts including service concessions, with the exception of contracts covered by the Utilities Directive or by other secondary legislation (5.2.). Subsequently, we will turn to the Treaty exceptions and the overriding reasons of public interest recognized in cases involving the free provision of services. That section too will cover all public contracts (5.3.).

### 5.1. *Limitations and exceptions for public contracts fully subject to the Directive*

It is submitted that the tendering of a service concession should be subject to the same limitations and exceptions as "normal" public contracts. Three aspects are worth mentioning.

First, the entity that awards a service concession must have the capacity of contracting authority. Article 1(9) of the Public Sector Directive distinguishes two categories of contracting authorities: public authorities (State, regional and local bodies are by definition contracting authorities) and bodies governed by public law. The latter category is defined by three cumulative conditions, one of which reads: "A body governed by public law is a body established for the purpose of meeting *needs in the general interest*, not having an industrial or commercial character." This provision must ensure that bodies controlled or financed by public authorities are not used as a means to escape the application of the Directive. In that sense it is a typical anti-circumvention provision. However, the concept of "bodies governed by public law" should not be so widely construed as to give the Directive horizontal effect.

Case law suggests that the concept of SGEI mentioned in Article 86(2) EC has been a source of inspiration for interpreting the terms "needs in the general interest."[121] In *BFI*, the Court decided that the existence of significant competition in the market place may be indicative of the absence of a need in the

121. This was explicitly advanced by A.G. La Pergola in *BFI Holding*, cited *supra* 119, (Opinion, para 49).

general interest.[122] Private undertakings may also carry out an activity that meets needs in the general interest, provided "the needs in question are ones which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain decisive influence."[123] The reference to "needs of general interest" – as opposed to interests having an "industrial or commercial character" – therefore serves to determine whether a body is a contracting authority. It does not constitute a ground to escape from the obligations arising out of the Public Sector Directive. On the contrary, it may precisely be a reason why a service contract must be tendered in accordance with that Directive.

Second, service concessions need not be tendered if they relate to subject matters which are excluded from the scope of the Directive, such as secret contracts (Art. 14), employment contracts, research and development contracts and financial services (Art. 16). One would indeed fail to see why service concessions – which are not regulated by the Directive – could not benefit from the specific exceptions that are applicable to "normal" public contracts. This is even more logical where unwritten exceptions have been admitted for cases fully covered by the Directive, such as the quasi in-house exception.[124] For example, in *Parking Brixen*, the Court examined whether the service concession at stake was covered by the quasi in-house exception.

### 5.2. *Article 86(2) EC as justification for not fulfilling tendering obligations*

The question whether Article 86(2) EC may provide a justification for not fulfilling the tendering obligations can be answered as follows: in theory it can, in practice it won't.

The Court has not yet had the opportunity to declare that Article 86(2) EC may derogate from public procurement rules and the transparency obligation. It is however very likely that is does. Article 86(2) EC can also prevail over the application of Community rules other than the competition rules, including the fundamental freedoms.[125] However, like every exception, Article 86(2) EC has

122. See for an analysis of the case law on this issue Pijnacker Hordijk et al., *Aanbestedingsrecht*, 3rd ed. (SDU, 2004), pp. 40 et seq. Other cases include C-44/96, *Mannesmann Austria*, [1998] ECR I-73; Joined Cases C-223 & 260/99, *Agora*, [2001] ECR I-3605; Case C-283/00, *Commission* v. *Spain*, [2003] ECR I-11697; Case C-18/01, *Korhonen*, [2003] ECR I-5321; C-373/00, *Truly*, [2003] ECR I-1931 and *Universale-Bau*, cited *supra* note 60. To a certain extent, the approach followed echoes the case law of the concept of "undertaking" for the purposes of competition law. For example, health insurance schemes that are predominantly based on solidarity cannot be offered by private companies.

123. *BFI*, cited *supra* note 119, at paras. 48–51.

124. See s*upra* note 5.

125. Case 72/83, *Campus Oil*, [1984] ECR 2747, para 19; Case C-179/90, *Port of Genoa*, [1991] ECR I-5926-5930, paras. 8–24; Case C-159/94, *Commission* v. *France* (gas and electricity

to be interpreted strictly. The restriction of, in this case, the free provision of services must be proportionate to the general economic interest pursued. In a number of cases the Court has *positively* applied Article 86(2) EC, holding that an exclusive or special right was required for the undertaking in question to perform the universal services under economically acceptable conditions.[126]

These cases all concern the lawfulness of an exclusive right *in itself*, whereas the key question here is whether any direct *granting* of an exclusive right is capable of being justified on the basis of Article 86(2) EC. It is submitted that this will be very rarely so. Indeed, one may have a difficulty in seeing any relevant link between the procedure for granting a right and the need for the selected company to perform an SGEI under economically acceptable circumstances.[127] Only in very exceptional cases may a contracting authority successfully rely on Article 86(2) EC to justify a breach of transparency obligations.

### 5.3. *Treaty exceptions and rule of reason exceptions*

The next question is whether other grounds for justification could be more promising. Under this heading, we refer to the "classic" exceptions admitted in cases relating to the free provision of services. The present paragraph applies equally to all public contracts.

The exception on account of exercise of official authority (Art. 45) EC would seem to be of little avail, since this exception is to be interpreted very

import monopolies), [1997] ECR I-5815, paras. 44–50; Case C-157/94, *Commission* v. *Netherlands* (electricity import monopoly), [1997] ECR I-5699, paras. 27–33; and Case T-266/97, *Vlaamse Televisie Maatschappij* v. *Commission*, [1999] ECR II-2329, para 114. Buendia Sierra in Faull and Nikpay, op. cit. *supra* note 78, pp. 631–641. It is also no longer contested that Art. 86(2) EC is, besides Art. 87(2) and (3) EC, a possible ground for declaring a State aid compatible with the common market. Until approximately 1994, this possibility was denied by the Commission.

126. In all these cases the Court accepted the argument that the exclusive right protected the undertaking in question against the risk of cream skimming, leaving them with the least profitable services. See *Corbeau*, cited *supra* note 110; Case C-67/96, *Albany*, [1999] ECR I-5751; Case C-209/98, *Deutsche Post*, [2000] ECR I-3743; and Case C-475/99, *Ambulanz Glöckner*, [2001] ECR I-8089. In the last judgment, the Court considered it sufficient when it was shown that "the exclusive rights were necessary to enable the holder to perform the tasks of general economic interest assigned to it under economically acceptable conditions". The Member State did not have to prove that the restrictive measures are suitable for achieving the objective or objectives, or that they did not go beyond what is necessary in order to achieve those objectives.

127. Inversely, the absence of any sort of selection procedure before an exclusive right is granted may reduce the chance that the conditions of Art. 86(2) EC are fulfilled. Cf., for a commercial monopoly, Case C-438/02, *Hunner*, [2005] I-4551, para 48. See also Drijber, "Les services d'intérêt économique général et la libre prestation des services" in Louis and Rodrigues (Eds.), *Les Services d'intérêt économique général et l'Union européenne* (Bruylant, 2006), pp. 65–97, at p. 77.

narrowly.[128] The exceptions on ground of public policy, public security or public health (Arts. 46 and 55) can also be invoked in exceptional cases only.

The case *Commission* v. *Italy (Agusta helicopters*) concerned a public supply contract fully covered by the public procurement Directives. The Italian Government sought to justify the awarding, through the "negotiated procedure" without any prior advertising notice, of helicopters to Agusta SpA, by invoking "legitimate requirements of national interest". The Court held that "the Treaty provides for derogations applicable in situations which may involve public safety, in particular, in Articles 30 EC, 39 EC, 46 EC, 58 EC, 64 EC, 296 EC and 297 EC, which deal with exceptional and clearly defined cases. It cannot be inferred from those Articles that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law."[129] Italy relied on the "defence exception" enshrined in Article 296 EC and on the specific exception for secret contracts or contracts whose execution must be accompanied by special security measures.[130] The Court held that Article 296 EC may only be invoked as regards products intended "for specifically military purposes", and that relying on the specific exception seemed to be disproportionate as regards the objective of preventing the disclosure of sensitive information relating to the production of helicopters.[131] As in the case law on the free provisions of services in general, public security and public order are exceptions to be construed narrowly and it is for the Member State concerned to furnish factual evidence that the conditions of these exceptions are fulfilled.

The same judgment also shows that in public procurement cases the Court is prepared to recognize rule of reason exceptions. Italy invoked the "requirement for homogeneity of the helicopter fleet" to justify the use of the negotiated procedure. The Court did not reject this ground as matter of principle; it held nonetheless that the ground went beyond the exhaustive list of cases in which the negotiated procedure may be used. It then did not draw the conclusion that harmonization has the effect of precluding the possibility of invoking other derogations. The Italian argument was dismissed because "[i]n this case, the Italian Republic has not discharged the burden of proof as regards the

128. See already Case 2/74, *Reyners* v. *Belgium*, [1974] ECR 63. Official authority is that which arises from the sovereignty and majesty of the State; for those who exercise it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens.

129. Case C-337/05, *Commission* v. *Italy*, judgment of 8 April 2008, nyr, para 43. See annotation by Trybus in this *Review*.

130. Art. 2(1) (b) Directive 93/36, currently Art. 14 of the Public Sector Directive.

131. *Commission* v. *Italy*, cited *supra* note 129, paras. 52 and 53.

reason for which only helicopters produced by Agusta would be endowed with the requisite technical specificities."[132]

In its recent ruling in *Michaniki*, the Court held that the list of grounds capable of justifying the exclusion of a contractor from participation in a contract, as laid down in the old Directive 93/37 on public works contracts, is exhaustive. Member States are therefore precluded from adding to the list other grounds of exclusion.[133] However, a Member State may apply substantive rules designed to ensure observance with "the principle of equal treatment and the principle of transparency entailed by the latter", provided such exclusionary measures are proportionate.[134] In that case, a national provision excluding media owners from taking part in a contact for public works was not objectionable as such, but in view of its automatic and absolute nature it had to be considered as disproportionate. Interestingly, the Court does not specify what provision or principle was violated. It held that "Community law" must be interpreted as precluding such a national provision.[135]

On an earlier occasion, in *Coname*, the Court examined whether there was an objective circumstance that could justify a difference in treatment. The Italian Government had argued that smaller municipalities needed to exercise control over a concessionaire managing a public service. The Court found that, even if such a need "may constitute an objective circumstance capable of justifying a possible difference in treatment", a 0.97% holding was too small to be effective.[136] In other words, the argument was again not rejected as a matter of principle, but because the condition of appropriateness (the third *Gebhard* condition) was not satisfied. No other circumstances capable of justifying the difference in treatment had been put forward.[137]

Two infringement cases appear to confirm that rule of reason exceptions may be invoked to justify the absence of a tender. In *Commission* v. *Ireland* (*ambulance services)*[138] Advocate General Stix-Hackl examined whether Ireland, which did not advertise the award to supply emergency services, could in that respect rely on "one of the Treaty rules providing for a general exemption of measures of the Member States from the application of primary law, whether one of the grounds of justification expressly provided for in the Treaty or a

132. Ibid., at para 59.

133. Case C-213/07, *Michaniki*, judgment of 16 Dec. 2008, nyr, para 43.

134. Ibid., paras. 44–48.

135. Ibid., para 69.

136. *Coname*, cited *supra* note 4, at para 24.

137. In *Parking Brixen*, cited *supra* note 4, the Court also limited itself to examining the justifications put forward (in that case: a purely internal situation and the quasi in-house exception).

138. *Commission* v. *Ireland*, cited *supra* note 42.

ground of justification recognized by case law."[139] As a matter of principle, the Advocate General considered that the rule of reason exceptions developed in settled case law on the freedom of establishment and services[140] should also be applied in relation to procurement law. Ireland was unable to demonstrate that grounds of justification or requirements in the general interest, recognized by the Court, such as consumer protection, were at stake.

In *Commission* v. *Italy* (service concessions for horse-betting), the Italian Government argued that the automatic renewal of 329 licences for horse-betting operations without inviting any competing bids was "justified by the need to ensure continuity, financial stability and a proper return on past investment for licence holders as well as the need to discourage recourse to clandestine activities, until the existing licences could be reallocated on the basis of tendering procedures."[141] The Court considered that, *in abstracto*, the renewal of the licences may (i) be recognized as an exceptional measure, as provided for in Articles 45 and 46 EC, or (ii) justified in accordance with case law of the Court for overriding reasons of general interest. Regarding overriding reasons of general interest, the Court referred to consumer protection and "the prevention of both fraud and incitement to squander on gaming", as well as to the need to preserve public order.[142] However, the renewal of the licences without putting them out to tender was "not an appropriate means of attaining the objective pursued by the Italian Republic, going beyond what was necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities."[143] The overriding reasons of public interest recognized to justify the limitation of the number of licence holders were therefore applied *mutatis mutandis* to the distinct problem of the lawfulness of the way in which licences had been awarded.

Finally, there are indications showing that the Court seems to be willing to consider "fresh" rule of reason exceptions. A first example is the *SECAP* case. The Italian rule that abnormally low tenders are automatically excluded from the tendering procedure could be acceptable "if recourse to that rule is justified by the unduly large numbers of tenders, a fact which might oblige the contracting authority concerned to examine on an *inter partes* basis such a high number of bids that it would exceed the administrative capacity of those authorities or might, due to the delay which such an examination would entail, jeopardize

139. Ibid., Opinion of the A.G., paras. 86 et seq. The Court concluded that there was no public contract. It therefore did not need to address the issues discussed here.

140. For example, Case C-19/92, *Kraus*, [1993] ECR I-1663, para 32; *Gebhard*, cited *supra* note 66, para 37; and Case C-243/01, *Gambelli*, [2003] ECR I-13031, paras. 64–65.

141. *Commission* v. *Italy*, cited *supra* note 63, para 15.

142. See, in particular, Joined Cases C-338/04, C-359/04 & C-360/04, *Placanica a.o*., [2007] ECR I-1891.

143. *Commission* v. *Italy*, cited *supra* note 63, paras. 34–35.

the implementation of the project."[144] However, the threshold of five valid tenders was not held to be reasonable.

A further example is given by *ASM Brescia*.[145] Stripped of technicalities, this case concerned an Italian law stipulating that the duration of a service concession for the distribution of national gas was strongly reduced, while foreseeing a transitional period. The discussion focused on the lawfulness of that transitional period. According to the Court, the Italian law gives rise to a difference in treatment "which can, however, be justified by objective circumstances, such as the necessity of complying with the principle of legal certainty."[146] The Court adds that "this principle forms part of the Community legal order." In the specific circumstances of the case, "the principle of legal certainty not only permits but also requires that the termination of such a concession be coupled with a transitional period."[147]

In those judgments the justifications invoked were examined outside the framework of a "classic" *Gebhard* test. In *SECAP*, the relevance of the administrative burden was mentioned in the context of the "certain cross-border interest" test. In *ASM Brescia*, the Court had to assess whether a restriction was justified on the ground of a fundamental principle of Community law. It did not apply the other "*Gebhard* conditions". Likewise, the exclusion of media owners in *Michaniki* was somewhat specific, because the stated objective pursued by the national measure under scrutiny concurred with the basic principles of Community procurement law. The Court essentially dealt with the question whether under the Public Sector Directive, Greece was still competent to enact such a provision, rather than with the justification of an unequal treatment.[148]

### 5.4. *Conclusions*

Our conclusions regarding the possible justifications can be summarized as follows:

144. Joined Cases *SECAP SpA and Santorso Soc. Coop. Arl* v. *Commune di Torino*, cited *supra* note 35, para 32.

145. *ASM Brescia*, cited *supra* note 38. It may be a coincidence that this case was, like *Coname*, *Parking Brixen* and *SECAP*, a request for a preliminary ruling from an Italian court.

146. Ibid., para 64.

147. Ibid., para 71. This judgment marks a sharp contrast with Case C-17/03, *VEMW*, [2005] ECR I-4983. In that case, the Court was not receptive for arguments derived from the need to observe long term agreements. It was also surprising that the Court considered, on the basis of a procedural provision (a notification mechanism for transitional measures), the First Electricity Directive 96/92 to provide for total harmonization. See case note by Hancher, (2006) CML Rev., 461–495.

148. In certain recitals (e.g. para 59) the Court nevertheless refers to "rule of reason cases".

The absence of a competitive procedure for the award of a service concession does not constitute an infringement of Community law if, under the same circumstances, an ordinary public service contract would not have to be tendered either.

The absence of a competitive procedure for the award of any public service contract (including service concessions) may in theory be justified on the basis of Article 86(2) EC, but in practice that Treaty exemption will be of little avail.

The Treaty exceptions and rule of reason exceptions may also provide a justification. The Court interprets these exceptions narrowly, but seems to be open to accept overriding reasons that are specific for procurement procedures.

The reasoning followed and the outcome reached in each judgement is largely determined by the arguments and justifications advanced before the Court. It is therefore not possible to draw general conclusions from individual precedents.

### Interaction between the various justifications under primary and secondary law

In this final section we will complete our study of the scope of the transparency obligations and the possible derogations thereto. First, we will examine the possible overlap or conflict of justifications recognized in Community law (6.1.). Secondly, we will analyse to what extent specific sector legislation provides for tendering obligations (6.2.). Finally, we will address the relationship between sector specific provisions and tendering obligations under the Treaty (6.3.).

#### 6.1. *The balancing of Community justifications*

The derogation provided for in Article 86(2) EC and the rule of reason exceptions may each, on their own, provide a justification for a supposed breach. For example, a postal undertaking may enjoy an exclusive right for the supply of basic postal services both for economic and non-economic reasons.[149] The company must indeed be able to discharge its tasks under economically acceptable conditions, covered by Article 86(2). Rather than an aim in itself, the

149 Cf. Case C-283/04, *Commission* v. *Netherlands* (golden share), [2006] ECR I-9141, para. 37–40. That case did not concern an exclusive right of an undertaking but a golden share of the State in an undertaking.

**Public works contracts, public supply contracts and public service contracts**

**The European Union is updating the rules concerning procurement procedures for public works contracts, public supply contracts and public service contracts. This revision is based on the fundamental principles of the internal market and basically strives for simplification, harmonisation and modernisation. It introduces a new procedure - the competitive dialogue - and promotes the development of electronic procedures. Recourse to social and environmental criteria is authorised for the selection of economic operators and is based on Court of Justice case-law.**

## ACT

**Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [ See amending acts ]**

## SUMMARY

The European Union is updating and simplifying the legislation on public procurement procedures * . Applicable in a Union of 27 Member States, this revision merges the four existing European directives into two legal instruments:

- The so-called "traditional" Directive 2004/18/EC for public works contracts, public supply contracts and public service contracts;
- Directive 2004/17/EC on the "special sectors" of water, energy, transport and postal services .

## SCOPE

### Revised thresholds

The "traditional" directive applies to public works contracts, public supply contracts and public service contracts which have a value excluding VAT estimated to be no less than the following thresholds:

- EUR 130.000 for public supply and service contracts awarded by central government authorities (ministries, national public establishments);
- EUR 200.000 for public supply and service contracts: awarded by contracting authorities * which are not central government authorities; covering certain products in the field of defense awarded by the central government authorities; concerning certain services in the fields of research and development (RTD), telecommunications, hotels and catering, transport by rail and waterway, provision of personnel, vocational training, investigation and security, certain legal, social and sanitary, recreational, cultural and sporting services;
- EUR 5.000.000 in the case of works contracts.

The Commission verifies the thresholds every two years. The calculation of their value is based on the average daily value of the euro, expressed in special drawing rights (SDR), over the 24 months ending on 31 August for the revision with effect from 1 January.

For those Member States which have not adopted the single currency, the European Commission publishes the values in national currencies of the applicable thresholds in the Official Journal. In principle, these values are revised every two years from 1 January 2004.

**Certain contracts are excluded or reserved**

The following public contracts are excluded from the scope of the directive:

- contracts covered by the "special sectors" directive and contracts awarded with the purpose of providing or exploiting public telecommunications networks;
- contracts which are declared to be secret or affect the essential interests of a Member State;
- contracts concluded pursuant to international agreements;
- contracts concerning the following services: the acquisition or rental of existing buildings; the acquisition, development, (co)production of broadcasting programmes; arbitration and conciliation services; the purchase, sale or transfer of financial instruments; central bank services; employment contracts; RTD services which do not belong exclusively to the contracting authority or which are not wholly financed by it;
- service contracts awarded on the basis of an exclusive right;
- service concessions * .

Member States may reserve certain public contracts to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons.

**RULES APPLICABLE TO ALL PUBLIC CONTRACTS**

**Contract award criteria**

The criteria used by the contracting authorities in awarding their public contracts are:

- either the lowest price only;
- or, where the contract is awarded to the most economically advantageous tender, various criteria linked to the subject-matter of the contract in question, such as: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date, and completion date.
  The contracting authority should specify the relative weighting it gives to each of the criteria.

**Rules on publication and transparency**

Throughout the procedure, public contracts whose value exceeds the thresholds in the Directive are subject to obligations regarding information and transparency. This takes the form of publishing information notices drawn up in accordance with standard Commission forms. There are several types:

- the notice of the publication of a prior information notice (not compulsory);
- the prior information notice (not compulsory).
  After having sent the notice of the publication of a prior information notice, the contracting authority publishes this notice on its buyer profile itself or sends it to the Office for Official Publications of the European Communities (Publications Office). This publication is compulsory when the contracting authority wishes to reduce the time limits for the receipt of tenders;

- the contract notice or notice of a design contest (compulsory).
  The contracting authority may publish this notice itself nationally and should send it to the Publications Office. Publication by the Publications Office is free. The notice is published in full in an official language of the Community, and a summary is translated into the other languages;
- the contract award notice and notice of the results of a design contest (compulsory).

The notices sent by the contracting authorities to the Commission can be transmitted by traditional or electronic means. Standard forms and details on transmission procedures are accessible on the information system for public procurement ( SIMAP ).

Each contracting authority shall provide information, as soon as possible, on the decisions reached concerning the award of a contract, including grounds for not awarding it. It shall draw up a written report for all contracts. It shall, as soon as possible, inform:

- any unsuccessful candidate of the reasons for rejecting his/her application;
- any tenderer who has made an admissible tender of the relative advantages of the tender selected, as well as the name of the economic operator * chosen.

The exchange and storage of information involving the various parties to the contract ensure the integrity of the data and confidentiality. The contracting authority only examines the content of the tenders after the time limit set for submitting them has expired. Use of electronic means is non-discriminatory and helps to speed up the procedures. Devices for the electronic receipt of tenders permit the use of electronic signatures , guarantee the authenticity, integrity and confidentiality of the data and are capable of detecting possible fraud.

**Technical specifications**

The technical specifications define the characteristics required of a material, supply or service such that they fulfil the use for which they are intended. They are out in the contract documentation (contract notices, contract documents or additional documents) without creating unjustified obstacles to competition. These characteristics include environmental performance, design, conformity assessment, performance, safety, dimensions, quality assurance, and production methods. For public works contracts, they also cover test, inspection and acceptance conditions, as well as construction techniques.

When drawing up its technical specifications, a contracting entity refers to national standards transposing European standards, European technical approvals, and international standards. It can also determine performance and functional requirements, particularly in the environmental domain (e.g. European eco-labels ). The tenderer's tender is valid if he/she manages to prove that it meets the requirements defined by the technical specifications in an equivalent fashion. An appropriate means may be constituted by the submission of a technical dossier or a test report from a recognised body (laboratory, certification and inspection body).

In principle, technical specifications do not mention a specific make or process nor do they refer to trade marks, patents or a specific production.

**Combating fraud and corruption**

European public procurement legislation imposes strict conditions regarding participation in public procurement. These conditions aim to check the suitability of economic operators tendering for contracts on the basis of criteria relating to their economic and financial capacity, and their technical and professional knowledge or abilities.

The conditions for participation also aim to effectively combat fraud and corruption, systematically excluding from public procurement contracts any economic operators who have been found guilty of participating in a criminal organisation or of corruption, fraud or money laundering. A contracting authority may ask tenderers for any document testifying to their professional conduct and/or economic situation. To obtain this information, it may turn to the competent national authorities or those of another Member State.

Any economic operator may be excluded from participation in a public contract where that economic operator:

- is bankrupt (or the subject of proceedings for a declaration of bankruptcy), is being wound up, has suspended business activities or his/her affairs are being administered by the court;
- has been convicted of any offence concerning his/her professional conduct;
- has been guilty of grave professional misconduct (e.g. misrepresentation);
- has not paid social security contributions or taxes.

**Traditional and electronic means of communication are on equal footing**

With regard to the exchange of information, the new directive places traditional and electronic means of communication on equal footing. It leaves market operators free to choose which means of communication to use for the procedures. If electronic means are used, the contracting authority is able to reduce the time limits as follows:

- The electronic publication of a prior information notice makes it possible to reduce by seven days the time limit for the receipt of tenders in open and restricted procedures. The same applies for the receipt of requests to participate in negotiated procedures and the competitive dialogue;
- On top of the previous reduction, time limits in open and restricted procedures may be further reduced by five days where the contract documents are available on the Internet.

A new purchasing technique has entered the scene: the dynamic purchasing system. It is exclusively based on electronic means of communication.

**Electronic auctions**

A contracting entity may hold an electronic auction to award a contract, except for certain works and service contracts such as the design of works which relate to intellectual performances. The electronic auction shall be based:

- either on prices when the contract is awarded to the lowest price,
- or on prices and/or the values of the features of the tenders, when the contract is awarded to the most economically advantageous tender.

The specifications shall contain the following details:

- the quantifiable features (figures or percentages) whose values are the subject of the electronic auction and the minimum differences when bidding;
- the electronic auction process and the technical specifications for connection.

Before proceeding with the electronic auction, the contracting authority shall make a full initial evaluation of the tenders. All tenderers who have submitted admissible tenders shall be

invited to take part simultaneously by electronic means. The invitation shall state the date and time of the start of the auction and, if appropriate, the number of phases. It shall also state the mathematical formula to be used to determine automatic rerankings, incorporating the weighting of all the award criteria. Throughout each phase, the participants shall know their relative rankings compared to the other participants, but without knowing their identity.

The electronic auction shall close either at a date and time fixed in advance, or when a certain amount of time has elapsed after receipt of the last submission, or when the number of phases in the auction has been completed.

## PUBLIC PROCUREMENT PROCEDURES

There are different public procurement procedures: the open procedure, the restricted procedure, the negotiated procedure, and the competitive dialogue.

### The open procedure

In an open procedure, any interested economic operator may submit a tender.

The minimum time limit for the receipt of tenders is 52 days from the date on which the contract notice was published. If a prior information notice has been published, this time limit can be cut to 36 days. In no case may the time limit for the receipt of tenders be less than 22 days.

### The restricted procedure

In the case of restricted procedures, any economic operator may request to participate and only candidates invited to do so may submit a tender.

The time limit for the receipt of requests to participate is 37 days from the date of the contract notice. The contracting authority then, simultaneously and in writing, invites the selected candidates to submit their tenders. There should be a minimum of five candidates. The minimum time limit for the receipt of tenders shall be 40 days from the date on which the invitation is sent. If a prior information notice has been published, this may be shortened to 36 days. The minimum time limit for the receipt of tenders may not be less than 22 days. Exceptionally and when urgency requires, the contracting authority may set a minimum time limit of 15 days (10 days if the notice is sent electronically) for requests to participate and of 10 days for the receipt of tenders.

### The negotiated procedure

In a negotiated procedure, the contracting authority consults the economic operators of its choice and negotiates the terms of the contract with them.

The following cases justify the use of the negotiated procedure **with prior publication** of a contract notice:

- following another procedure which revealed the presence of irregular tenders, insofar as this new procedure does not substantially alter the original terms of the contract;
- in exceptional cases, when the nature of the contracts or the risks attaching thereto prevent prior pricing;
- in the field of services, for intellectual services which do not permit the use of an open or restricted procedure;

- for works which are performed solely for purposes of research or testing.

The following cases justify the use of the negotiated procedure **without prior publication** of a contract notice:

- for all types of contract: when no tenders have been submitted in response to an open procedure or a restricted procedure; when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be executed only by a particular economic operator; in cases of extreme urgency brought about by unforeseeable events;
- for supply contracts: when the products involved are manufactured purely for the purposes of RTD; for additional deliveries over a maximum period of three years where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics; for supplies quoted and purchased on a commodity market; for purchases of supplies under particularly advantageous conditions from an economic operator definitively winding up his business activities or in receivership;
- for public service contracts, when the contract is awarded to the successful candidate in a design contest;
- for works and service contracts: up to 50 % of the amount of the original contract, for additional works or services which are not included in the initial project and have become necessary through unforeseen circumstances; for new works or services consisting in the repetition of similar works or services entrusted to the initial economic operator for a maximum of three years.

In negotiated procedures **with prior publication** of a contract notice, the minimum time limit for receipt of requests to participate is 37 days from the date of the contract notice. In cases of extreme urgency, the contracting authority may set a minimum time limit of 15 days (10 days if the notice is sent electronically). The contracting authority, simultaneously and in writing, invites the selected candidates (a minimum of three) to negotiate. The invitation comprises all the contract documents, the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up. The relative weighting of criteria for the award of the contract is also included.

**A new procedure: the competitive dialogue**

A contracting authority may make use of the competitive dialogue for complex contracts if it is not able to define by itself the technical solutions to satisfy its needs or is not able to specify the legal and/or financial make-up of a project. Large infrastructure projects would seem to lend themselves to this type of dialogue.

The contracting authority publishes a contract notice that includes the award criteria. The minimum time limit for receipt of requests to participate is 37 days. The contracting authority then, simultaneously and in writing, invites the selected candidates (a minimum of three) to conduct a dialogue. The discussion commences, may take place in stages and continues until the (technical and/or economic and legal) solutions have been defined. The contracting authority ensures equal treatment of all tenderers and protects the confidentiality of the information. At the end of the dialogue, the candidates submit their final tenders. These tenders may be specified, but without changing the basic features of the contract. The contracting authority awards the contract in accordance with the award criteria set and on the basis of the most economically advantageous tender.

**PUBLIC WORKS CONCESSIONS**

Public works concessions of a value in excess of EUR 6 242 000 are subject to specific rules. These rules do not apply to:

- public works contracts concerning the provision or exploitation of public telecommunications networks;
- public contracts which are secret or are awarded pursuant to international rules;
- public works contracts covered by the "special sectors" directive.

The contracting authority publishes an information notice. The time limit for the presentation of applications is 52 days from the date of the notice, minus seven days if it is transmitted by electronic means.

The concessionaire must respect the rules for awarding public works contracts. It must apply the advertising rules for contracts awarded to third parties, except in the case of a negotiated procedure without prior publication of an information notice.

Groups of enterprises that have been formed to obtain the concession and enterprises related to them are not considered third parties. An enterprise is related to a concessionaire when the relationship between the two is, directly or indirectly, that of a dominant influence. Ownership, financial participation, and operating rules determine this dominant influence.

**SERVICE DESIGN CONTESTS**

Admission to design contests may not be limited to the territory (or part of the territory) of a Member State or by the legal nature of the participants. Design contests in the field of services and design contests with prizes for participants may be organised by:

- central government authorities starting from a threshold of EUR 137 000;
- other contracting authorities starting from a threshold of EUR 211 000;
- all contracting authorities starting from a threshold of EUR 211 000 where the contests concern certain services in the fields of RTD, telecommunications, hotels and catering, transport by rail and waterway, provision of personnel, vocational training, investigation and security, certain legal, social and sanitary, recreational, cultural and sporting services.

The contracting authority publishes a contest notice drawn up in accordance with the rules for public procurement procedures. The exchange and storage of information ensures the integrity and the confidentiality of data. The contracting authority examines the projects only after the time limit set for submitting them has expired.

The selection criteria are clear and non-discriminatory, ensuring genuine competition. The jury shall be composed exclusively of independent natural persons. Where a professional qualification is required of participants in a contest, at least a third of the jury members shall have this qualification. The jury is autonomous in its decisions and examines the plans on the basis of the selection criteria. Anonymity must be observed until the jury has reached its final decision.

**FINAL PROVISIONS**

By 31 October of each year at the latest, Member States shall send the Commission a statistical report on public supply contracts, service contracts and works contracts. This report shall specify in particular the number and value of the contracts awarded, their breakdown by type of award and the nationality of the economic operator selected.

| Key terms used in the act |
| --- |
| Public contract: contract for pecuniary interest concluded in writing between a contracting body and an economic operator, which has as its object the execution of works, the supply of products or the provision of services.<br>(Works or service) concession: a contract which differs from a public contract in that the source of revenue for the economic operator consists either solely in the right of exploitation or in this right together with payment.<br>Contracting authority: the State, a regional or local authority, a body governed by public law (and their associations) with the ability to engage in public procurement.<br>Economic operator: a contractor, supplier or service provider who responds to an invitation to tender |

**Public procurement in the water, energy, transport and postal services sectors**

**The European Union is updating the rules concerning procurement procedures in the water, energy, transport and postal services sectors. This revision is based on the fundamental principles of the internal market and basically strives for simplification, harmonisation and modernisation. It promotes the development of electronic procedures. Recourse to social and environmental criteria is authorised for the selection of economic operators * and is based on Court of Justice case law.**

## ACT

**Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [ See amending acts ]**

## SUMMARY

The European Union is updating and simplifying the legislation on public procurement procedures * . Applicable in a Union of 25 Member States, this revision merges the four existing European directives into two legal instruments:

- The so-called "traditional" Directive 2004/18/EC for public works contracts, public supply contracts and public service contracts ;
- Directive 2004/17/EC on the "special sectors" of water, energy, transport and postal services.

## SCOPE

### Contracting entities

The "special sectors" directive applies to:

- all contracting authorities * or public undertakings * which pursue activities in one of the following fields: gas, electricity, water, transport services, postal services * , the extraction of fuels, or the provision of ports or airports;
- all contracting entities which, when they are neither contracting authorities nor public undertakings, pursue one (or more) of the above activities and enjoy special or exclusive rights * granted by a competent authority of a Member State.

Non-exhaustive lists of contracting entities are given in the Annexes. Member States must notify the Commission of any changes.

### Activities concerned

The directive applies to the following activities:

- the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas, heat or electricity, or the supply of gas, heat or electricity to such networks;

- the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of water, or the supply of water to such networks;
- where the contracting entity is active in the drinking water sector, contracts or design contests connected with irrigation, land drainage or hydraulic engineering projects, or contracts connected with the disposal or treatment of sewage;
- the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable. Bus transport services are excluded from the scope of the directive where other entities are free to provide those services, either in general or in a particular geographical area, under the same condition as the contracting entities;
- the provision of postal services. * These services cover: postal services which are reserved under the terms of Directive 97/67/EC, as well as those which may not be reserved under Directive 97/67/EC; all of the following services are also covered, on condition that such services are provided by an entity which also provides postal services and that the market is not yet open to competition: mail management services (e.g. mailroom management services), added-value services linked to and provided entirely by electronic means (e.g. the secure transmission of coded documents, address management services), direct mail bearing no address, financial services (e.g. postal money orders and postal giro transfers), philatelic services and logistics services;
- the exploitation of a geographical area for the purpose of 1) exploring for or extracting oil, gas, coal or other solid fuels, or 2) the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

Contracts awarded in the sectors in question are no longer subject to the Directive if effective competition exists. Since 30 April 2004, Member States have had the possibility of asking the Commission to adopt a decision testifying to the existence of effective competition in a Member State for a given sector in accordance with a specific procedure. This procedure is based on the characteristics of the goods and services under consideration, the existence of alternatives, prices and the presence of several competitors. On its own initiative or at the request of the national contracting entities, when the national transposition of the directive allows them to do so, the Commission may adopt a decision testifying to the existence of effective competition in a Member State and for a given sector. If no decision is made within the deadline set, the exclusion becomes applicable.

**Revised thresholds**

The directive applies to contracts that have a value excluding VAT estimated to be no less than the following thresholds:

- EUR 400.000 in the case of supply and service contracts;
- EUR 5.000.000 in the case of works contracts.

The Commission verifies the thresholds every two years. The calculation of their value is based on the average daily value of the euro, expressed in special drawing rights (SDR), over the 24 months ending on 31 August for the revision with effect from 1 January.

For those Member States that have not adopted the single currency, the European Commission publishes the values in national currencies of the applicable thresholds in the Official Journal. In principle, these values are revised every two years from 1 January 2004.

**Certain contracts are excluded or reserved**

The scope of the directive excludes:

- works and service concessions in the sectors of activity concerned;
- contracts awarded for purposes of resale, lease to third parties, for purposes other than the pursuit of an activity in the sectors concerned or for the pursuit of such an activity in a third country.
  The Commission may publish in the Official Journal the list of the categories of products and activities excluded;
- contracts which are secret and require special security measures or are awarded pursuant to international rules;
- certain contracts awarded by a contracting entity to an affiliated undertaking or awarded by a joint venture formed exclusively by a number of contracting entities for the purpose of carrying out the activities concerned.
  By definition, an affiliated undertaking has annual accounts which are consolidated with those of the contracting entity or is subject to a dominant influence by virtue of ownership, financial participation, or the rules which govern it.
  Contracting entities must notify the Commission of the names of the undertakings or (joint) ventures concerned and the nature and volume of the contracts involved;
- service contracts awarded on the basis of an exclusive right;
- service contracts for the acquisition or rental of land, existing buildings or other immovable property or concerning rights thereon (excluding financial service contracts concluded at the same time as, before or after the contract of acquisition or rental); arbitration and conciliation services; financial services in connection with the issue, sale, purchase or transfer of financial instruments (such as transactions to raise money or capital); employment contracts; and research and development (RTD) services wholly remunerated by the contracting entity;
- contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy;
- certain contracts subject to special arrangements in Germany, Austria, the Netherlands and the United Kingdom and in the field of the exploration or extraction of oil, gas, coal and other solid fuels.

Member States may reserve certain public contracts to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons.

## RULES APPLICABLE TO CONTRACTS

### Contract award criteria

The criteria used by the contracting entities are:

- either the lowest price only;
- or, where the contract is awarded to the most economically advantageous tender, various criteria linked to the subject-matter of the contract in question, such as: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date, and completion date.
  The contracting entity should specify the relative weighting it gives to each of the criteria.

### Rules on publication and transparency

Throughout the procedure, public contracts whose value exceeds the thresholds in the Directive are subject to obligations regarding information and transparency. This takes the form of publishing information notices drawn up in accordance with standard Commission forms. There are several types:

- the notice of the publication of a periodic indicative notice (not compulsory);
- the periodic indicative notice for supplies and services contracts in excess of EUR 750 000 and for works contracts of more than EUR 6 242 000. The contracting entity publishes this notice on its buyer profile itself (after having sent the notice of the publication of a periodic indicative notice) **or** sends it to the Office for Official Publications of the European Communities (Publications Office).
  This publication is compulsory when the contracting entity wishes to reduce the time limits for the receipt of tenders or when the notice is used as a means of calling for competition;
- the contract notice or notice of a design contest (compulsory).
  The contracting entity may publish this notice itself nationally and should send it to the Publications Office. Publication by the Publications Office is free. The notice is published in full in an official language of the Community, and a summary is translated into the other languages;
- the contract award notice and notice of the results of a design contest (compulsory).
- the notice on the existence of a qualification system.

The notices sent by the contracting entities to the Commission can be transmitted by traditional or electronic means. Standard forms and details on transmission procedures are accessible on the information system for public procurement ( SIMAP )

The contracting entity shall provide information on the decisions reached concerning the award of a contract, including grounds for not awarding it. For all contracts, it must be able to justify its decisions and should keep all the appropriate information for at least four years. It shall, as soon as possible, inform:

- any unsuccessful candidate of the reasons for rejecting his/her application;
- any tenderer who has made an admissible tender of the relative advantages of the tender selected, as well as the name of the economic operator chosen.

The exchange and storage of information involving the various parties to the contract ensure the integrity of the data and confidentiality. The contracting entity only examines the content of the tenders after the time limit set for submitting them has expired. Use of electronic means is non-discriminatory and helps to speed up the procedures. Devices for the electronic receipt of tenders permit the use of electronic signatures , guarantee the authenticity, integrity and confidentiality of the data and are capable of detecting possible fraud.

**Technical specifications**

The technical specifications define the characteristics required of a material, supply or service such that they fulfil the use for which they are intended. They are out in the contract documentation (contract notices, contract documents or additional documents) without creating unjustified obstacles to competition. These characteristics include environmental performance, design, conformity assessment, performance, safety, dimensions, quality assurance, and production methods. For public works contracts, they also cover test, inspection and acceptance conditions, as well as construction techniques.

When drawing up its technical specifications, a contracting entity refers to national standards transposing European standards, European technical approvals, and international standards. It

can also determine performance and functional requirements, particularly in the environmental domain (e.g. European eco-labels ). The tender is valid if it manages to prove that it meets the requirements defined by the technical specifications in an equivalent fashion. An appropriate means may be constituted by the submission of a technical dossier or a test report from a recognised body (laboratory, certification and inspection body).

In principle, technical specifications do not mention a specific make or process nor do they refer to trade marks, patents or a specific production.

**Combating fraud and corruption**

European public procurement legislation imposes strict conditions regarding participation in public procurement. These conditions aim to check the suitability of economic operators tendering for contracts on the basis of criteria relating to their economic and financial capacity, and their technical and professional knowledge or abilities.

The conditions for participation also aim to effectively combat fraud and corruption, systematically excluding from public procurement contracts any economic operators who have been found guilty of participating in a criminal organisation or of corruption, fraud or money laundering. A contracting authority may ask tenderers for any document testifying to their professional conduct and/or economic situation. To obtain this information, it may turn to the competent national authorities or those of another Member State. It should be noted that the application of these exclusion clauses is only compulsory for contracting authorities. For other contracting entities (public enterprises and private enterprises with a special or exclusive right), these clauses are optional.

Any economic operator may be excluded from participation in a public contract where that economic operator:

- is bankrupt (or the subject of proceedings for a declaration of bankruptcy), is being wound up, has suspended business activities or his/her affairs are being administered by the court;
- has been convicted of any offence concerning his/her professional conduct;
- has been guilty of grave professional misconduct (e.g. misrepresentation);
- has not paid social security contributions or taxes.

**Traditional and electronic means of communication are on equal footing**

With regard to the exchange of information, the new directive places traditional and electronic means of communication on equal footing. It leaves market operators free to choose which means of communication to use for the procedures. If electronic means are used, the contracting entity is able to reduce the time limits (but within irreducible margins):

- The electronic transmission of notices used as a means of calling for competition (depending on the individual case, a contract notice, periodic indicative notice or notice on the existence of a qualification system) makes it possible to reduce by seven days the time limit for the receipt of tenders in open procedures. The same applies for the receipt of requests to participate in restricted and negotiated procedures;
- On top of the previous reduction, time limits for the receipt of tenders in open, restricted and negotiated procedures may be further reduced by five days where the contract documents are available on the Internet.

A new purchasing technique has entered the scene: the dynamic purchasing system. It is exclusively based on electronic means of communication.

**Electronic auctions**

A contracting entity may hold an electronic auction to award a contract. This is valid for all types of contract, with the exception of certain works and service contracts having as their subject-matter intellectual performances (e.g. the design of works). The electronic auction shall be based:

- either on prices when the contract is awarded to the lowest price,
- or on prices and/or the values of the features of the tenders, when the contract is awarded to the most economically advantageous tender.

The specifications shall contain the following details:

- the quantifiable features (figures or percentages) whose values are the subject of the electronic auction and the minimum differences when bidding;
- the electronic auction process and the technical specifications for connection.

Before proceeding with the electronic auction, the contracting entity shall make a full initial evaluation of the tenders. All tenderers who have submitted admissible tenders shall be invited to take part simultaneously by electronic means. The invitation shall state the date and time of the start of the auction and, if appropriate, the number of phases. It shall also state the mathematical formula to be used to determine automatic rerankings, incorporating the weighting of all the award criteria. Throughout each phase, the participants shall know their relative rankings compared to the other participants, but without knowing their identity.

The electronic auction shall close either at a date and time fixed in advance, or when a certain amount of time has elapsed after receipt of the last submission, or when the number of phases in the auction has been completed.

**Rejection of tenders that are abnormally low or contain products originating in third countries**

A contracting entity may reject a tender if it:

- is abnormally low, particularly because the tenderer has obtained State aid which was granted illegally; it should, however, give the economic operator the opportunity to justify the constituent elements of its tender.
- contains products amounting to over 50 % of its value which originate in third countries with which the Community has not concluded multilateral or bilateral market access agreements for Community enterprises.

Member States shall inform the Commission of any general difficulties encountered by their enterprises in securing the award of service contracts in third countries. They may, for example, report the non-observance of international labour law provisions. The Commission shall, at the same time, draw up an annual report to the Council on negotiations with third countries regarding access for Community enterprises to the markets covered by this Directive in these countries. It may propose that the Council restrict (or suspend) access to service contracts in the European Union covered by this Directive to enterprises with links to these third countries.

**PUBLIC PROCUREMENT PROCEDURES**

There are different public procurement procedures: the open procedure, the restricted procedure, and the negotiated procedure with or without the publication of a public contract notice.

Contracting entities may award a contract without a prior call for competition under the following conditions:

- when no suitable tenders or applications have been submitted in response to a prior call for competition; where a contract is awarded purely for the purposes of RTD; when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be executed only by a particular economic operator; in cases of extreme urgency brought about by unforeseeable events; for contracts based on a framework agreement, when this has been concluded in accordance with the Directive;
- supply contracts: for additional deliveries where a change of supplier would oblige the contracting entity to acquire material having different technical characteristics; for supplies quoted and purchased on a commodity market; for bargain purchases or purchases of supplies under particularly advantageous conditions from an economic operator definitively winding up his business activities or in receivership;
- for additional works or services which were not included in the initial project and have become necessary through unforeseen circumstances;
- for new works consisting in the repetition of similar works;
- as part of a design contest.

**The open procedure**

In an open procedure, any interested economic operator may submit a tender.

The minimum time limit for the receipt of tenders is 52 days from the date on which the contract notice was published. If a periodic indicative notice has been published, this time limit can be cut, as a general rule, to 36 days. In no case may the time limit for the receipt of tenders be less than 22 days.

**The restricted procedure**

In the case of restricted procedures, any economic operator may request to participate and only candidates invited to do so may submit a tender.

The time limit for the receipt of requests to participate is, as a general rule, 37 days from the date of the notice (or the invitation to confirm interest, when the call for competition is made by means of a periodic notice). In no case may it be less than 22 days (or 15 days if the notice is transmitted electronically). The contracting entity then, simultaneously and in writing, invites the selected candidates to submit their tenders. The time limit for the receipt of tenders, which is the same for all applicants, can be set by mutual agreement between the contracting entity and the selected candidates. If no agreement is reached, the contracting entity fixes a time limit that is, as a general rule, at least 24 days - and never less than 10 days - from the date of the invitation to tender.

**The negotiated procedure**

In a negotiated procedure, the contracting entity consults the economic operators of its choice and negotiates the terms of the contract with them.

In negotiated procedures with the **publication of a contract notice**, the procedure and the minimum time limits for the receipt of requests to participate and for the receipt of tenders are identical to those for the restricted procedure.

## SERVICE DESIGN CONTESTS

The directive applies to design contests for service procurement procedures worth over EUR 499 000 or where the contest prizes and payments are in excess of this value (this threshold will be updated by a Commission Regulation which is to be adopted shortly).

A design contest may not be held for:

- contracts awarded for purposes other than the pursuit of an activity in the sectors concerned or for the pursuit of such an activity in a third country;
- contracts which are secret, require special security measures or are awarded pursuant to international rules;
- any activity which is exposed to competition.

The contracting entity publishes a contest notice drawn up in accordance with the rules for public procurement procedures. The exchange and storage of information ensures the integrity and the confidentiality of data. The contracting entity examines the projects only after the time limit set for submitting them has expired.

Admission to design contests may not be limited to the territory (or part of the territory) of a Member State or by the legal nature of the participants. The selection criteria are clear and non-discriminatory, ensuring genuine competition. The jury shall be composed exclusively of independent natural persons. Where a professional qualification is required of participants in a contest, at least a third of the jury members shall have this qualification. The jury is autonomous in its decisions and examines the plans on the basis of the selection criteria. Anonymity must be observed until the jury has reached its final decision.

## FINAL PROVISIONS

In order to ensure that the Directive is implemented, the Member States may appoint or establish an independent body.

By 31 October of each year at the latest, Member States shall send the Commission a statistical report on contracts awarded which are subject to this directive.

The Advisory Committee for Public Contracts shall assist the European Commission.

This directive repeals Directive 93/38/EC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors with effect from 31 January 2006.

### Background

Public procurement accounts for over 16% of the EU's GDP.

The EU action seeks to create a European area for public procurement in the context of the internal market. It is based on the fundamental principles enshrined in the Treaty establishing the European Community: equal treatment, a transparent and non-discriminatory call for competition, mutual recognition, the fight against fraud and corruption.

| Key terms used in the act |
| --- |
| public contract: contract for pecuniary interest concluded in writing between a contracting body and an economic operator, which has as its object the execution of works, the supply of products or the provision of services<br>(works or service) concession: a contract which differs from a public contract in that the source of revenue for the economic operator consists either solely in the right of exploitation or in this right together with payment.<br>contracting authority: the State, a regional or local authority, a body governed by public law (and their associations) with the ability to engage in public procurement.<br>public undertaking: any undertaking over which a contracting authority may exercise a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.<br>economic operator: a contractor, supplier or service provider who responds to an invitation to tender.<br>special or exclusive rights: rights granted by a Member State which limits the exercise of a given activity to one or more entities, and affects the ability of other entities to carry out such activity.<br>postal services: services consisting of the clearance, sorting, routing and delivery of postal items. |

# LECTURE 10

## Sustainable Coffee and Local Rail Transport

15 March 2012

# Green procurement: *the essentials*

© Communauté européenne

## Green public procurement is a step-by-step process. Here are the steps.

- **Consider which products, services or works are the most suitable** on the basis both of their environmental impact and of other factors, such as the information you have, what is on the market, the technologies available, costs and visibility (Chapter 1).

- **Identify your needs and express them appropriately.** Choose a green title to communicate your policy to the outside world, ensuring optimum transparency for potential suppliers or service providers, and for the citizens you are serving (Chapter 2).

- **Draw up clear and precise technical specifications,** using environmental factors where possible (pass/fail conditions) (Chapter 3):

  - look for examples of environmental characteristics in databases/eco-labels;

  - build upon the 'best practices' of other contracting authorities; use networking as a way of obtaining and spreading information;

  - take a scientifically sound 'life-cycle costing approach'; do not shift environmental impacts from one stage of the life cycle to another;

  - use performance-based or functional specifications to encourage innovative green offers;

  - consider environmental performances, such as the use of raw materials, sustainable production methods (where relevant for the end product or service), energy efficiency, renewable energies, emissions, waste, 'recyclability', dangerous chemicals, etc.;

  - if you are uncertain about the actual existence, price or quality of green products or services, ask for green variants.

- **Establish selection criteria** on the basis of the exhaustive list of criteria mentioned in the public procurement directives. Where appropriate include environmental criteria to prove technical capacity to perform the contract. Tell potential suppliers, service providers or contractors that they can use environmental management schemes and declarations to prove compliance with the criteria (Chapter 4).

- **Establish award criteria:** where the criteria of the 'economically most advantageous tender' is chosen, insert relevant environmental criteria either as a benchmark to compare green offers with each other (in the case where the technical specifications define the contract as being green) or as a way of introducing an environmental element (in the case where the technical specifications define the contract in a 'neutral' way) and giving it a certain weighting. Consider the life-cycle costing (Chapter 5)!

- **Use contract performance clauses** as a way of setting relevant extra environmental conditions in addition to the green contract. Where possible, insist on environment-friendly transport methods (Chapter 6).

- **Always make sure that everything you ask of potential bidders and their offers relates to the subject matter of the contract.**

### 3.2.4. Use of variants

It is possible that, even after conducting a market analysis, you are not sure whether any green alternatives to the products, services or works you want to purchase exist, or that you remain unsure about their quality or price.

If this is the case, it may be interesting to ask potential bidders to submit green variants. This means that you establish a minimal set of technical specifications for the product you want to purchase, which will apply to both the neutral offer and its green variant. For the latter, you will add an environmental dimension. When the bids are sent in, you can then compare them all (the neutral ones and the green ones) on the basis of the same set of award criteria. Hence, you can use variants to support the environment by allowing a comparison between standard solutions and environment-friendly options (based on the same standard technical requirements). Companies are free to provide offers based on the variant or the initial tender, unless indicated otherwise by the contracting authority.

To be able to accept variants in a public procurement procedure ([1]), you need to indicate in advance in the tender documents:

- that variants will be accepted,
- the minimum environmental specifications the variants have to meet (e.g. better environmental performance),
- specific requirements for presenting variants in bids (such as requiring a separate envelope indicating variant or indicating that a variant can only be submitted combined with a neutral bid).

## 3.3. Eco-labels

### 3.3.1. In general

A wide range of eco-labels have been developed to communicate information on the environmental credentials of a product or service in a standardised way, with a view to helping consumers or other businesses to select greener products or services.

Eco-label criteria are not based on one single parameter, but rather on studies that analyse the environmental impact of a product or service throughout its life cycle, the 'cradle to grave' approach, based on valid scientific information. This provides useful information on the inherent costs of a product, from extraction of the raw materials in the pre-production stage, through production and distribution, to final disposal.

You can use the information from eco-labels in different ways:

- to help you draw up your technical specifications in order to define the characteristics of the supplies or services you are purchasing;
- for checking compliance with these requirements, by accepting the label as a means of proof of compliance with the technical specifications;
- as a benchmark against which to assess offers at the award stage (see the example below);
- by using different types of labels for different purposes, for example, single-issue labels can be useful for a step by step approach.

However, you can never require tenderers to be registered under a certain eco-label scheme.

([1]) See Article 24 of Directive 2004/18/EC and Article 36 of Directive 2004/17/EC.

© Frédéric Cirou/PhotoAlto

## Using EU eco-labels for light bulbs

The EU eco-label criteria for light bulbs require that they should have an average life-span of 10 000 hours. When reflecting this in a call for tender for light bulbs, 10 000 hours could be set as the technical specification for the minimum life span, and a bonus point could be given in the award criteria for every 1 000 hours over and above 10 000.

### 3.3.2 Legal guidance on how to use eco-labels and their underlying specifications in the procurement procedure

The public procurement directives (2004/17/EC and 2004/18/EC) ([1]) explicitly allow you to use the underlying specifications of eco-labels when defining performance-based or functional environmental requirements, provided that:

- the specifications are appropriate for defining the characteristics of the supplies or services covered by the contract;
- the requirements for the label are based on scientific information;
- the eco-labels are adopted with the participation of all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations;
- they are accessible to all interested parties.

Those products and services which bear an eco-label are presumed to comply with the technical specifications. It is, however, not permitted to set a requirement for companies to possess a certain eco-label or to be (fully) compliant with a certain eco-label. You must always accept other suitable evidence as well, such as a test report from a recognised body or a technical dossier from the manufacturer.

([1]) See Article 23 of Directive 2004/18/EC and Article 35 of Directive 2004/17/EC.

### 3.3.3. Eco-label categories

**Public, multi-criteria eco-labels (Type I, ISO 14024)**

These are the most common types of label and also the most commonly used in green procurement. They are based on a number of pass/fail criteria that set the standard for the label in question. Different sets of criteria are established for each product or service group covered by the scheme. These criteria will normally define the environmental performance that the product must reach and may also set standards ensuring that the product is fit for use.

## Some interesting European and national eco-labels

The best known multi-criteria eco-labels are the European label (the flower) ([2]), the Scandinavian label (the 'Nordic swan') ([3]) and national labels (like the German 'Blue angel') ([4]). All of these labels are voluntary and life-cycle based, and they involve certification of the product by a third party (i.e. not by the producers themselves). They meet high standards of transparency and scientific rigour in terms of setting criteria and are non-discriminatory.

([2]) For more information, see the Internet (http://europa.eu.int/comm/environment/ecolabel/index_en.htm).

([3]) For more information, see the Internet (http://www.svanen.nu/Eng/default.asp).

([4]) For more information, see the Internet (http://www.blauer-engel.de/englisch/navigation/body_blauer_engel.htm).

© Communauté européenne

In the case of the EU eco-label, for example, the criteria for all product and service groups can, where appropriate, be cut and pasted directly from the EU eco-label website ([1]) into the technical specifications or the award criteria.

However, this is not the case with all eco-labels. Some labels contain criteria that:

- relate to the general management practice of the company making the product or offering the service;
- deal with ethical and other similar issues.

These criteria do not qualify as technical specifications as defined in the public procurement directives and so should not be used for contracts falling under these directives. Indeed, in order for criteria to be applicable to public procurement they have to relate to the subject matter of the contract.

### Public, single-issue labels

Single-issue labels are labels that relate to one particular environmental issue like energy use or emission levels. There are two different types of single-issue labels.

([1]) For more information, see the Internet (http://europa.eu.int/comm/environment/ecolabel/).

The first type is based on one or more pass/fail criteria linked to a specific issue, e.g. energy efficiency. If a product meets those criteria, then it may display the label. Examples of this type of label are the EU organic label or the 'Energy star' label for office equipment.

### A US success with 'Energy star'

In 1993 the US Federal Government decided to purchase only 'Energy star'-compliant IT equipment. The federal government is the world's largest single computer purchaser, and it is estimated that this decision played a significant part in the subsequent move to compliance with 'Energy star' standards for the vast majority of IT equipment on the market. The environmental benefits of the move to 'Energy star' by the federal administration have been calculated at 200 billion kWh of electricity saved since 1995, which equates to 22 million tonnes of $CO^2$ ([2]).

([2]) For more information, see the Internet (http://www.energystar.gov/).

The second type of label works by grading products or services according to their environmental performance on the issue in question. Examples of the second type include the EU energy label, which grades household goods according to their energy efficiency, with A* as the most efficient and G as the least efficient.

Single-issue labels can be very useful if you are following a step-by-step approach to greening procurement because they allow for gradual improvement. Using energy efficiency standards would be an excellent first step towards a wider green purchasing programme. The different grades allow you to decide easily how far you want to go.

© Communauté européenne

**Private labels**

In addition to the major public labels, there are a number of private labels, run by NGOs, industry groups, or combinations of stakeholders. These include labels on forestry certification schemes (see Chapter 3.4.5), such as the FSC (Forest Stewardship Council) ([1]) or PEFC (Pan European Forest Certification Council) ([2]) schemes, organic labels such as the IFOAM scheme ([3]), or multiple-criteria labels such as the Swedish label 'Bra miljoval' ([4]).

Depending on their accessibility and the way they are adopted these labelling schemes may or may not conform to the guidelines on appropriate environmental labels for public procurement as set out above.

## 3.4. Purchasing specific materials and taking into account production and process methods

What a product is made of, and how it is made, can form a significant part of its environmental impact. Under Directives 2004/17/EC and 2004/18/EC, production methods can explicitly be taken into account when defining the technical specifications ([5]), but this is also possible under the previous directives.

### 3.4.1. Purchasing specific materials

As a contracting authority, you have the right to insist that the product you are purchasing be made from a specified material, provided the Treaty principles of non-discrimination, and the free movement of goods and services are respected.

You can also indicate the range of materials you would prefer, or alternatively specify that none of the materials or chemical substances should be detrimental to the environment. A common approach for the green procurement of cleaning products, for example, is for the contracting authority to give an indicative list of hazardous substances harmful to the environment or public health (on the basis of an objective risk assessment) that it does not wish to be present in the product.

The right to specify materials or the content of a product also includes the right to demand a minimum percentage of recycled or reused content where possible.

([1]) For more information, see the Internet (http://www.fsc.org/fsc).

([2]) For more information, see the Internet (http://www.pefc.org/internet/html/).

([3]) For more information, see the Internet (http://www.ifoam.org).

([4]) For more information, see the Internet (http://www.snf.se/bmv/english.cfm).

([5]) Annex VI of Directive 2004/18/EC and Annex XXI of Directive 2004/17/EC.

© Communauté européenne

## Green procurement codes in Gothenburg (1) and in London (2)

Choose products that damage the environment as little as possible, both when they are manufactured and when they are used. The whole process from production via consumption to final disposal must be taken into consideration.

- Choose products that are not harmful to the consumers or users (taking into account the working environment of the employees).
- Choose products that are biologically degradable or can be reused.
- Choose products that do not consume energy and natural resources unnecessarily, either when they are manufactured or when they are used.

The Mayor of London has launched a green procurement code where both corporate and public purchasers have signed up to purchase goods containing recycled materials where possible.

(1) For more information, see the Internet (http://www3.iclei.org/egpis/egpc-056.html).

(2) For more information, see the Internet (http://www.lecf.org.uk/procurement/index.htm).

### 3.4.2. Process and production methods

As we said earlier, both Directives 2004/17/EC and 2004/18/EC and the previous directives allow you to include requirements on production methods in the specifications for green procurement.

However, since all technical specifications should bear a link to the subject matter of the contract, you can only include those requirements which are related to the manufacturing of the product and contribute to its characteristics, without necessarily being visible.

You can for example ask for electricity produced from renewable energy sources (see Section 3.4.3 for more details), although green electricity is not physically different from electricity produced from conventional energy sources, and makes the lights work in exactly the same way. However, the nature and value of the end product has been modified by the process and production method used. For example, electricity produced from a renewable source will in principle be more expensive, but cleaner, than electricity from a conventional source.

In conclusion, you can include all requirements which are linked to the subject of the contract. To the contrary, you may not impose environmental requirements on issues which are unrelated to the product in question.

A clear example of an unacceptable requirement might be, when purchasing furniture, to insist that the furniture manufacturers use recycled paper in their offices.

## Bezwaren van Douwe Egberts afgewezen

Alkmaar, 18 maart 2010 - Douwe Egberts wenst in te schrijven op de aanbesteding ‘Warme drankenautomaten’ van de gemeente Den Helder en Alkmaar. Douwe Egberts stelt dat zij bij voorbaat kansloos is omdat zij niet kan voldoen aan de door deze gemeenten gestelde voorwaarden. Zo dienen de leveranciers aan de koffieboeren een kostendekkende minimumprijs te garanderen, een additionele premie te betalen en de mogelijkheid van voorfinanciering te bieden. Aan deze voorwaarden voldoen volgens Douwe Egberts alleen leveranciers die met het Fair Trade keurmerk zijn gecertificeerd door de Fairtrade Labelling Organisations International (FLO). In Nederland is Max Havelaar het keurmerk voor Fair Trade.

Douwe Egberts is aangesloten bij een andere organisatie, namelijk Utz Certified. Volgens Douwe Egberts is het keurmerk van Utz Cerified minimaal gelijkwaardig aan het Fair Trade Keurmerk van de FLO. Douwe Egberts heeft daarom de gemeenten in kort geding gedagvaard. Daarin heeft Douwe Egberts onder meer gesteld dat de gemeenten onrechtmatig handelen door zodanige voorwaarden te stellen, dat alleen leveranciers die het Fair Trade keurmerk voeren voor de aanbesteding in aanmerking kunnen komen.

Vandaag heeft de voorzieningenrechter in Alkmaar de vordering van Douwe Egberts afgewezen. De voorzieningenrechter is van oordeel dat de voorwaarden die de gemeenten stellen onderschreven worden door het Europese Parlement, de Europese Commissie en de Nederlandse regering. Zo heeft bijvoorbeeld de Europese Commissie gesteld dat de door Fair Trade toegepaste normen behoren tot de uitgebreidste en meest ambitieuze normen. De voorzieningenrechter is daarom van oordeel dat de door de gemeenten gestelde voorwaarden aanvaardbaar zijn.

Ook het gelijkheidsbeginsel wordt volgens de voorzieningenrechter niet geschonden. Er blijven immers nog voldoende potentiële leveranciers over die kunnen inschrijven op de aanbesteding. Douwe Egberts heeft tenslotte niet aannemelijk kunnen maken dat het keurmerk van Utz Certified en het Fair Trade keurmerk in hun uitwerking minimaal gelijkwaardig zijn. De aanbestedingsprocedure van de gemeente Alkmaar en Den Helder kan derhalve ongewijzigd doorgaan.

LJ Nummer
BL7898

Bron: Rechtbank Alkmaar
Datum actualiteit: 18 maart 2010

CONCLUSIE VAN ADVOCAAT-GENERAAL
J. KOKOTT
van 15 december 2011 (1)

**Zaak C−368/10**

**Europese Commissie**
**tegen**
**Koninkrijk der Nederlanden**

„Overheidsopdrachten voor leveringen – Biologische producten – Fair trade – Sociaal− en milieuvriendelijke producten – Duurzaam ondernemen – Keurmerken ‚Max Havelaar' en ‚EKO' – Beginselen voor plaatsen van overheidsopdrachten – Technische specificaties – Milieukenmerken – Geschiktheid en selectie van deelnemers – Technische bekwaamheid en beroepsbekwaamheid – Gunningscriteria – Economisch meest voordelige aanbieding – Artikelen 2, 23, 26, 44, 48 en 53 van richtlijn 2004/18/EG"

Inhoud

I – Inleiding

II – Rechtskader

III – Feiten en procesverloop

A – De aanbestedingsprocedure

1. De aankondiging van de overheidsopdracht

2. Het bestek

3. De nota van inlichtingen

4. De gunning

B – De in de voorwaarden voor de uitvoering van de opdracht vermelde keurmerken

C – De administratieve procedure

IV – Conclusies van partijen en procedure voor het Hof

V – Beoordeling

A – Eerste grief: vermelding van de keurmerken Max Havelaar en EKO in de technische

specificatie voor de te leveren koffie en thee

1. Eerste deel van de eerste grief: vermelding van het keurmerk EKO voor de te leveren koffie en thee (artikel 23, lid 6, van richtlijn 2004/18)

a) Toepasselijkheid van artikel 23 van richtlijn 2004/18

b) Geen algemeen verbod op vermelding van milieukeuren in het kader van de vastlegging van de milieukenmerken van een product

c) Verbod, een bepaalde milieukeur dwingend voor te schrijven

d) Voorlopige conclusie

2. Tweede deel van de eerste grief: vermelding van het keurmerk Max Havelaar voor de te leveren koffie en thee (artikel 23, lid 8, van richtlijn 2004/18)

a) De toepasselijkheid van artikel 23, lid 8, van richtlijn 2004/18

b) Subsidiair: de verenigbaarheid van de vermelding van het keurmerk Max Havelaar met richtlijn 2004/18

i) Toepasselijke bepaling: artikel 26 van richtlijn 2004/18

ii) Toetsing van de vermelding van het keurmerk Max Havelaar aan artikel 26 van richtlijn 2004/18

3. Samenvatting bij de eerste grief

B – Derde grief: verwijzing in de gunningscriteria naar de keurmerken Max Havelaar en EKO met het oog op de te leveren ingrediënten

1. Opmerking vooraf

2. Eerste argument in het kader van de derde grief: beweerdelijk ontbreken van een verband tussen het voorwerp van de opdracht en de twee keurmerken

3. Tweede argument in het kader van de derde grief: verwijzing naar keurmerken in plaats van naar de eraan ten grondslag liggende criteria

C – Tweede grief: vermeende verwijzing naar duurzaam inkopen en maatschappelijk verantwoord ondernemen als geschiktheidscriterium

1. Eerste deel van de tweede grief: vermeende ontoelaatbare eisen met betrekking tot het bewijs van de technische bekwaamheid van de inschrijvers (artikel 48, lid 1, juncto artikel 48, lid 2, van richtlijn 2004/18)

2. Tweede deel van de tweede grief: vermeend ontbrekend verband tussen de eisen betreffende de geschiktheid van de inschrijvers en het voorwerp van de opdracht (artikel 44, lid 2, van richtlijn 2004/18)

3. Derde deel van de tweede grief: vermeende schending van het algemene transparantiegebod (artikel 2 van richtlijn 2004/18)

D – Samenvatting

VI – Kosten

VII – Conclusie

## I – Inleiding

1. Niet alleen de verbruiker, maar ook ondernemingen en openbare instanties hechten steeds meer belang aan de duurzaamheid van hun consumptiegedrag. In de onderhavige niet-nakomingszaak staat de vraag centraal in hoeverre bij de plaatsing van overheidsopdrachten de sociaal- en milieuvriendelijkheid van de te leveren producten als gunningscriterium mag worden gehanteerd.

2. Een Nederlandse provincie heeft in 2008 in het kader van de gunning van een overheidsopdracht voor de levering en het beheer van koffieautomaten de keurmerken Max Havelaar en EKO in de offerteaanvraag vermeld. Daardoor moest worden gewaarborgd dat de inschrijver waaraan de opdracht werd gegund „duurzame" producten zou leveren die meer in het bijzonder sociaal- en milieuvriendelijk zouden zijn. De Europese Commissie verwijt het Koninkrijk der Nederlanden nu, dat de vermelding van de twee keurmerken en diverse passages in de aanbestedingsstukken indruisen tegen de bepalingen van Unierecht op het gebied van overheidsopdrachten.

3. Of en in hoeverre in aanbestedingsprocedures milieubelangen en sociale belangen in de beschouwing mogen worden betrokken, meer in het bijzonder of melding mag worden gemaakt van keurmerken op het gebied van milieu en fair trade, is een vraag die van fundamentele betekenis is voor de verdere ontwikkeling van het recht op het gebied van overheidsopdrachten. Bij de beantwoording van die vraag staat het Hof voor de uitdaging, een juiste afweging te maken tussen de belangen van de interne markt en milieu- en sociaalpolitieke aspecten, zonder echter de praktische vereisten van aanbestedingsprocedures uit het oog te verliezen. Aan de ene kant mag er geen discriminatie van potentiële inschrijvers of marktafscherming ontstaan. Aan de andere kant moeten de aanbestedende diensten de mogelijkheid hebben, zich met verantwoorde administratieve inspanningen milieuvriendelijke en biologische producten en fairtradeproducten te verschaffen.

## II – Rechtskader

4. Het rechtskader in deze zaak wordt bepaald door richtlijn 2004/18/EG van het Europees Parlement en de Raad van 31 maart 2004 betreffende de coördinatie van de procedures voor het plaatsen van overheidsopdrachten voor werken, leveringen en diensten.(2)

5. In Titel I van deze richtlijn, „Definities en algemene beginselen", legt artikel 2 de volgende „Beginselen van het plaatsen van overheidsopdrachten" vast:

„Aanbestedende diensten behandelen ondernemers op gelijke en niet-discriminerende wijze en betrachten transparantie in hun handelen."

6. Onder de „Op overheidsopdrachten toepasselijke voorschriften" in titel II bevat hoofdstuk IV een reeks „Bijzondere voorschriften betreffende het bestek en de aanbestedingsstukken". Daarvan zijn voor de onderhavige zaak artikel 23, juncto bijlage VI, en artikel 26 relevant.

7. Zoals blijkt uit artikel 23, juncto bijlage VI, punt 1, sub b, van richtlijn 2004/18, betekent de uitdrukking „technische specificatie" in geval van overheidsopdrachten voor leveringen

„een specificatie die voorkomt in een document ter omschrijving van de vereiste kenmerken van een product [...], zoals het niveau van kwaliteit, het niveau van milieuvriendelijkheid, een ontwerp dat aan alle vereisten voldoet [...] en de overeenstemmingsbeoordeling,

gebruiksgeschiktheid, gebruik, veiligheid of afmetingen van het product, met inbegrip van de voor het product geldende voorschriften inzake handelsbenaming, terminologie, symbolen, proefnemingen en proefnemingsmethoden, verpakking, markering en etikettering, gebruiksaanwijzingen, productieprocessen en −methoden, en overeenstemmingsbeoordelingsprocedures".

8. In aansluiting op deze begripsbepaling bevat artikel 23 van richtlijn 2004/18 een regeling op het gebied van de technische specificaties, met onder meer de volgende bepalingen:

„1. De technische specificaties zoals omschreven in punt 1 van bijlage VI maken deel uit van de aanbestedingsstukken, zoals de aankondiging van de opdracht, het bestek of aanvullende stukken. [...]

2. De technische specificaties moeten de inschrijvers gelijke toegang bieden en mogen niet tot gevolg hebben dat ongerechtvaardigde belemmeringen voor de openstelling van overheidsopdrachten voor mededinging worden geschapen.

3. Onverminderd verplichte nationale technische voorschriften, voor zover verenigbaar met het gemeenschapsrecht, worden de technische specificaties als volgt aangegeven:

a) hetzij door verwijzing naar de technische specificaties van bijlage VI [...] Iedere referentie gaat vergezeld van de woorden ‚of gelijkwaardig';

b) hetzij in termen van prestatie-eisen en functionele eisen; deze kunnen milieukenmerken bevatten. Zij moeten echter zo nauwkeurig zijn dat de inschrijvers het voorwerp van de opdracht kunnen bepalen en de aanbestedende diensten de opdracht kunnen gunnen;

c) hetzij in de onder b bedoelde termen van prestatie-eisen en functionele eisen, waarbij onder vermoeden van overeenstemming met deze prestatie-eisen en functionele eisen wordt verwezen naar de onder a bedoelde specificaties;

d) hetzij door verwijzing naar de onder a bedoelde specificaties voor bepaalde kenmerken, en naar de onder b bedoelde prestatie-eisen en functionele eisen voor andere kenmerken.

[...]

6. Aanbestedende diensten die milieukenmerken voorschrijven door verwijzing naar prestatie-eisen of functionele eisen, zoals bepaald in lid 3, sub b, kunnen gebruikmaken van de gedetailleerde specificaties of, zo nodig, van gedeelten daarvan, zoals vastgesteld in Europese, (pluri)nationale milieukeuren of in een andere milieukeur, voor zover:

– die geschikt zijn voor de omschrijving van de kenmerken van de leveringen of diensten waarop de opdracht betrekking heeft;

– de vereisten voor de milieukeur zijn ontwikkeld op grond van wetenschappelijke gegevens;

– de milieukeuren zijn aangenomen via een proces waaraan alle betrokkenen, zoals regeringsinstanties, consumenten, fabrikanten, kleinhandel en milieuorganisaties kunnen deelnemen,

– en de keuren toegankelijk zijn voor alle betrokken partijen.

De aanbestedende diensten kunnen aangeven dat de van een milieukeur voorziene producten of diensten worden geacht te voldoen aan de technische specificaties van het bestek; zij dienen elk ander passend bewijsmiddel te aanvaarden, zoals een technisch dossier van de fabrikant of een testverslag van een erkende organisatie.

[...]

8. Behalve indien dit door het voorwerp van de opdracht gerechtvaardigd is, mag in de technische specificaties geen melding worden gemaakt van een bepaald fabrikaat of een bepaalde herkomst of van een bijzondere werkwijze, en mogen deze evenmin een verwijzing bevatten naar een merk, een octrooi of een type, een bepaalde oorsprong of een bepaalde productie, waardoor bepaalde ondernemingen of bepaalde producten worden bevoordeeld of geëlimineerd. Deze vermelding of verwijzing is bij wijze van uitzondering toegestaan wanneer een voldoende nauwkeurige en begrijpelijke beschrijving van het voorwerp van de opdracht niet mogelijk is door toepassing van de leden 3 en 4; deze vermelding of verwijzing moet vergezeld gaan van de woorden ‚of gelijkwaardig'."

9. Artikel 26 van richtlijn 2004/18 bepaalt met betrekking tot de „Voorwaarden waaronder de opdracht wordt uitgevoerd" het volgende:

„De aanbestedende diensten kunnen bijzondere voorwaarden bepalen waaronder de opdracht wordt uitgevoerd, mits deze verenigbaar zijn met het gemeenschapsrecht en in de aankondiging van de opdracht of in het bestek worden vermeld. De voorwaarden waaronder de opdracht wordt uitgevoerd, kunnen met name verband houden met sociale of milieuoverwegingen."

10. Richtlijn 2004/18 bevat in titel II, hoofdstuk VII, bepalingen over het „Verloop van de procedure". Daarvan zijn relevant de artikelen 44, 48 en 53.

11. Artikel 44 van richtlijn 2004/18 behoort tot de algemene bepalingen betreffende het verloop van de procedure en bepaalt onder het opschrift „Controle van de geschiktheid en selectie van de deelnemers, en gunning van de opdrachten" onder meer het volgende:

„1. Opdrachten worden gegund [...] nadat de aanbestedende diensten de geschiktheid van de [...] ondernemers hebben gecontroleerd op grond van de criteria van economische en financiële draagkracht, technische bekwaamheid en/of beroepsbekwaamheid, genoemd in de artikelen 47 tot en met 52 [...]

2. De aanbestedende diensten kunnen minimumeisen inzake draagkracht en bekwaamheden overeenkomstig de artikelen 47 en 48 stellen waaraan de gegadigden en de inschrijvers moeten voldoen.

De in de artikelen 47 en 48 bedoelde inlichtingen en de minimumeisen inzake draagkracht en bekwaamheden moeten verband houden met en in verhouding staan tot het voorwerp van de opdracht.

Deze minimumeisen worden vermeld in de aankondiging van de opdracht.

[...]"

12. Artikel 48 van richtlijn 2004/18 bevat onder meer de volgende bepalingen over de „Technische bekwaamheid en/of beroepsbekwaamheid" van ondernemers:

„1. De technische bekwaamheid en/of beroepsbekwaamheid van de ondernemers worden beoordeeld en gecontroleerd overeenkomstig de leden 2 en 3.

2. De technische bekwaamheid van de ondernemer kan op een of meer van de volgende manieren worden aangetoond, afhankelijk van de aard, de hoeveelheid of omvang en het doel van de werken, leveringen of diensten:

[...]

c) aan de hand van een beschrijving van de technische uitrusting van de leverancier of de dienstverlener, van de maatregelen die hij treft om de kwaliteit te waarborgen en de mogelijkheden die hij biedt ten aanzien van ontwerpen en de mogelijkheden die hij biedt

ten aanzien van ontwerpen en onderzoek;

[...]

6. De aanbestedende dienst geeft in de aankondiging of in de uitnodiging tot indiening van een inschrijving aan, welke van de in lid 2 genoemde referenties hij verlangt."

13. Tot slot bepaalt artikel 53 van richtlijn 2004/18, getiteld „Gunningscriteria", in lid 1 het volgende:

„Onverminderd de nationale wettelijke en bestuursrechtelijke bepalingen betreffende de vergoeding van bepaalde diensten, zijn de criteria aan de hand waarvan de aanbestedende diensten een overheidsopdracht gunnen:

a) hetzij, indien de gunning aan de inschrijver met de vanuit het oogpunt van de aanbestedende dienst economisch meest voordelige aanbieding plaatsvindt, verschillende criteria die verband houden met het voorwerp van de opdracht, zoals de kwaliteit, de prijs, de technische waarde, de esthetische en functionele kenmerken, de milieukenmerken, de gebruikskosten, de rentabiliteit, de klantenservice en de technische bijstand, de datum van levering en de termijn voor levering of uitvoering;

[...]"

**III – Feiten en procesverloop**

A – *De aanbestedingsprocedure*

14. In 2008 heeft de Nederlandse Provincie Noord-Holland de gunning van een overheidsopdracht voor de levering en het beheer van koffieautomaten bekendgemaakt. De opdracht betrof een overeenkomst met een looptijd van drie jaar met een mogelijke verlenging met één jaar.

1. De aankondiging van de overheidsopdracht

15. De bekendmaking van de overheidsopdracht, die op 16 augustus 2008 in het *Publicatieblad van de Europese Unie* is geplaatst(3), bevatte onder meer de volgende tekst onder het kopje „Korte beschrijving van de opdracht of de aankoop/aankopen":

„De Provincie Noord-Holland heeft een contract voor het beheer van koffieautomaten. Dit contract loopt [1 januari] 2009 af. De Provincie wil door middel van een openbare Europese aanbestedingsprocedure met ingang van [1 januari] 2009 een nieuw contract afsluiten. Een belangrijk aspect is dat de Provincie Noord-Holland meer biologische producten en Fair trade wil gaan gebruiken in de koffieautomaten."(4)

16. In de rubriek „Andere bijzondere voorwaarden voor de uitvoering van de opdracht" stond in de aankondiging de vermelding „neen".(5) De opdracht zou worden gegund aan de economisch meest voordelige aanbieding.(6)

2. Het bestek

17. In het bestek(7), dat voor belangstellenden op aanvraag verkrijgbaar was, werd onder meer vermeld dat de aanbiedingen niet alleen op de prijs, maar ook op kwalitatieve criteria en milieucriteria zouden worden beoordeeld. Daarbij werd erop gewezen dat de Provincie Noord-Holland in haar koffieautomaten meer biologische producten en fairtradeproducten wilde gebruiken.

18. Het bestek vermeldde zowel de door de inschrijvers te vervullen geschiktheidscriteria als de criteria voor de gunning van de opdracht aan de economisch meest voordelige aanbieding. Daarnaast werd duidelijk gemaakt dat alleen aanbiedingen die aan de

geschiktheidscriteria voldeden aan de gunningscriteria zouden worden getoetst.

19. In onderafdeling 4.4 van het bestek, betreffende de „Geschiktheidseisen/minimumeisen", was onder rubriek 4.4.4, getiteld „Kwaliteitseisen", onder meer het volgende vermeld:

„In het kader van duurzaam inkopen en maatschappelijk verantwoord ondernemen eist Provincie Noord-Holland dat de leverancier voldoet aan de criteria van duurzaam inkopen en maatschappelijk verantwoord ondernemen. Op welke wijze geeft u invulling aan de criteria van duurzaam inkopen en maatschappelijk verantwoord ondernemen[?] Tevens dient aangegeven te worden op welke wijze de leverancier bijdraagt aan het duurzamer maken van de koffiemarkt en aan een milieutechnisch, sociaal en economisch verantwoorde koffieproductie."

Dezelfde kwaliteitseis werd nog eens in de samenvattende rubriek 4.4.6 van het bestek onder het kopje „Overzicht minimale eisen" als knock-outcriterium ingedeeld.

20. Bij het bestek was in bijlage A een „Programma van eisen" gevoegd waarmee iedere aanbieder zich akkoord moest verklaren. Daarin waren zowel „eisen" als „wensen" van de Provincie opgesomd. Bij de eisen ging het om minimumvoorwaarden die vervuld moesten zijn om te voorkomen dat een aanbieder van de procedure zou worden uitgesloten, terwijl de wensen gunningscriteria waren aan de hand waarvan de individuele inschrijvers met punten zouden worden beoordeeld.

21. In punt 31 van het programma van eisen was met betrekking tot de te leveren koffie en thee de volgende „eis" vermeld:

„Provincie Noord-Holland maakt voor de koffie- en theeconsumpties gebruik van het Max Havelaar- en EKO-keurmerk."

22. Voorts werd in punt 35 van het programma van eisen met betrekking tot de te leveren „ingrediënten" – suiker, melkpoeder en cacao – de volgende „wens" geformuleerd, die maximaal 15 punten kon opleveren:

„De ingrediënten dienen indien mogelijk aan het EKO- en/of Max Havelaar-keurmerk te voldoen."

23. Volgens het bestek was de indiening van alternatieven niet toegestaan. Voorwaardelijke aanbiedingen mochten evenmin worden ingediend.

3. De nota van inlichtingen

24. Potentiële inschrijvers konden volgens het bestek vragen aan de Provincie als aanbestedende dienst stellen. Die vragen zouden worden beantwoord in de vorm van een nota van inlichtingen. Deze nota, die elektronisch beschikbaar was, zou een onderdeel van het bestek worden en prevaleren boven andere delen van het bestek.

25. Op 9 september 2008 heeft de Provincie Noord-Holland bovenbedoelde nota van inlichtingen uitgebracht, waarin onder meer twee antwoorden op vragen van potentiële inschrijvers over de in het bestek vermelde keurmerken Max Havelaar en EKO waren opgenomen.

– In verband met punt 31 van het programma van eisen antwoordde de Provincie op de vraag „Kunnen wij ervan uitgaan dat voor de gestelde keurmerken geldt: of vergelijkbaar?": „Zolang de uitgangspunten maar vergelijkbaar of hetzelfde zijn" (punt 11 van de nota van inlichtingen).

– In verband met punt 35 van het programma van eisen antwoordde de Provincie op de vraag „Kunnen wij ervan uitgaan dat voor de gestelde keurmerken geldt: of vergelijkbaar?": „De ingrediënten mogen van een keurmerk zijn met dezelfde

uitgangspunten” (punt 12 van de nota van inlichtingen).

4. De gunning

26. Volgens de aankondiging van 24 december 2008 is de opdracht gegund aan de Nederlandse onderneming Maas International BV, gevestigd te Eindhoven.(8)

B – *De in de voorwaarden voor de uitvoering van de opdracht vermelde keurmerken*

27. Het keurmerk Max Havelaar(9) wordt sinds 1998 afgegeven door een stichting naar Nederlands burgerlijk recht, de Stichting Max Havelaar. De van dit keurmerk voorziene producten zijn ingekocht tegen een eerlijke prijs en onder eerlijke handelsvoorwaarden bij organisaties bestaande uit kleine groepen boeren in ontwikkelingslanden. Bij de toekenning worden vier criteria gehanteerd: een kostendekkende minimumprijs, een toeslag op de wereldmarktprijs, voorfinanciering en langdurige handelsrelaties tussen producent en importeur. Zowel de normstelling als de auditing en de certificatie geschieden door een internationale koepelorganisatie, de Fairtrade Labelling Organisation (FLO), gevestigd te Bonn (Duitsland).(10)

28. Het keurmerk EKO is eveneens een Nederlands privaatrechtelijk keurmerk. Het wordt sinds 1985 toegekend door een stichting naar Nederlands burgerlijk recht, de Stichting Skal, voor producten die voor minstens 95 % uit biologische ingrediënten bestaan. De Stichting Skal treedt op in samenspraak met het Nederlandse Ministerie van Landbouw, Natuurbeheer en Visserij.

29. Zowel Max Havelaar als EKO is als gemeenschapsmerk bij het Bureau voor harmonisatie binnen de interne markt geregistreerd.

C – *De administratieve procedure*

30. Nadat een klacht was ingediend heeft de Commissie de onderhavige niet-nakomingsprocedure ingeleid. Zowel in haar aanmaningsbrief van 14 mei 2009 als in haar met redenen omkleed advies van 29 oktober 2009 heeft zij in hoofdzaak dezelfde bezwaren geformuleerd als de bezwaren waarop het onderhavige beroep is gebaseerd. Zij verwijt Nederland dat de aanbestedingsprocedure in strijd met richtlijn 2004/18 heeft plaatsgevonden.

31. Zowel in haar antwoord van 17 augustus 2009 op de aanmaningsbrief als in haar schriftelijke opmerkingen van 31 december 2009 op het met redenen omkleed advies van de Commissie bestrijdt de Nederlandse regering de niet-nakoming.(11)

**IV – Conclusies van partijen en procedure voor het Hof**

32. Bij verzoekschrift van 20 juli 2010, ingekomen bij het Hof op 22 juli 2010, heeft de Commissie overeenkomstig artikel 258, lid 2, VWEU beroep tegen Nederland ingesteld.

33. De Commissie verzoekt het Hof:

1) vast te stellen dat het Koninkrijk der Nederlanden niet heeft voldaan aan de verplichtingen die op hem rusten krachtens onderstaande artikelen van richtlijn 2004/18, doordat de aanbestedende dienst in het kader van de gunning van een overheidsopdracht voor de levering en het beheer van koffieautomaten, gepubliceerd onder nummer 2008/S 158-213630,

– in strijd met artikel 23, leden 6 en 8, van de richtlijn in de technische specificaties de keurmerken Max Havelaar en EKO, althans keurmerken met vergelijkbare of dezelfde uitgangspunten, heeft voorgeschreven;

– in strijd met de artikelen 48, leden 1 en 2, en 44, lid 2, hoe dan ook in strijd met artikel 2

van die richtlijn, ter toetsing van de bekwaamheid van de ondernemers criteria en bewijsmiddelen betreffende duurzaam inkopen en maatschappelijk verantwoord ondernemen heeft opgenomen;

– in strijd met artikel 53, lid 1, van dezelfde richtlijn bij het formuleren van de gunningscriteria een verwijzing naar het Max Havelaar- en/of het EKO-keurmerk, althans naar keurmerken met dezelfde uitgangspunten, heeft opgenomen;

2) het Koninkrijk der Nederlanden te verwijzen in de kosten.

34. De Nederlandse regering verzoekt het Hof:

1) het beroep af te wijzen, en

2) de Commissie in de kosten van de procedure te verwijzen.

35. Voor het Hof heeft na de schriftelijke behandeling op 26 oktober 2011 de mondelinge behandeling plaatsgevonden. Het Koninkrijk Denemarken, dat bij beschikking van de president van 11 februari 2011 als interveniënt aan de zijde van Nederland was toegelaten, heeft niet verder aan de procedure deelgenomen en heeft zich bij brief van 17 oktober 2011 uit de procedure teruggetrokken.

## V – Beoordeling

36. Het nastreven van doeleinden op ecologisch en sociaal gebied werd in het recht op het gebied van openbare aanbestedingen lange tijd als ontoelaatbaar beschouwd, hetgeen niet in de laatste plaats tot uiting kwam in het gebruik van de slogan „vergabefremde Ziele”. Inmiddels wordt echter in beginsel erkend dat de aanbestedende diensten bij de gunning van opdrachten mede ecologische en sociale aspecten in de beschouwing mogen betrekken(12), hetgeen ook de Commissie niet principieel betwist. Dit volgt reeds uit de door haar over dit onderwerp gepubliceerde standpunten.(13) Voorts heeft de Commissie in de onderhavige procedure – vooral ter terechtzitting – uitdrukkelijk erkend dat de aanbestedende diensten speciaal de aanschaf van biologische producten en fairtradeproducten tot voorwerp van overheidsopdrachten voor leveringen mogen maken.

37. Wat de details betreft is het echter hoogst omstreden onder welke voorwaarden en in welke vorm ecologische en sociale bedoelingen van de aanbestedende dienst in een concreet geval een rol mogen spelen. Volgens de Commissie is in casu richtlijn 2004/18 geschonden. Zij voert tegen de handelwijze van de Provincie Noord-Holland drie grieven aan, die zij in haar verzoekschrift afzonderlijk aan de orde stelt. Het gaat daarbij in hoofdzaak om de vermelding van de keurmerken Max Havelaar en EKO in het aanbestedingsdossier.

38. Nederland stelt niet aan de orde dat richtlijn 2004/18 op de aan de orde zijnde openbare aanbesteding toepasselijk is, maar bestrijdt dat de Provincie Noord-Holland deze richtlijn heeft geschonden.

### A – *Eerste grief: vermelding van de keurmerken Max Havelaar en EKO in de technische specificatie voor de te leveren koffie en thee*

39. Met haar eerste grief verwijt de Commissie Nederland schending van artikel 23, leden 6 en 8, van richtlijn 2004/18, waaruit blijkt hoe de aanbestedende diensten producteigenschappen (zogenaamde „Technische specificaties”) kunnen definiëren.

40. Zoals de Commissie ter terechtzitting heeft uiteengezet, beschouwt zij het besluit van de Provincie Noord-Holland, biologische producten en fairtradeproducten te betrekken(14), als zodanig niet als in strijd met het recht van de Unie. De aangevoerde schending van artikel 23 van richtlijn 2004/18 is veeleer terug te voeren op het feit dat de Provincie Noord-Holland bij de vastlegging van de technische specificaties voor de aan haar te leveren koffie en thee heeft verwezen naar de keurmerken Max Havelaar en EKO, althans naar keurmerken met

vergelijkbare of dezelfde criteria.

41. In concreto heeft deze grief betrekking op punt 31 van het programma van eisen, waar de aanbieder in kennis wordt gesteld van de „eis" dat de Provincie Noord-Holland voor het koffie- en theegebruik van het Max Havelaar- en EKO-keurmerk „gebruikmaakt". Ook van belang is punt 11 van de nota van inlichtingen, waarin de aanbestedende dienst te kennen gaf dat vergelijkbare keurmerken ook konden worden aanvaard „zolang de uitgangspunten maar vergelijkbaar of hetzelfde [zouden] zijn".

42. Het eerste deel van de eerste grief betreft het keurmerk EKO (zie daartoe het hierna volgende onderdeel 1), terwijl het tweede is gewijd aan het keurmerk Max Havelaar (zie het hierna volgende onderdeel 2).

1. Eerste deel van de eerste grief: vermelding van het keurmerk EKO voor de te leveren koffie en thee (artikel 23, lid 6, van richtlijn 2004/18)

43. Het eerste deel van de eerste grief betreft het keurmerk EKO, waarvan de vermelding in punt 31 van het programma van eisen volgens de Commissie indruist tegen artikel 23, lid 6, van richtlijn 2004/18.

44. Dienaangaande moet worden opgemerkt dat de aanbestedende diensten zelf mogen bepalen welk product zij geleverd willen krijgen. Wel moeten zij bij de vastlegging van de producteigenschappen, de ecologische daaronder begrepen, enkele regels van het recht van de Unie eerbiedigen die moeten waarborgen dat de aanbestedingsprocedure doorzichtig blijft, dat geen discriminatie tussen potentiële inschrijvers ontstaat en dat het openstaan van overheidsopdrachten voor mededinging niet op ongerechtvaardigde wijze wordt gehinderd. Tot die regels behoort artikel 23 van richtlijn 2004/18.

a) Toepasselijkheid van artikel 23 van richtlijn 2004/18

45. Artikel 23 van richtlijn 2004/18 bevat gedetailleerde voorschriften voor de het gebruik van technische specificaties door de aanbestedende diensten in de aanbestedingsstukken. Zoals uit bijlage VI, punt 1, sub b, bij deze richtlijn blijkt moet onder technische specificaties bij overheidsopdrachten voor leveringen worden verstaan specificaties die voorkomen in een document ter omschrijving van de vereiste kenmerken van een product of dienst. Als voorbeelden van technische specificaties worden in bijlage VI, punt 1, sub b, onder meer genoemd het niveau van milieuvriendelijkheid, symbolen, verpakking, markering en etikettering en productieprocessen en -methoden.

46. Onder deze begripsbepaling van de technische specificaties kan zonder meer de verwijzing door de aanbestedende dienst naar een milieukeur als het keurmerk EKO worden gebracht. Dit keurmerk staat immers voor een bepaalde productiemethode en geeft informatie over bepaalde milieukenmerken van deze koffie en thee.

47. Het gebruik van de EKO-keurmerk in het programma van eisen van de Provincie Noord-Holland moet dan ook aan artikel 23 van richtlijn 2004/18 worden getoetst.

b) Geen algemeen verbod op vermelding van milieukeuren in het kader van de vastlegging van de milieukenmerken van een product

48. Overeenkomstig artikel 23, lid 3, sub b, van richtlijn 2004/18 mogen de aanbestedende diensten voor het te leveren product milieukenmerken in termen van prestatie-eisen en functionele eisen verlangen. Daartoe mogen zij volgens artikel 23, lid 6, van richtlijn 2004/18 gebruikmaken van de gedetailleerde specificaties of, zo nodig, van gedeelten daarvan, zoals vastgesteld in Europese, (pluri)nationale of andere milieukeuren.

49. De Commissie lijkt deze regeling aldus op te vatten dat de aanbestedende diensten bij de opgaaf van hun eisen aan potentiële inschrijvers alleen mogen verwijzen naar concrete

specificaties – zogezegd naar de kleine letters – en dat iedere rechtstreekse verwijzing naar milieukeuren verboden is.

50. Een dergelijk categorisch verbod op het gebruik van milieukeuren kan echter, anders dan de Commissie betoogt, niet uit de bewoordingen van artikel 23, lid 6, van richtlijn 2004/18 worden afgeleid en lijkt evenmin zijn rechtvaardiging te vinden in het doel van deze bepaling of in haar context.

51. Het is juist dat in artikel 23, lid 6, van richtlijn 2004/18 de „gedetailleerde specificaties" worden genoemd die de aanbestedende diensten ter beschrijving van de milieukenmerken van producten moeten gebruiken.

52. Dit betekent echter niet noodzakelijkerwijs dat de aanbestedende diensten in hun aanbestedingsstukken iedere afzonderlijke tot een milieukeur behorende specificatie apart moeten vermelden. Veeleer staat het de aanbestedende diensten vrij, in de aanbestedingsstukken door de loutere vermelding van milieukeuren globaal te verwijzen naar alle specificaties waarop de betrokken milieukeuren berusten. In deze zin moet worden begrepen dat de aanbestedende diensten op grond van artikel 23, lid 6, van richtlijn 2004/18 voor de aanduiding van de milieukenmerken gebruik mogen maken van de „gedetailleerde specificaties [...] zoals vastgesteld in [...] milieukeuren".

53. Een dergelijke globale verwijzing is volgens de duidelijke bewoordingen van de regeling niet alleen toegestaan voor „Europese" milieukeuren – zoals het zogenoemde „EU-milieukeurmerk" in de zin van verordening (EG) nr. 1980/2000(15) respectievelijk verordening (EG) nr. 66/2010(16) –, maar ook voor „nationale", „plurinationale" en „andere" milieukeuren, voor zover zij voldoen aan de criteria die achter de vier gedachtestreepjes van artikel 23, lid 6, van richtlijn 2004/18 worden opgesomd.(17)

54. Anders dan de Commissie meent, is overigens de globale verwijzing naar alle specificaties waarop een milieukeur berust in de regel zonder meer verenigbaar met het transparantiebeginsel, dat tot de grondbeginselen van het Europese recht inzake overheidsopdrachten behoort.(18)

55. Het transparantiebeginsel verlangt namelijk slechts dat de technische specificaties voor alle inschrijvers *op gelijke wijze toegankelijk* zijn (artikel 23, lid 2, van richtlijn 2004/18) en dat de milieukenmerken van het te leveren product zo nauwkeurig worden opgegeven dat de inschrijvers *het voorwerp van de opdracht kunnen bepalen* (artikel 23, lid 3, sub b, van richtlijn 2004/18).(19)

56. Hiertoe kan in de regel geheel worden volstaan met een globale verwijzing naar de specificaties waarop de milieukeur berust. Van de redelijk geïnformeerde en normaal zorgvuldige inschrijver(20) kan immers zonder meer worden verwacht dat hij de op de betrokken markt gebruikte milieukeuren kent althans dat hij bij de desbetreffende certificeringsautoriteiten informatie inwint over de door hen gehanteerde criteria.

57. Daar komt bij dat bij de vastlegging van de eisen waaraan de aanbestedende diensten moeten voldoen, de daaraan verbonden administratieve lasten niet buiten beschouwing mogen worden gelaten. Die lasten moeten steeds in een evenredige verhouding staan tot de in het recht inzake openbare aanbestedingen vastgelegde doeleinden. Wanneer de milieukenmerken van een product uit het oogpunt van de normaal zorgvuldige inschrijver alleen al door globale verwijzing naar de aan een milieukeur ten grondslag liggende specificaties voldoende nauwkeurig kunnen worden beschreven, zou het overdreven formalistisch zijn, van de aanbestedende dienst niettemin te verlangen dat hij al die specificaties afzonderlijk vermeldt.

58. Dat rechtstreekse verwijzing naar milieukeuren niet principieel verboden is blijkt overigens ook uit artikel 23, lid 6, laatste alinea, van richtlijn 2004/18. Daarin wordt de aanbestedende diensten uitdrukkelijk toegestaan, aan te geven dat de van een milieukeur voorziene producten of diensten worden geacht te voldoen aan de technische specificaties van het bestek. Deze bepaling zou zinloos zijn indien de aanbestedende diensten alleen

afzonderlijke specificaties individueel mochten vermelden, maar niet naar de bijbehorende milieukeur mochten verwijzen.

59. De omstandigheid dat in casu de Provincie Noord-Holland in de aanbestedingsstukken een milieukeur heeft vermeld, zonder de daaraan ten grondslag liggende technische specificaties gedetailleerd op te sommen, is dus op zich nog niet in strijd met artikel 23, lid 6, van richtlijn 2004/18.

c) Verbod, een bepaalde milieukeur dwingend voor te schrijven

60. Thans moet nog worden onderzocht of de manier waarop de Provincie Noord-Holland in punt 31 van het programma van eisen het keurmerk EKO heeft vermeld in strijd is met artikel 23, lid 6, van richtlijn 2004/18.

61. Op dit punt geven partijen een verschillende uitlegging aan de feiten. Terwijl de Commissie ervan uitgaat dat voor de te leveren koffie en thee het keurmerk EKO dwingend was voorgeschreven, geeft Nederland te kennen dat de Provincie Noord-Holland alleen koffie en thee uit biologische productie heeft willen bestellen en dat de vermelding van het keurmerk EKO in het programma van eisen slechts als voorbeeld ter verduidelijking is genoemd.

62. De zienswijze van de Commissie steunt op de sterkste argumenten.

63. Weliswaar had de Provincie Noord-Holland zowel in de aankondiging van haar aanbesteding in het *Publicatieblad van de Europese Unie* als in het bestek te kennen gegeven dat zij in haar koffieautomaten meer biologische producten en fairtradeproducten wenste te gebruiken, maar in het programma van eisen vermeldde zij in de rubriek „eisen” dat zij van koffie en thee met het keurmerk EKO „gebruikmaakte”. Tegelijkertijd definieerde zij het begrip „eis” zodanig dat het daarbij ging om dwingende minimumeisen, die vervuld moesten zijn om te voorkomen dat een aanbieder van de procedure zou worden uitgesloten.(21)

64. De potentiële inschrijver, wiens begrip bij de lezing van de aanbestedingsvoorwaarden voorop staat(22), kon dit alles alleen maar aldus begrijpen dat van hem de levering van koffie en thee met het keurmerk EKO werd verlangd en dat hij van de procedure zou worden uitgesloten indien zijn producten niet van dat keurmerk waren voorzien.

65. Een dergelijk vereiste druist in tegen het discriminatieverbod en het beginsel dat overheidsopdrachten openstaan voor de mededinging (artikel 23, lid 2, juncto artikel 2 van richtlijn 2004/18), die ook in het kader van artikel 23, lid 6, van richtlijn 2004/18 in acht moeten worden genomen. In de eerste plaats worden ondernemingen – inzonderheid ondernemingen uit andere lidstaten – die koffie en thee met een ander keurmerk dan het in Nederland gebruikelijke keurmerk EKO verkopen, benadeeld. In de tweede plaats worden ondernemingen die in hun assortiment koffie en thee van biologische productie verkopen zonder daarvoor een keurmerk te bezitten, benadeeld.

66. Daarmee is de Provincie Noord-Holland verder gegaan dan ingevolge artikel 23, lid 6, juncto artikel 23, lid 3, sub b, van richtlijn 2004/18 bij de vaststelling van de milieukenmerken van de te leveren producten is toegestaan. Zij heeft niet slechts globaal verwezen naar de „gedetailleerde specificaties” achter het keurmerk EKO (artikel 23, lid 6, eerste alinea), en evenmin enkel aangegeven dat producten met de milieukeur EKO werden geacht te voldoen aan de aanbestedingsvoorwaarden (artikel 23, lid 6, laatste alinea). Veeleer heeft zij het keurmerk EKO dwingend voorgeschreven, zodat alleen koffie en thee met dit specifieke keurmerk – met uitsluiting van alle andere koffie en thee – konden worden geleverd.

67. Daaraan doet evenmin af de omstandigheid dat de aanbestedende dienst nadien in zijn nota van inlichtingen voor de twee door hem gebruikte keurmerken voor koffie en thee in antwoord op een vraag de woorden „of gelijkwaardig” heeft toegevoegd.

68. Er bestaan geen principiële bezwaren tegen het gebruik van de toevoeging „of

gelijkwaardig". De wetgever van de Unie heeft deze tenslotte zelf – in een ander verband – uitdrukkelijk opgenomen (vergelijk artikel 23, lid 3, sub a, laatste zin, en lid 8 van richtlijn 2004/18). Inzonderheid kan de toevoeging „of gelijkwaardig", anders dan de Commissie meent, niet met een beroep op de beweerdelijk daarmee teweeggebrachte rechtsonzekerheid ontoelaatbaar worden geacht. Bij iedere openbare aanbesteding is het zo dat de aanbestedende diensten de bij hun ingediende offertes aan de aanbestedingsvoorwaarden dienen te toetsen en daartoe in voorkomend geval een onderzoek naar de gelijkwaardigheid moeten doen.(23)

69. Zoals de Commissie echter terecht opmerkt, is in casu de toevoeging „of gelijkwaardig" pas enkele weken nadat de belanghebbenden het bestek hadden ontvangen in de nota van inlichtingen opgenomen. Onder deze omstandigheden is het niet uitgesloten dat ondertussen een of meer potentiële inschrijvers op grond van de strengere formulering in het bestek, die erop wees dat het keurmerk EKO dwingend was voorgeschreven, zonder enig gelijkwaardigheidsonderzoek, hadden besloten geen offerte in te dienen.

70. Nederland brengt hiertegen in dat de Provincie Noord-Holland haar nota van inlichtingen met de daarin aangebrachte verduidelijking „of gelijkwaardig" heeft bekendgemaakt binnen de daartoe in artikel 39, lid 2, van richtlijn 2004/18 gestelde termijn, dat wil zeggen minstens zes dagen voor de uiterste datum voor de ontvangst van de inschrijvingen.

71. Dit argument faalt echter. De in artikel 39, lid 2, van richtlijn 2004/18 bedoelde termijn van zes dagen vindt alleen toepassing op „nadere inlichtingen over het bestek en de aanvullende stukken" die de aanbestedende dienst potentiële inschrijvers verstrekt. Met die inlichtingen kunnen weliswaar bepaalde verduidelijkingen worden aangebracht en inlichtingen worden verstrekt, maar fundamentele juridische gebreken in de aanbestedingsvoorwaarden kunnen langs deze weg niet worden hersteld. De aanbestedingsstukken moeten immers reeds voordat zij ter beschikking van de potentiële inschrijvers worden gesteld aan alle voorgeschreven eisen beantwoorden en kunnen niet enkele dagen voor de uiterste datum voor de ontvangst van de inschrijvingen op wezenlijke punten worden verbeterd.

d) Voorlopige conclusie

72. Gelet op het voorgaande moet dus worden vastgesteld dat artikel 23, lid 6, van richtlijn 2004/18 is geschonden doordat de Provincie Noord-Holland voor de te leveren koffie en thee dwingend een bepaald milieukeur – het keurmerk EKO – heeft voorgeschreven. Het eerste onderdeel van de eerste grief van de Commissie is derhalve gegrond.

2. Tweede deel van de eerste grief: vermelding van het keurmerk Max Havelaar voor de te leveren koffie en thee (artikel 23, lid 8, van richtlijn 2004/18)

73. Het tweede deel van de eerste grief van de Commissie betreft het keurmerk Max Havelaar, waarvan de vermelding in punt 31 van het programma van eisen, nadien aangevuld door punt 11 van de nota van inlichtingen, volgens de Commissie in strijd is met artikel 23, lid 8, van richtlijn 2004/18.

a) De toepasselijkheid van artikel 23, lid 8, van richtlijn 2004/18

74. Vooraf moet worden vastgesteld of artikel 23, lid 8, van richtlijn 2004/18 op feiten als de onderhavige überhaupt toepassing kan vinden.

75. De Commissie meent dat dit het geval is, alleen al omdat Nederland in de loop van de procedure een standpunt heeft ingenomen over de inhoud van artikel 23, lid 8, van richtlijn 2004/18. Daarbij gaat de Commissie er echter aan voorbij dat Nederland zich slechts subsidiair heeft uitgelaten over artikel 23, lid 8, waarvan het de toepasselijkheid op het keurmerk Max Havelaar fel bestrijdt. Maar ook al was Nederland zonder tegenwerping ingegaan op een debat over artikel 23, lid 8, zou niettemin door het Hof moeten worden onderzocht of deze bepaling

toepasselijk is. Het is immers aan het Hof om vast te stellen of van de beweerde niet-nakoming inderdaad sprake is, ook wanneer deze niet of niet meer wordt bestreden.(24) Het Hof kan dus niet met open ogen een niet ter zake dienende bepaling toepassen, ook al mochten partijen het eens zijn over de toepasselijkheid ervan.(25) Zoals advocaat-generaal Léger het treffend heeft geformuleerd, is de rol van de rechter niet passief en kan hij niet slechts „de mond van partijen" zijn.(26)

76. Het bepaalde in artikel 23, lid 8, van richtlijn 2004/18 betreft – evenals alle voorgaande delen van dit artikel – technische specificaties waarmee de aanbestedende dienst het voorwerp van de opdracht beschrijft. Bijgevolg moet worden onderzocht of de Provincie Noord-Holland door het keurmerk Max Havelaar te vermelden een technische specificatie voor de te leveren koffie en thee heeft vastgelegd.

77. Zoals ik al zei, moet onder technische specificaties in de zin van richtlijn 2004/18 overeenkomstig bijlage VI, punt 1, sub b, worden verstaan specificaties die voorkomen in een document ter omschrijving van de vereiste kenmerken van een product. Het dient dus te gaan om opgaven waarmee de eigenschappen van een product worden omschreven. Deze zienswijze wordt bevestigd bij een blik op de opsomming in bijlage VI, punt 1, sub b, bij richtlijn 2004/18: de daar genoemde voorbeelden van technische specificaties betreffen allemaal het product zelf, de vervaardiging ervan, de verpakking en de gebruiksgeschiktheid.

78. Daarentegen verwijst het keurmerk Max Havelaar niet naar producteigenschappen, maar naar de handelsvoorwaarden die de producenten van landbouwproducten in ontwikkelingslanden worden gewaarborgd. Het keurmerk zegt niets over de kenmerken van een product, maar alleen over de vraag of het een fairtradeproduct betreft, in het bijzonder met betrekking tot de aan de betrokken landbouwers geboden prijzen en handelsvoorwaarden.

79. Toegepast op het onderhavige geval betekent dit dat het keurmerk Max Havelaar niets zegt over de eigenschappen en de wijze van vervaardiging van de betrokken koffie of thee – zoals smaak, coffeïnegehalte en het gebruik van pesticiden – maar alleen conclusies toelaat over de omstandigheden waaronder de koffie of thee van de betrokken producenten betrokken is. Zoals partijen toepasselijk hebben opgemerkt, gaat het om de inkooppolitiek van de potentiële inschrijvers.

80. Door het keurmerk Max Havelaar te vermelden heeft de aanbestedende dienst dus geen technische specificaties in de zin van richtlijn 2004/18 vastgelegd, maar veeleer sociale overwegingen in de aanbestedingsprocedure betrokken.

81. Bijgevolg is artikel 23, lid 8, van richtlijn 2004/18 op het onderhavige geval niet van toepassing. Hierna(27) zal ik aantonen dat de vermelding door een aanbestedende dienst van een fairtradekeurmerk als Max Havelaar aan artikel 26 van de richtlijn zou moeten worden getoetst.

82. Daaruit volgt dat het tweede onderdeel van de eerste grief van de Commissie ongegrond is.

83. Anders dan de Commissie lijkt te menen, kan haar op artikel 23, lid 8, van richtlijn 2004/18 gebaseerde grief niet kortweg worden omgevormd tot een grief die op artikel 26 van dezelfde richtlijn berust. Volgens vaste rechtspraak(28) wordt het voorwerp van het geschil van een niet-nakomingsprocedure immers door de administratieve procedure afgebakend. De Commissie mag dat voorwerp in de procedure voor het Hof niet uitbreiden. Wanneer zij in de administratieve procedure schending van artikel 23, lid 8, van richtlijn 2004/18 aanvoert, kan derhalve nadien in de procedure voor het Hof geen schending van artikel 26 van dezelfde richtlijn worden vastgesteld. Voor het overige zou een daartoe strekkende grief ook op artikel 42, lid 2, van het Reglement voor de procesvoering van het Hof stuiten, daar zij pas in repliek door de Commissie is geformuleerd zonder dat daarvoor gegronde redenen waren.

b) Subsidiair: de verenigbaarheid van de vermelding van het keurmerk Max Havelaar met richtlijn 2004/18

84. Volledigheidshalve ga ik hierna in het kort subsidiair in op de vraag of de vermelding door de Provincie Noord-Holland van het keurmerk Max Havelaar verenigbaar was met richtlijn 2004/18.

i) Toepasselijke bepaling: artikel 26 van richtlijn 2004/18

85. Zoals Nederland terecht heeft opgemerkt, moet de vraag of een aanbestedende dienst melding mag maken van fairtradekeurmerken niet aan artikel 23, lid 8, van richtlijn 2004/18 worden getoetst, maar aan artikel 26 van die richtlijn. Volgens deze laatste bepaling mogen de aanbestedende diensten „bijzondere voorwaarden bepalen waaronder de opdracht wordt uitgevoerd", en kunnen deze „met name verband houden met sociale of milieuoverwegingen".

86. Een niet onbelangrijk deel van de uitvoering van een overheidsopdracht voor leveringen is de inkoop van de aan de aanbestedende dienst te leveren producten door de opdrachtnemer. Of een product zoals koffie of thee die aan een aanbestedende dienst moet worden geleverd uit fair trade afkomstig is, is een kwestie van de inkooppolitiek – volgens sociale criteria – van de opdrachtnemer.

87. In werkelijkheid heeft de Provincie Noord-Holland dus, door te verwijzen naar het keurmerk Max Havelaar voor de uitvoering van de litigieuze overheidsopdracht, een aan sociale overwegingen ontleende voorwaarde in de zin van artikel 26 van richtlijn 2004/18 gesteld, ook al is de Provincie er wellicht zelf van uitgegaan dat dergelijke voorwaarden in haar aanbestedingsstukken niet waren opgenomen.(29)

ii) Toetsing van de vermelding van het keurmerk Max Havelaar aan artikel 26 van richtlijn 2004/18

88. Ten gronde ben ik het eens met de Commissie, dat artikel 26 van richtlijn 2004/18 de aanbestedende dienst niet onbeperkt toestaat, het inkoopbeleid van zijn toekomstige opdrachtnemer te beïnvloeden. Zijn verlangens inzake dat beleid moeten concreet betrekking hebben op het voorwerp van de overheidsopdracht(30) en mogen niet het inkoopbeleid in het algemeen betreffen. De aanbestedende dienst mag dus niet verlangen dat potentiële inschrijvers uitsluitend fairtradeproducten in hun assortiment opnemen, maar alleen dat de aan hem in het kader van een bepaalde overheidsopdracht te leveren producten fairtradeproducten zijn. In het onderhavige geval heeft de Provincie Noord-Holland niets anders verlangd.

89. Vanuit het oogpunt van het transparantiegebod, dat in het kader van artikel 26 van richtlijn 2004/18 in acht moet worden genomen(31), bestaan er evenmin principiële bezwaren tegen dat een aanbestedende dienst ter verduidelijking van de door hem gestelde sociale voorwaarden voor de uitvoering van de opdracht verwijst naar een fairtradekeurmerk en daarbij de aan dat keurmerk ten grondslag liggende criteria niet in alle details vermeldt. Zoals ik al zei met betrekking tot milieukeuren(32), kan van de redelijk geïnformeerde en normaal zorgvuldige inschrijver worden verwacht dat hij de op de betrokken markt gebruikte milieukeuren kent althans dat hij bij de desbetreffende certificeringsautoriteiten informatie inwint over de door hen gehanteerde criteria.

90. De aanbestedingsprocedure en de latere uitvoering van de opdracht kunnen zelfs in aanzienlijke mate worden vergemakkelijkt wanneer het de betrokken ondernemingen wordt toegestaan, onder verwijzing naar fairtradekeurmerken aan te tonen dat zij voldoen aan de door de aanbestedende dienst gestelde sociale voorwaarden. Op die manier worden de administratieve lasten zowel voor de aanbestedende dienst als voor de potentiële inschrijvers en de latere opdrachtnemer tot een minimum beperkt.

91. Anders dan de Commissie ter terechtzitting te kennen heeft gegeven, kan van een aanbestedende dienst bepaald niet worden verlangd dat hij in de aanbestedingsvoorwaarden steeds zijn eigen voorstellingen over het begrip eerlijke handel uiteenzet. In de meeste gevallen zal hij daartoe alleen al niet over de nodige vakkennis beschikken. Bovendien zouden uiteenlopende opvattingen van aanbestedende diensten over wat eerlijke handel is (bijvoorbeeld prijsniveau, passende duur van de betrekkingen tussen de handelaren en de

producenten in ontwikkelingslanden en aard en omvang van de voorfinanciering van de productie(33)), een ernstig gevaar voor marktversplintering meebrengen. In het belang van zowel de potentiële inschrijver als de aanbestedende diensten moeten derhalve bij overheidsopdrachten voor leveringen verwijzingen naar fairtradekeurmerken worden toegestaan.

92. Wel moeten de door de aanbestedende dienst vastgelegde sociale voorwaarden voor de uitvoering van een opdracht overeenkomstig artikel 26 van richtlijn 2004/18 verenigbaar zijn met het recht van de Unie. Dat betekent inzonderheid dat van rechtstreekse of indirecte discriminatie geen sprake mag zijn.(34)

93. Dit laatste vereiste is in de onderhavige zaak niet in acht genomen. De Provincie Noord-Holland heeft het keurmerk Max Havelaar immers niet slechts ter verduidelijking van haar sociaalpolitieke opvattingen over eerlijke handel gebruikt. Evenmin heeft zij louter aangegeven dat van het keurmerk Max Havelaar voorziene producten worden geacht te voldoen aan haar sociaalpolitieke eisen voor de uitvoering van de opdracht. Zij heeft juist het keurmerk Max Havelaar als zodanig dwingend voorgeschreven, zodat alleen koffie en thee met dit specifieke keurmerk – met uitsluiting van alle andere koffie en thee – konden worden geleverd.(35)

94. Daarmee heeft zij in de plaats ondernemingen – inzonderheid ondernemingen uit andere lidstaten – die koffie en thee met een ander dan het vooral in Nederland en België gebruikelijke keurmerk Max Havelaar verhandelen benadeeld. Ook heeft zij ondernemingen die in hun assortiment koffie en thee uit eerlijke handel voeren zonder daartoe een keurmerk te bezitten, benadeeld.(36)

95. Gelet op het voorgaande kan worden geconcludeerd dat voor zover de Provincie Noord-Holland voor de te leveren koffie en thee dwingend een bepaald fairtradekeurmerk – het keurmerk Max Havelaar – heeft voorgeschreven, zij in strijd met artikel 26 van richtlijn 2004/18 heeft gehandeld.

96. Zoals gezegd(37), doet daaraan niet af dat de aanbestedende dienst nadien in punt 11 van zijn nota van inlichtingen heeft verduidelijkt dat de vermelding van het keurmerk Max Havelaar moest worden gelezen met de toevoeging „of gelijkwaardig”.

97. Slechts zijdelings merk ik op dat bovenstaande overwegingen met betrekking tot artikel 26 van richtlijn 2004/18 ook gelden voor artikel 23, lid 8, van deze richtlijn, mocht het Hof deze laatste bepaling – in afwijking van mijn betoog hierboven(38) – toepasselijk achten.

3. Samenvatting bij de eerste grief

98. De eerste grief van de Commissie is slechts gedeeltelijk gegrond. Hij is gegrond voor zover daarmee schending van artikel 23, lid 6, van richtlijn 2004/18 wordt aangevoerd, maar moet worden verworpen voor de beweerde schending van artikel 23, lid 8.

B – *Derde grief: verwijzing in de gunningscriteria naar de keurmerken Max Havelaar en EKO met het oog op de te leveren ingrediënten*

99. Aangezien de derde grief van de Commissie thematisch nauw samenhangt met de eerste, kan hij het best onmiddellijk in aansluiting op deze laatste worden onderzocht. De derde grief heeft betrekking op de beweerde inbreuk op artikel 53, lid 1, sub a, van richtlijn 2004/18, waaruit blijkt welke gunningscriteria de aanbestedende dienst voor de gunning mag hanteren. Deze bepaling zou geschonden zijn doordat de Provincie Noord-Holland bij de formulering van haar gunningscriteria naar het keurmerk Max Havelaar en/of het keurmerk EKO heeft verwezen althans naar keurmerken met dezelfde criteria.

100. Concreet heeft deze grief betrekking op punt 35 van het programma van eisen, waarin de inschrijvers in kennis werden gesteld van de „wens” van de Provincie Noord-Holland dat de „ingrediënten” (te weten suiker, melkpoeder en cacao) „indien mogelijk” aan het EKO- en/of

Max Havelaar-keurmerk voldeden. Voor het voldoen aan deze „wens” konden tot 15 punten worden toegekend. In punt 12 van de nota van inlichtingen gaf de aanbestedende dienst voorts te kennen dat hij ook „gelijkwaardige” keurmerken zou aanvaarden, waaraan hij toevoegde dat de „ingrediënten [...] van een keurmerk [mochten] zijn met dezelfde uitgangspunten” als de keurmerken Max Havelaar en EKO.

1. Opmerking vooraf

101. Artikel 53, lid 1, sub a, van richtlijn 2004/18 vindt toepassing wanneer de aanbestedende dienst – zoals in de onderhavige zaak – heeft besloten de opdracht te gunnen aan de economisch meest voordelige inschrijver.(39) Zoals duidelijk blijkt uit de bewoordingen van deze bepaling, inzonderheid uit het gebruik van de uitdrukking „zoals”, bevat richtlijn 2004/18 zelf geen uitputtende opsomming van de criteria voor de bepaling van de economisch meest voordelige offerte.(40)

102. Het hoeft hierbij niet noodzakelijkerwijs om economische criteria te gaan. De waarde van een offerte voor de aanbestedende dienst kan immers ook worden beïnvloed door factoren die verder gaan dan zuiver economische overwegingen. Dat blijkt reeds uit de bewoordingen van artikel 53, lid 1, sub a, van richtlijn 2004/18, volgens welke bij de bepaling van de economisch meest voordelige inschrijving de esthetische en functionele kenmerken en de milieukenmerken een rol kunnen spelen.(41)

103. In die omstandigheden spreekt niets ertegen dat een aanbestedende dienst in het kader van de vaststelling van de economisch meest voordelige offerte mede ecologische en sociale overwegingen in de beschouwing betrekt.(42)

104. Niettemin betekent deze vaststelling niet dat elk criterium van deze aard door de aanbestedende dienst in aanmerking mag worden genomen. Volgens de rechtspraak zijn alleen criteria toelaatbaar aan de hand waarvan daadwerkelijk de economisch meest voordelige offerte kan worden vastgesteld.(43)

105. Dienaangaande heeft de aanbestedende dienst geen onbeperkte beslissingsvrijheid.(44) De bewoordingen van artikel 53, lid 1, sub a, van richtlijn 2004/18 tonen immers aan dat de gehanteerde criteria verband moeten houden met het voorwerp van de opdracht.(45) De inschrijving met de beste prijs-kwaliteitverhouding moet aan de hand ervan kunnen worden bepaald.(46) Bovendien moet het gaan om objectieve criteria waarbij het discriminatieverbod en de beginselen van transparantie, non-discriminatie en gelijke behandeling in acht worden genomen en de beoordeling van de inschrijvingen onder voorwaarden van daadwerkelijke mededinging wordt gegarandeerd.(47)

106. Deze beginselen zijn volgens de Commissie in het onderhavige geval in twee opzichten geschonden. In de eerste plaats houden de keurmerken Max Havelaar en EKO volgens haar geen verband met het voorwerp van de opdracht (zie hieronder, deel 2). In de tweede plaats zou de Provincie Noord-Holland beide keurmerken als zodanig tot gunningscriterium hebben verheven in plaats van enkel de eraan ten grondslag liggende inhoudelijke eisen in acht te nemen (zie hieronder deel 3). Deze twee argumenten van de Commissie moeten hierna nader worden behandeld.

2. Eerste argument in het kader van de derde grief: beweerdelijk ontbreken van een verband tussen het voorwerp van de opdracht en de twee keurmerken

107. Om te beginnen geeft de Commissie te kennen dat er geen verband bestaat tussen het voorwerp van de opdracht en de twee door de Provincie Noord-Holland vermelde keurmerken EKO en Max Havelaar omdat deze keurmerken enkel betrekking zouden hebben op het algemene inkoopbeleid van de potentiële inschrijvers.

108. Deze argumenten zijn niet overtuigend en zijn overigens in tegenspraak met hetgeen de Commissie zelf in het kader van haar eerste grief betoogt.(48) Anders dan de Commissie te

kennen geeft, vertonen de twee aan de orde zijnde keurmerken voldoende verband met het voorwerp van de opdracht.

109. Zo betreft het keurmerk EKO rechtstreeks de producteigenschappen – om preciezer te zijn de milieukenmerken – van de te leveren ingrediënten. Wanneer een keurmerk door de Commissie zelf in het kader van artikel 23, lid 6, juncto artikel 23, lid 3, sub b, van richtlijn 2004/18 als technische specificatie ter bepaling van de prestatie-eisen of functionele eisen van de te leveren producten is ingedeeld, kan niet in het kader van artikel 53, lid 1, van richtlijn 2004/18 ieder verband met het voorwerp van de opdracht worden ontkend.

110. Wat vervolgens het keurmerk Max Havelaar betreft, dit definieert weliswaar geen producteigenschappen in eigenlijke zin, zoals die in het kader van de technische specificaties (artikel 23 van richtlijn 2004/18)(49), maar verschaft informatie over de vraag of sprake is van fairtradeproducten. Een dergelijk aspect kan in het kader van de voorwaarden waaronder de opdracht wordt uitgevoerd (artikel 26 van richtlijn 2004/18) in de beschouwing worden betrokken.(50) Van dit keurmerk kan dus niet bij voorbaat worden gezegd dat het verband met het voorwerp van de opdracht (in casu de levering van „ingrediënten" zoals suiker, melkpoeder en cacao) ontbreekt. Voor een aanbestedende dienst die blijkens de aanbestedingsstukken waarde hecht aan sociaal verantwoord handelen, kan het immers bij de bepaling van de verhouding prijs-prestatie zeer goed een rol spelen of de te leveren producten onder eerlijke voorwaarden bij de producent zijn betrokken. Strikt genomen smaakt suiker weliswaar niet verschillend naargelang hij al dan niet afkomstig is uit eerlijke handel, maar dat neemt niet weg dat een product dat onder oneerlijke voorwaarden op de markt is gekomen bij een klant die verantwoordelijkheidsgevoel heeft een bittere nasmaak heeft.

111. Het zou stellig te ver gaan wanneer een aanbestedende dienst in het kader van de vaststelling van de economisch meest voordelige inschrijving het algemene inkoopbeleid van de potentiële inschrijvers zou willen beoordelen en daarbij in aanmerking zou willen nemen of alle producten in zijn assortiment – ongeacht of zij voorwerp van de opdracht zijn – fairtradeproducten zijn.(51)

112. Van een zo vergaande inaanmerkingneming van het fairtrade-aspect kan in casu echter geen sprake zijn. Zoals de Nederlandse regering terecht heeft opgemerkt, heeft de Provincie Noord-Holland in punt 35 van het programma van eisen alleen maar als criterium aangeduid dat de te leveren ingrediënten voorzien zouden zijn van een keurmerk waaruit bleek dat het ging om fairtradeproducten. Het gebruik van het keurmerk Max Havelaar in de betrokken aanbestedingsstukken vertoonde dan ook een duidelijk specifiek verband met het voorwerp van de opdracht.

113. Het eerste argument van de Commissie in het kader van haar derde grief moet dan ook worden verworpen.

3. Tweede argument in het kader van de derde grief: verwijzing naar keurmerken in plaats van naar de eraan ten grondslag liggende criteria

114. Thans moet nog worden onderzocht of inbreuk is gemaakt op artikel 53, lid 1, sub a, van richtlijn 2004/18 door de manier waarop de Provincie Noord-Holland in het onderhavige geval in punt 35 van het programma van eisen de keurmerken EKO en Max Havelaar heeft vermeld.

115. Partijen interpreteren de feiten in zoverre verschillend. Terwijl de Commissie ervan uitgaat dat de aanbestedende dienst voor de te leveren „ingrediënten" (te weten suiker, melkpoeder en cacao) de keurmerken EKO en Max Havelaar als gunningscriterium heeft gehanteerd, betoogt de Nederlandse regering dat de Provincie Noord-Holland alleen heeft willen verwijzen naar de aan beide keurmerken ten grondslag liggende inhoudelijke eisen.

116. Voor de zienswijze van de Commissie spreken de sterkste argumenten.

117. Het is juist dat de Provincie Noord-Holland zowel in de aankondiging van haar

aanbesteding in het *Publicatieblad van de Europese Unie* als in het bestek in algemene formuleringen te kennen had gegeven dat zij in haar koffieautomaten meer biologische producten en fairtradeproducten wilde gebruiken. In punt 35 van het programma van eisen gaf zij echter de „wens" te kennen dat de ingrediënten „indien mogelijk" aan het EKO- „en/of" Max Havelaar-keurmerk voldeden. Deze uitspraak heeft zij in punt 12 van de nota van inlichtingen gepreciseerd door aan te geven dat de ingrediënten een ander keurmerk mochten hebben met dezelfde uitgangspunten als de keurmerken EKO en Max Havelaar. Van biologische producten en fairtradeproducten *zonder keurmerk* was echter noch in het programma van eisen noch in de nota van inlichtingen sprake.

118. De potentiële inschrijver, wiens begrip bij de lezing van de aanbestedingsvoorwaarden voorop staat(52), kon dit alles alleen maar aldus begrijpen dat de door hem te leveren ingrediënten het keurmerk EKO en/of het keurmerk Max Havelaar moesten dragen om het er in de aanbestedingsprocedure zo goed mogelijk af te brengen.

119. Een dergelijk handelen van de aanbestedende dienst strookt niet met de eisen die artikel 53, lid 1, sub a, van richtlijn 2004/18 aan de formulering van gunningscriteria stelt.

120. Anders dan de Commissie meent, ligt dit niet aan een vermeend gebrek aan transparantie (53) bij de verwijzing naar de twee keurmerken. Zoals gezegd(54) kan van de redelijk geïnformeerde en normaal zorgvuldige inschrijver immers zonder meer worden verwacht dat hij de op de betrokken markt gebruikte milieukeuren kent althans dat hij bij de desbetreffende certificeringsautoriteiten informatie inwint over de door hen gehanteerde criteria.

121. Het zou ook zonder meer mogelijk zijn dat potentiële inschrijvers producten aanbieden met andere keurmerken, met dezelfde uitgangspunten als de keurmerken EKO en Max Havelaar. In zoverre heeft de Nederlandse regering immers onweersproken te kennen gegeven dat het EKO-keurmerk(55) uitsluitend berust op de criteria van de zogenaamde EG-ecoverordening(56), en het keurmerk Max Havelaar is inhoudelijk gelijk aan het internationaal verbreide fairtradekeurmerk dat door de bij de Fairtrade Labelling Organisation aangesloten instanties in talrijke landen wordt afgegeven.(57)

122. Het is echter in strijd met het beginsel van non-discriminatie en gelijke behandeling(58) en met het beginsel van daadwerkelijke mededinging op het gebied van overheidsopdrachten(59), die in het kader van artikel 53, lid 1, sub a, van richtlijn 2004/18 moeten worden geëerbiedigd (60), wanneer een aanbestedende dienst – zoals in casu de Provincie Noord-Holland – in het kader van de gunningscriteria extra punten geeft wanneer de te leveren producten van keurmerken op het gebied van de biologische productie en eerlijke handel zijn voorzien. Ondernemingen die biologische producten en fairtradeproducten in hun assortiment hebben zonder daarvoor een keurmerk te bezitten worden daardoor immers benadeeld. Potentiële inschrijvers moeten de mogelijkheid behouden, aan te tonen dat hun producten voldoen aan de door de aanbestedende dienst geformuleerde gunningscriteria, ook wanneer zij andere dan de door de aanbestedende dienst genoemde keurmerken of helemaal geen keurmerk dragen.

123. In dit verband moet worden afgewezen de tegenwerping van Nederland dat de keurmerken EKO en Max Havelaar met betrekking tot de te leveren „ingrediënten" geen dwingende eisen waren, maar slechts niet-bindende „wensen" van de aanbestedende dienst, waarvoor een gering aantal punten kon worden toegekend. Het al dan niet slagen in een aanbestedingsprocedure met een op punten gebaseerd beoordelingssysteem kan in voorkomend geval immers reeds worden bepaald door weinig punten. Voorts moeten alle gunningscriteria – ook de criteria waaraan de aanbestedende dienst verhoudingsgewijs weinig gewicht toekent – onverkort aan de fundamentele beginselen voor aanbestedingen, dat wil zeggen gelijke behandeling en non-discriminatie, voldoen. Die beginselen moeten volgens vaste rechtspraak in alle stadia van de aanbestedingsprocedure in acht worden genomen.(61)

124. Over het geheel genomen moet dus schending van artikel 53, lid 1, sub a, van richtlijn 2004/18 worden vastgesteld. De derde grief van de Commissie moet dan ook worden aanvaard.

C – *Tweede grief: vermeende verwijzing naar duurzaam inkopen en maatschappelijk verantwoord ondernemen als geschiktheidscriterium*

125. De tweede grief van de Commissie is ontleend aan artikel 2, artikel 44, lid 2, en artikel 48, leden 1 en 2, van richtlijn 2004/18, betreffende het transparantiebeginsel (artikel 2) en andere voorwaarden voor het onderzoek van de bekwaamheid van ondernemers door de aanbestedende dienst (artikelen 44 en 48). Deze voorschriften zijn volgens de Commissie geschonden doordat de Provincie Noord-Holland criteria heeft vastgesteld en bewijzen heeft verlangd die – aldus de Commissie – heel in het algemeen betrekking hadden op duurzaam inkopen en maatschappelijk verantwoord ondernemen door de potentiële inschrijvers.

126. Meer bepaald heeft deze grief betrekking op rubriek 4.4.4 van het bestek, waarin de Provincie Noord-Holland van de potentiële inschrijvers verlangt dat zij „voldoe[n] aan de criteria van duurzaam inkopen en maatschappelijk verantwoord ondernemen". Bovendien wordt de inschrijvers in dezelfde rubriek gevraagd aan te geven „[o]p welke wijze geeft [zij] invulling [geven] aan de criteria van duurzaam inkopen en maatschappelijk verantwoord ondernemen" en „op welke wijze [zij] bijdra[gen] aan het duurzamer maken van de koffiemarkt en aan een milieutechnisch, sociaal en economisch verantwoorde koffieproductie".(62)

1. Eerste deel van de tweede grief: vermeende ontoelaatbare eisen met betrekking tot het bewijs van de technische bekwaamheid van de inschrijvers (artikel 48, lid 1, juncto artikel 48, lid 2, van richtlijn 2004/18)

127. Het eerste deel van de tweede grief is speciaal gewijd aan de vereisten aangaande het bewijs van de technische bekwaamheid van de inschrijvers. Volgens de Commissie heeft de Provincie Noord-Holland in het bestek met haar verklaringen betreffende duurzaam inkopen en maatschappelijk verantwoord ondernemen voor de potentiële inschrijver de grenzen overschreden van het enge kader dat in artikel 48 van richtlijn 2004/18 is vastgelegd voor de beoordeling en het onderzoek van de technische bekwaamheid en beroepsbekwaamheid van de marktdeelnemer.

128. De Nederlandse regering merkt echter terecht op dat dit deel van de tweede grief op onjuiste lezing van rubriek 4.4.4 van het bestek berust. De eisen die daar aan potentiële inschrijvers worden gesteld hebben namelijk helemaal geen betrekking op hun technische bekwaamheid en beroepsbekwaamheid. Zoals reeds uit het opschrift van rubriek 4.4.4 kan worden afgeleid, gaat het hier veeleer om „kwaliteitseisen" voor de te verrichten prestaties.

129. Ook een blik op de algemene context waarin rubriek 4.4.4 zich bevindt bevestigt deze indruk. Zo draagt onderafdeling 4.4 het opschrift „Geschiktheidseisen/minimumeisen", hetgeen erop duidt dat het daar niet alleen gaat om de geschiktheid van de potentiële bieders (respectievelijk hun bekwaamheid) – rubriek 4.4.3 is bijvoorbeeld gewijd aan de ervaring van de inschrijvers – maar ook om andere aspecten. Tot die aspecten behoort ook het antwoord op de hier aan de orde zijnde vraag, hoe de betrokken inschrijver denkt te voldoen aan de eisen op het gebied van duurzaamheid en maatschappelijk verantwoord ondernemen (rubriek 4.4.4 van het bestek).

130. Daarmee valt de litigieuze rubriek 4.4.4 van het bestek, anders dan de Commissie meent, al helemaal niet onder het toepassingsgebied van artikel 48, leden 1 en 2, van richtlijn 2004/18 en kan zij dus niet aan deze bepaling worden getoetst.

131. Voor het geval het Hof genoemde bepaling van de richtlijn toch mocht willen toepassen, zou deze zich niet verzetten tegen voorwaarden als vervat in rubriek 4.4.4 van het bestek.

132. Het staat vast dat artikel 48 van richtlijn 2004/18 een uitputtende opsomming geeft van de bewijzen van de technische bekwaamheid die aanbestedende diensten van de marktdeelnemers mogen verlangen.(63)

133. Met haar „kwaliteitseisen" in rubriek 4.4.4 van het bestek kon de Provincie Noord-Holland

echter terugvallen op een van de clausules van artikel 48, lid 2, van richtlijn 2004/18, en wel op het bepaalde sub c, waar voor het bewijs van de technische bekwaamheid van een leverancier uitdrukkelijk een „beschrijving van de [...] maatregelen die hij treft om de kwaliteit te waarborgen” wordt genoemd. Daarop heeft de Nederlandse regering terecht de aandacht gevestigd.

134. De grief betreffende schending van artikel 48 van richtlijn 2004/18 is dus ongegrond.

2. Tweede deel van de tweede grief: vermeend ontbrekend verband tussen de eisen betreffende de geschiktheid van de inschrijvers en het voorwerp van de opdracht (artikel 44, lid 2, van richtlijn 2004/18)

135. Het tweede deel van de tweede grief berust op artikel 44, lid 2, van richtlijn 2004/18. Deze bepaling houdt in wezen in dat de aanbestedende dienst bepaalde minimumeisen mag stellen aan de geschiktheid van de potentiële inschrijvers voor zover deze verband houden met en in verhouding staan tot het voorwerp van de opdracht.(64)

136. Volgens de Commissie is artikel 44, lid 2, van richtlijn 2004/18 geschonden omdat de uiteenzettingen in het bestek betreffende duurzaam inkopen en maatschappelijk verantwoord ondernemen van de potentiële inschrijvers geen verband houden met het voorwerp van de onderhavige overheidsopdracht, maar veeleer betrekking hebben op het algemene inkoopbeleid van de marktdeelnemers.

137. Dit verwijt kan niet op de enkele grond dat Nederland er zich in de administratieve procedure maar half tegen heeft verweerd(65) als toegegeven worden beschouwd. Volgens vaste rechtspraak verplicht immers geen enkele procedureregel de betrokken lidstaat om in het kader van een niet-nakomingsprocedure krachtens artikel 258 VWEU reeds tijdens de precontentieuze fase alle argumenten voor zijn verdediging aan te voeren.(66) In elk geval heeft Nederland in de gerechtelijke procedure nadrukkelijk verweer gevoerd tegen de verweten schending van artikel 44, lid 2, van richtlijn 2004/18.

138. Het verwijt dat artikel 44, lid 2, van richtlijn 2004/18 geschonden is moet echter ook ten gronde worden afgewezen. Om te beginnen gaat het bij de hier aan de orde zijnde rubriek 4.4.4 van het bestek zoals gezegd niet om een vereiste met betrekking tot de geschiktheid of technische bekwaamheid van de potentiële inschrijver(67), zodat artikel 44 van richtlijn 2004/18 al helemaal geen toepassing kan vinden. In de tweede plaats is het uitgesloten dat rubriek 4.4.4 van het bestek onvoldoende verband houdt met het voorwerp van de opdracht.

139. Voorwerp van de opdracht was – voor zover hier van belang – de levering van koffie, thee en overige „ingrediënten” voor koffieautomaten, waarbij de aanbestedende dienst uitdrukkelijk waarde hechtte aan „duurzame” producten van biologische herkomst en afkomstig uit eerlijke handel. Dergelijke eisen dienen, zoals uiteengezet in het kader van de eerste grief, ten dele ter beschrijving van de producteigenschappen van de te leveren waren (milieukenmerken in de zin van artikel 23 van richtlijn 2004/18), en ten dele ter beschrijving van overige voorwaarden voor de uitvoering van de opdracht (sociale belangen in de zin van artikel 26 van richtlijn 2004/18).

140. Nu derhalve duurzaamheid en milieuvriendelijkheid een belangrijke rol voor de afwikkeling van de onderhavige overheidsopdracht speelden, had de aanbestedende dienst gegronde redenen, de potentiële inschrijvers de vraag te stellen op welke wijze zij „invulling [gaven] aan de criteria van duurzaam inkopen en maatschappelijk verantwoord ondernemen” en in hoeverre zij „bijdr[oegen] aan het duurzamer maken van de koffiemarkt en aan een milieutechnisch, sociaal en economisch verantwoorde koffieproductie”.

141. Het is zonder meer legitiem wanneer een aanbestedende dienst de potentiële inschrijvers de vraag voorlegt hoe zij de door hem vastgelegde doelstellingen denken te bereiken. Anders dan de Commissie meent, gaat het daarbij niet in de eerste plaats om het algemene inkoopbeleid van de potentiële inschrijvers, maar veeleer om hun inkoopgedrag met betrekking tot de heel concreet te leveren producten, dus koffie, thee en de overige „ingrediënten”.(68)

142. Het verwijt van schending van artikel 44, lid 2, van richtlijn 2004/18 is dus eveneens ongegrond.

3. Derde deel van de tweede grief: vermeende schending van het algemene transparantiegebod (artikel 2 van richtlijn 2004/18)

143. In het derde deel van haar tweede grief beroept de Commissie zich tot slot subsidiair op schending van het algemene transparantiegebod van artikel 2 van richtlijn 2004/18.(69)

144. Dit fundamentele beginsel van Europees recht op het gebied van overheidsopdrachten dient voornamelijk elk risico van favoritisme en willekeur van de aanbestedende dienst uit te sluiten. Het impliceert dat alle voorwaarden en modaliteiten van de gunningsprocedure in de aankondiging of in het bestek duidelijk, nauwkeurig en ondubbelzinnig worden geformuleerd, opdat alle gemiddeld vakkundige inschrijvers bij inachtneming van de gebruikelijke zorgvuldigheid de precieze betekenis kunnen begrijpen en deze op dezelfde manier kunnen interpreteren, en de aanbestedende dienst in staat is metterdaad na te gaan of de offertes van de inschrijvers beantwoorden aan de criteria die op de betrokken opdracht van toepassing zijn. (70)

145. Die Commissie voert aan dat de eisen in rubriek 4.4.4 van het bestek te algemeen en te onnauwkeurig zijn geformuleerd.

146. Ik deel dit standpunt. Uit de bewuste passage in het bestek wordt onvoldoende duidelijk welke verduidelijkingen en welke bewijzen de aanbestedende dienst van de potentiële inschrijvers verlangt. Met de door de Provincie Noord-Holland gekozen formulering is het bovendien niet zeker, wat precies wordt bedoeld met „duurzaam inkopen en maatschappelijk verantwoord ondernemen" en „bijdragen aan het duurzamer maken van de koffiemarkt en aan een milieutechnisch, sociaal en economisch verantwoorde koffieproductie".

147. Hier zou een nauwkeuriger beschrijving van wat de Provincie Noord-Holland van de potentiële inschrijvers verwachtte op zijn plaats zijn geweest. Zo had de Provincie vragen kunnen stellen over eventuele contractuele afspraken van de potentiële inschrijvers met hun toeleveranciers over eerlijke handel en biologische productie. Ook had de Provincie de potentiële inschrijvers kunnen vragen mee te delen welke maatregelen zij hadden getroffen om erop toe te zien dat die afspraken werden nagekomen.

148. Het argument van de Nederlandse regering dat meerdere internationale organisaties het begrip duurzaamheid hebben gedefinieerd was in elk geval te weinig onderbouwd om de grief betreffende het gebrek aan transparantie te kunnen ontkrachten.

149. Bijgevolg moet worden vastgesteld dat artikel 2 van richtlijn 2004/18 geschonden is. Het derde deel van de derde grief van de Commissie is dus gegrond.

D – *Samenvatting*

150. Gelet op al het voorgaande kan worden vastgesteld dat de aanbestedende diensten volgens richtlijn 2004/18 in de aanbestedingsprocedure zonder meer rekening mogen houden met ecologische en sociale belangen, en dat zij daartoe uitdrukkelijk ook in de aanbestedingsvoorwaarden melding mogen maken van keurmerken op het gebied van milieu en eerlijke handel.

151. De aanbestedende dienst mag echter niet verlangen dat de aan hem te leveren producten een heel concreet keurmerk dragen. Hij moet ook andere keurmerken toelaten en producten zonder enig keurmerk voor zover de milieukenmerken en de voorwaarden waaronder zij worden vervaardigd en in de handel worden gebracht gelijkwaardig zijn aan de door de aanbestedende dienst gestelde eisen.

152. Bovendien mag de aanbestedende dienst bij de gunning van zijn opdracht niet het

algemene inkoopbeleid van de inschrijver in de beschouwing betrekken, maar alleen diens inkoopgedrag met betrekking tot de in het concrete geval te leveren producten. Wanneer de aanbestedende dienst van de inschrijver informatie en bewijzen aangaande de duurzaamheid van zijn producten en zijn bedrijfspolitiek verlangt, moet dit voldoende nauw verband houden met het voorwerp van de opdracht en concreet zijn geformuleerd.

153. In het onderhavige geval heeft de Provincie Noord-Holland zich slechts gedeeltelijk aan deze regels gehouden. In haar voorwaarden voor de gunning van de litigieuze overheidsopdracht uit 2008 heeft zij drie voorschriften van het recht van de Unie geschonden: artikel 2, artikel 23, lid 6, en artikel 53, lid 1, sub a, van richtlijn 2004/18. Daarentegen zijn de overige door de Commissie aangevoerde bepalingen, te weten artikel 23, lid 8, artikel 44, lid 2, en artikel 48, leden 1 en 2, van richtlijn 2004/18 niet geschonden.

**VI – Kosten**

154. Overeenkomstig artikel 69, lid 3, van het Reglement voor de procesvoering kan het Hof de proceskosten over de partijen verdelen of beslissen dat elke partij haar eigen kosten zal dragen. Deze regeling vindt onder meer toepassing wanneer elke partij ten dele in het gelijk en ten dele in het ongelijk wordt gesteld.

155. Gelet op het voorgaande moet de Commissie in deze zaak met betrekking tot het eerste deel van haar eerste grief, het derde deel van haar tweede grief en haar derde grief in het gelijk worden gesteld, terwijl zij met betrekking tot het tweede deel van haar eerste grief en het eerste en het tweede deel van haar tweede grief in het ongelijk moet worden gesteld.

156. In deze omstandigheden komt het mij voor dat elk der partijen in haar eigen kosten moet worden veroordeeld.(71)

**VII – Conclusie**

157. Op grond van het bovenstaande geef ik het Hof in overweging als volgt te beslissen:

„1) Het Koninkrijk der Nederlanden heeft niet voldaan aan de krachtens de Verdragen op hem rustende verplichtingen doordat de Provincie Noord-Holland in het jaar 2008 in de procedure voor de gunning van een overheidsopdracht voor de levering en het beheer van koffieautomaten

– in strijd met artikel 23, lid 6, van richtlijn 2004/18 dwingend heeft voorgeschreven dat de te leveren koffie en thee het EKO-keurmerk of een op vergelijkbare criteria berustend keurmerk droegen,

– in de voorwaarden voor de uitvoering van de opdracht in strijd met artikel 2 van richtlijn 2004/18 onnauwkeurige ‚kwaliteitseisen' voor potentiële inschrijvers met betrekking tot ‚duurzaam inkopen en maatschappelijk verantwoord ondernemen' heeft opgenomen en

– in het kader van de gunningscriteria in strijd met artikel 53, lid 1, sub a, van richtlijn 2004/18 heeft aangegeven dat extra punten werden toegekend indien de te leveren ‚ingrediënten' waren voorzien van de keurmerken EKO en/of Max Havelaar of van een op dezelfde criteria berustend keurmerk.

2) Het beroep wordt verworpen voor het overige.

3) Elke partij zal haar eigen kosten dragen."

---

1 – Oorspronkelijke taal: Duits.

---

2 – PB L 134, blz. 114, gerectificeerd in PB L 351, blz. 44.

3 – PB 2008, S 158-213630.

4 – Afdeling II, punt 1.5 van de aankondiging.

5 – Afdeling III, punt 1.4 van de aankondiging.

6 – Afdeling IV, punt 2.1 van de aankondiging.

7 – „Offerteaanvraag ‚Koffieautomaten'" van 11 augustus 2008 (Referentie: PNH-45096).

8 – Aankondiging van een gegunde opdracht, PB 2008, S 250-333033.

9 – In haar verweerschrift heeft de Nederlandse regering aangegeven dat de naam Max Havelaar is ontleend aan de titel van een van de bekendste boeken uit de Nederlandse literatuur: „Max Havelaar of de koffieveilingen der Nederlandse Handelsmaatschappij". Dit boek werd in 1859 geschreven door Multatuli (pseudoniem voor Eduard Douwes Dekker). Het boek handelt over de sociale misstanden in de koffieteelt in voormalig Nederlands-Indië (tegenwoordig Indonesië) als gevolg van het Nederlandse koloniale beleid.

10 Zie daartoe de website www.fairtrade.net (voor het laatst bezocht op 25 oktober 2011).

11 – In haar antwoord op de aanmaningsbrief gaf de Nederlandse regering nog toe dat de bepalingen van de artikelen 2, 23, lid 6, en 53 van de richtlijn „niet volledig naar de letter [waren] nageleefd", maar dit wordt in het antwoord op het met redenen omkleed advies niet meer herhaald.

12 – Zie daartoe vooral de arresten van 20 september 1988, Beentjes (31/87, Jurispr. blz. 4635, punten 28-30), en 17 september 2002, Concordia Bus Finland (C−513/99, Jurispr. blz. I−7213, punten 53−69), en de punten 1, 5, 29, 33, 44 en 46 van de considerans van richtlijn 2004/18.

13 – Interpretatieve mededeling van de Commissie van 4 juli 2001 betreffende het gemeenschapsrecht van toepassing op overheidsopdrachten en de mogelijkheden om milieuoverwegingen hierin te integreren [COM(2001) 274 def., PB C 333, blz. 12.]; interpretatieve mededeling van de Commissie van 15 oktober 2001 betreffende het gemeenschapsrecht van toepassing op overheidsopdrachten en de mogelijkheden om sociale aspecten hierin te integreren [COM (2001) 566 def., PB C 333, blz. 27]; mededeling van de Commissie van 16 juli 2008 aan het Europees Parlement, de Raad, het Europees Economisch en Sociaal Comité en het Comité van de Regio's „Overheidsopdrachten voor een beter milieu" [COM(2008) 400 def.]; mededeling van de Commissie van 5 mei 2009 aan de Raad, het Europees Parlement en het Europees Economisch en Sociaal Comité „Bijdragen aan een duurzame ontwikkeling: de rol van Fair Trade en niet-gouvernementele handelsgerelateerde programma's om duurzaamheid te waarborgen" [COM(2009) 215 def., blz. 10]; mededeling van de Commissie van 3 maart 2010 „EUROPA 2020 – Een strategie voor slimme, duurzame en inclusieve groei" [COM (2010) 2020 def., blz. 18 en 19].

14 Zie daartoe de algemene beschrijving van de opdracht in de aankondiging en in het bestek (kort weergegeven in de punten 15 en 17 van deze conclusie).

15 – Verordening (EG) nr. 1980/2000 van het Europees Parlement en de Raad van 17 juli 2000 inzake een herzien communautair systeem voor de toekenning van milieukeuren (PB L 237, blz. 1).

16 – Verordening (EG) nr. 66/2010 van het Europees Parlement en de Raad van 25 november 2009 betreffende de EU-milieukeur (PB L 27, blz. 1). Deze verordening heeft verordening nr. 1980/2000 per 19 februari 2010 ingetrokken.

17 – Zie daartoe de toelichtingen van de Commissie bij amendement 45 in het gewijzigd voorstel voor een richtlijn van het Europees Parlement en de Raad betreffende de coördinatie van de procedures voor het plaatsen van overheidsopdrachten voor leveringen, diensten en werken, COM(2002) 236 def. (PB C 203 E, blz. 210, 215, rechter kolom). Op een vraag van het Hof bleek op dit punt ter terechtzitting tussen partijen geen verschil van mening te bestaan.

18 – Artikel 2 en punt 2 van de considerans van richtlijn 2004/18.

19 – Zie ook de laatste zin van punt 29 van de considerans van richtlijn 2004/18; in dezelfde zin arrest van 29 april 2004, Commissie/CAS Succhi di Frutta (C−496/99 P, Jurispr. blz. I−3801, punt 111).

20 – Voor het criterium van de redelijk geïnformeerde en normaal zorgvuldige inschrijver, zie arrest van 4 december 2003, EVN en Wienstrom (C−448/01, Jurispr. blz. I−14527, punt 57), en arrest Commissie/CAS Succhi di Frutta (aangehaald in voetnoot 19, punt 111).

21 – Zie supra, punt 20.

22 – In die zin – met betrekking tot de bepaling van de waarde van een overheidsopdracht in de bouwsector – arrest van 18 januari 2007, Auroux e.a. (C−220/05, Jurispr. blz. I−385, punt 53).

23 – Zie in die zin ook artikel 23, lid 6, laatste zinsnede, en punt 29 van de considerans (inzonderheid de vijfde zin) van richtlijn 2004/18.

24 – Arresten van 22 juni 1993, Commissie/Denemarken (C−243/89, Jurispr. blz. I−3353, punt 30), en 6 oktober 2009, Commissie/Zweden (C−438/07, Jurispr. blz. I−9517, punt 53).

25 – In die zin beschikking van 27 september 2004, UER/M6 e.a. (C−470/02 P, niet gepubliceerd in de Jurisprudentie, punt 69), en arrest van 21 september 2010, Zweden/API en Commissie (C−514/07 P, C−528/07 P en C−532/07 P, nog niet gepubliceerd in de Jurisprudentie, punt 65).

26 – Conclusie van advocaat-generaal Léger van 2 april 1998 in de zaak Parlement/Gutiérrez de Quijano y Lloréns (C−252/96 P, Jurispr. 1998, blz. I−7421, punt 36).

27 – Zie punten 85-87 van de onderhavige conclusie.

28 Zie bijvoorbeeld arresten van 15 februari 2007, Commissie/Nederland (C−34/04, Jurispr. blz. I−1387, punt 49), en 15 juni 2010, Commissie/Spanje (C−211/08, nog niet gepubliceerd in de Jurisprudentie, punt 33).

29 – Zie punt 16 van de onderhavige conclusie.

30 – In die zin reeds – zij het ook met betrekking tot milieupolitieke gunningscriteria – arresten Concordia Bus Finland (aangehaald in voetnoot 12, punten 59, laatste zin, en 64) en EVN en Wienstrom (aangehaald in voetnoot 20, punt 66).

31 – Zie artikel 2 en punten 2 en 33 van de considerans van richtlijn 2004/18.

32 – Zie punt 56 van de onderhavige conclusie.

33 – Welke handelscondities passend zijn, kan bovendien per product en per producerend land zeer verschillend zijn. De certificeringsautoriteit die een fairtradekeurmerk afgeeft kan dit in geval van twijfel beter en objectiever beoordelen dan een leverancier of aanbestedende dienst.

34 – Punt 29 van de considerans van richtlijn 2004/18; in dezelfde zin arrest Beentjes (aangehaald in voetnoot 12, punt 30).

35 – Zie daartoe ook punt 66 van de onderhavige conclusie, met betrekking tot het keurmerk EKO.

36 – Zie daartoe ook punt 65 van de onderhavige conclusie, met betrekking tot het keurmerk EKO.

37 – Zie punt 67 van de onderhavige conclusie.

38 – Zie punten 74–81 van de onderhavige conclusie.

39 – Zie punt 16 van de onderhavige conclusie.

40 – In die zin, met betrekking tot de bepalingen die golden vóór artikel 53, lid 1, sub a, van richtlijn 2004/18, arrest Concordia Bus Finland (aangehaald in voetnoot 12, punt 54) en arresten van 18 oktober 2001, SIAC Construction (C–19/00, Jurispr. blz. I–7725, punt 35); 19 juni 2003, GAT (C–315/01, Jurispr. blz. I–6351, punt 63), en 24 januari 2008, Lianakis e.a. (C–532/06, Jurispr. blz. I–251, punt 29).

41 – In die zin reeds arrest Concordia Bus Finland (aangehaald in voetnoot 12, punt 55).

42 – Zie ook de vierde alinea van punt 46 van de considerans van richtlijn 2004/18.

43 – Arresten Beentjes (aangehaald in voetnoot 12, punt 19), SIAC Construction (aangehaald in voetnoot 40, punt 36), Concordia Bus Finland (aangehaald in voetnoot 12, punt 59), GAT (aangehaald in voetnoot 40, punt 64) en Lianakis e.a. (aangehaald in voetnoot 40, punten 29 en 30).

44 – Arresten Beentjes (aangehaald in voetnoot 12, punt 26), SIAC Construction (aangehaald in voetnoot 40, punt 37) en Concordia Bus Finland (aangehaald in voetnoot 12, punten 61 en 64) en arrest van 24 november 2005, ATI EAC e Viaggi di Maio e.a. („ATI EAC”, C–331/04, Jurispr. blz. I–10109, punt 21).

45 – In dezelfde zin reeds arresten Concordia Bus Finland (aangehaald in voetnoot 12, punten 59, laatste zin, en 64), EVN en Wienstrom (aangehaald in voetnoot 20, punt 66) en ATI EAC (aangehaald in voetnoot 44, punt 21).

46 – Derde alinea van punt 46 van de considerans van richtlijn 2004/18; zie bovendien punt 5 van de considerans van die richtlijn.

47 – Eerste alinea van punt 46 en punt 2 van de considerans van richtlijn 2004/18; in dezelfde zin arresten Concordia Bus Finland (aangehaald in voetnoot 12) en ATI EAC (aangehaald in voetnoot 44, punt 21).

48 – In het kader van haar eerste grief heeft de Commissie zowel het keurmerk EKO als het keurmerk Max Havelaar als technische specificatie beschouwd en ze aan artikel 23, leden 6 en 8, van richtlijn 2004/81 getoetst.

49 – Zie daartoe punten 74–81 van de onderhavige conclusie.

50 – Zie daartoe punten 85–87 van de onderhavige conclusie.

51 – Evenzo – zij het in een andere context – arresten Beentjes (aangehaald in voetnoot 12, punt 28, voor de algemene capaciteit van de inschrijver, langdurig werklozen in dienst te nemen) en EVN en Wienstrom (aangehaald in voetnoot 20, punten 70–72, voor de capaciteit van de inschrijver, de grootst mogelijke hoeveelheid elektriciteit boven de in de offerteaanvraag vastgelegde hoeveelheid te leveren). Zie ook punt 88 van de onderhavige conclusie.

52 – Zie daartoe punt 64 van de onderhavige conclusie.

53 – Eerste en tweede alinea van punt 46 van de considerans van richtlijn 2004/18.

54 – Zie daartoe punt 56 van de onderhavige conclusie.

55 – Zie daartoe punt 28 van de onderhavige conclusie.

56 – Ten tijde van de gunning van de litigieuze overheidsopdracht gold verordening (EEG) nr. 2092/91 van de Raad van 24 juni 1991 inzake de biologische productiemethode en aanduidingen dienaangaande op landbouwproducten en levensmiddelen (PB L 198, blz. 1), die later is vervangen door verordening (EG) nr. 834/2007 van de Raad van 28 juni 2007 inzake de biologische productie en de etikettering van biologische producten en tot intrekking van verordening (EEG) nr. 2092/91 (PB L 189, blz. 1).

57 – Zie punt 27 van de onderhavige conclusie.

58 – Eerste en vierde alinea van punt 46 van de considerans van richtlijn 2004/18.

59 – Punt 2 van de considerans van richtlijn 2004/18.

60 – In die zin arrest Beentjes (aangehaald in voetnoot 12, punt 29); arrest van 26 september 2000, Commissie/Frankrijk (C–225/98, Jurispr. blz. I–7445, punt 50), en arresten Concordia Bus Finland (aangehaald in voetnoot 12, punten 63 en 64) en EVN en Wienstrom (aangehaald in voetnoot 20, punt 69).

61 – Zie daartoe, op de meest verschillende gebieden van het recht inzake openbare aanbestedingen, arresten van 25 april 1996, Commissie/België (C–87/94, Jurispr. blz. I–2043, punt 54), en 12 december 2002, Universale-Bau e.a. (C–470/99, Jurispr. blz. I–11617, punt 93), en arresten EVN en Wienstrom (aangehaald in voetnoot 20, punt 56) en ATI EAC (aangehaald in voetnoot 44, punt 22).

62 – Zie punt 19 van de onderhavige conclusie.

63 – In die zin ook arresten van 10 februari 1982, Transporoute (76/81, Jurispr. blz. 417, punten 8, 9 en 15); 9 juli 1987, CEI (27/86–29/86, Jurispr. blz. 3347, punt 9), en 26 april 1994, Commissie/Italië (C−272/91, Jurispr. blz. I−1409, punt 35), alle met betrekking tot met artikel 48 van richtlijn 2004/18 vergelijkbare regelingen.

64 – Zie meer in het bijzonder artikel 44, lid 2, tweede alinea, van richtlijn 2004/18.

65 – De Commissie citeert uit bladzijde 6 van het antwoord van de Nederlandse regering op de aanmaningsbrief, waar Nederland zou hebben toegegeven dat de aan de orde zijnde aanbestedingsvoorwaarden „niet uitsluitend verband [hielden] met het voorwerp van de opdracht”.

66 – Arrest van 16 september 1999, Commissie/Spanje (C−414/97, Jurispr. blz. I−5585, punt 19), en arrest Commissie/Nederland (aangehaald in voetnoot 27, punt 49, aan het einde).

67 – Zie punten 128−130 van de onderhavige conclusie.

68 – Zie daartoe mijn uiteenzetting met betrekking tot de eerste en de derde grief (in het bijzonder punten 88 en 109-112 van de onderhavige conclusie).

69 – Zie ook punten 2 en 39 van de considerans van richtlijn 2004/18.

70 – Arrest Commissie/CAS Succhi di Frutta (aangehaald in voetnoot 19, punt 111); zo ook arresten van 14 oktober 2004, Commissie/Frankrijk (C−340/02, Jurispr. blz. I−9845, punt 34), en 10 december 2009, Commissie/Frankrijk (C−299/08, Jurispr. blz. I−11587, punt 41), waarin is verklaard dat het transparantiebeginsel gebiedt dat het voorwerp van de overheidsopdracht en de criteria voor de gunning van de opdracht duidelijk worden vastgelegd.

71 – In dezelfde zijn bijvoorbeeld arrest van 29 april 2010, Commissie/Duitsland (C−160/08, Jurispr. blz. I−3713, punt 133).

# LECTURE 11

## Environmental Law: General Principles and EIA

19 March 2012

work Directive,[69] Directive 91/156 on waste[70] and Directive 96/62 on ambient air quality assessment and management.[71]

The case law of the Court shows that the Court is in principle willing to review European legislation in the light of the proportionality principle. In the *Standley* case, the Court considered the Nitrates Directive. It was argued that this directive gave rise to disproportionate obligations on the part of farmers, so that it offended against the principle of proportionality. The Court was not impressed. After a careful study of the Nitrates Directive, it came to the conclusion:

> 'that the Directive contains flexible provisions enabling the Member States to observe the principle of proportionality in the application of the measures which they adopt. It is for the national courts to ensure that that principle is observed.' In general the Court, in its assessment of the proportionality of an EC measure, will apply the so called 'manifestly inappropriate' test: 'the legality of a measure adopted [...] can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.[73]

The conclusion in *Standley* that the flexible provisions of the directive enables the Member States to observe the principle of proportionality will be applicable to most, if not all, European environmental legislation.

*The integration principle*

One of the most important principles of EC law of relevance for environmental protection is the integration principle stated in Article 6 EC:[74] 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.'

[69] Directive 2000/60 establishing a framework for the Community action in the field of water policy - OJ 2000 L 327.

[70] OJ 1991 L 78/32.

[71] OJ 1996 L 296/55.

[72] Case C-293/97 *Standley* [1999] ECR I-2603. Cf. also Case C-102/97 *Commission* v. *Germany* [1999] ECR I-5051, para. 42. The same approach can also be found in the Court's judgment in Case C-6/99 *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651, on the precautionary principle; See below section 3.2 of this chapter.

[73] Case 331/88 *Fedesa* [1990] ECR I-4023. Cf. also more recently Case C-189/01 *Jippes* [2001] ECR I-5689, para. 83 and Case C-27/00 *Omega Air a.o.* [2002] ECR I-2569, para. 72. In the latter case, concerning threshold levels for noise produced by airplanes, the Court did not find that the Council committed a manifest error of assessment even if alternative measures could have been taken which would have been economically less damaging. Cf. also, with respect to the Waste Oils Directive, Case C-15/03 *Commission* v. *Austria* [2005] ECR I-837, para. 38 in particular and Case C-92/03 *Commission* v. *Portugal* [2005] ECR I-867.

[74] Cf. Article 11 FEU after the entry into force of the Reform Treaty.





The importance of the integration principle is reaffirmed in the Sixth Environment Action Programme, which stipulates that 'integration of environmental concerns into other policies must be deepened' in order to move towards sustainable development.[75] This refers to what is known as external integration, in other words, the integration of environmental objectives in other policy sectors. The principle was introduced into the Treaty by the Single European Act. There it was provided that 'Environmental protection requirements shall be a component of the Community's other policies.' It is notable that the current version of the Treaty is worded more forcefully and refers explicitly to implementation of the Community policies. Moreover, the general formulation makes it clear that the operation of the integration principle extends to the entire EC Treaty. New is the introduction of the clause 'in particular with a view to promoting sustainable development.' This has given the concept of 'sustainable development' some legal 'weight' and therefore cannot be seen as merely stating a policy objective to be achieved.[76]

The first question which presents itself is what precisely has to be integrated. The Treaty refers to 'environmental protection requirements'. What should this be taken to mean? Certainly, it would seem to include the environment policy objectives of Article 174(1) EC. It also seems likely that it includes the principles referred to in Article 174(2) EC, such as the precautionary principle and the principle that preventive action should be taken. And finally integration of the environment policy aspects referred to in Article 174(3) EC should not *a priori* be excluded, though it is true that the Treaty does not state that these aspects have to be integrated, but only that they should be taken into account. This wide interpretation of the integration principle in effect leads to a general obligation on the European institutions to reach an integrated and balanced assessment of all the relevant environmental aspects when adopting other policy.

The next problem concerns the question of whether the integration principle implies that the EU's environment policy has been given some measure of priority over other European policy areas. Probably, it has not, at least if by priority it is meant that, in the event of a conflict with other policy areas, environment policy has a certain added value from a legal point of view.[77] The text of the Treaty does not support such a conclusion. The integration principle is designed to ensure that protection of the environment is at least taken into consideration, even when commercial policy is involved or when other decisions are being taken and have to be worked out in detail, for example in the fields of agricul-

[75] Decision 1600/2002 laying down the Sixth Community Environment Action Programme, OJ 2002 L 242. Cf. also Communication from the Commission 'A partnership for integration: a strategy for integrating the environment into EU policies', COM (1998) 333 and Commission working document 'Integrating environmental considerations into other policy areas – a stocktaking of the Cardiff process' COM (2004) 394.

[76] Cf. Bär & Kraemer (1998) at 316-318.

[77] See for a discussion of this issue Bär & Kraemer (1998) at 318-319.

## 3 Article 174 EC[115]

### 3.1 The Objectives of European Environment Policy

The environmental objectives to be pursued by the EU are formulated in the first paragraph of Article 174 EC.[116] They are:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems.

*Preserving, protecting and improving the quality of the environment*

The first objective formulated in Article 174 EC is fairly general and indeterminate. The term environment is given no further definition in the Treaty itself.[117] On the one hand, this is an advantage in that the objective is sufficiently flexible to be adapted to new developments and new needs for protection.[118] On the other hand, it is impossible to determine with absolute certainty from the Treaty itself what might be understood by a European environment policy. The following problems of interpretation present themselves in connection with the uncertain scope of these environmental objectives.

Does the objective also include protection of nature and landscape values? Having regard to the Habitats Directive, it seems quite clear that it does. The first consideration of the preamble to this directive states that the preservation, protection and improvement of the quality of the environment, 'including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community'. Even the care and accommodation of animals in zoos seem to be covered by this objective.[119] The Zoo Directive illustrates that to a certain extent 'animal welfare' is within the scope of application of Article 174 EC, albeit that animal welfare cannot be regarded a 'general principle of Community law'.[120] In general, however, animal welfare will find its regulatory basis in the Treaty provision on the Common Agricultural Policy (CAP); the Articles 32 *et seq.* EC.[121] It is also possible that

[115] Cf. the renumbered Article 191 FEU after the entry into force of the Reform Treaty.

[116] Although Article 174 EC defines the objectives to be pursued in the context of environmental policy, Article 175 EC constitutes the legal basis on which Community measures are adopted; Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, para. 43.

[117] Cf. also the European Council's Declaration on the environmental imperative of 15 June 1990, Bulletin EC 1990 No. 6, at 16-20.

[118] Cf. Krämer (2007) at 2 who refers to an all-embracing concept.

[119] Cf. Directive 1999/ 22 relating to the keeping of wild animals in zoos, OJ 1999 L 94/24.

[120] Case C-189/01 *Jippes a.o.* [2001] ECR I-5689, paras. 71-79. See in general on animal welfare: the Amsterdam Treaty Protocol on protection and welfare of animals, OJ 1997 C 340/110. Cf. Krämer (2007) at 2-3.

[121] For instance Directive 1999/74 laying down minimum standards for the protection of laying hens, OJ 1999 L 203/53. See on CAP also Chapter 2, section 7.1.





certain aspects of animal welfare are integrated in secondary legislation. For instance, Article 4 (1)(b)(iii) of the Pesticide Directive 91/414 stipulates that a plant protection product is not authorised unless 'it does not cause unnecessary suffering and pain to vertebrates to be controlled'.[122]

Not only measures which result *directly* in the improvement of the environment fall under this objective, but also those which *result* in the improvement of the environment in a more indirect fashion fall within its scope.

> In the preamble to Directive 2003/4 on public access to environmental information, it is stated that 'increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making *and, eventually, to a better environment*.'[123] More generally, it is arguable that decision-making in respect of the non-substantive or procedural aspects of environmental legislation, such as issues of legal protection, authorisation procedures and even measures concerning the administrative organisation of the environment sector, is also within its compass.

A political 'hot potato' was dealt with by the Court in Case C-176/03 *Commission v. Council*.[124] The concerned the question to what extent, if any, Article 175 EC can or even must be used as legal basis to harmonise national criminal law. Based on Title VI of the EU Treaty, in particular, Articles 29 EU, 31(e) EU and 34(2)(b) EU the Council adopted Framework Decision 2003/80 on the protection of the environment through criminal law.[125] In essence, this framework decision laid down a number of environmental offences, in respect of which the Member States were required to introduce criminal penalties. The Commission challenged the Council's choice of Title VI EU as the legal basis for the framework decision. It submitted that the purpose and content of the latter are within the scope of the Community's powers in the environment, as they are stated in Articles 174 to 176 EC. The Court of Justice started its findings by pointing at Article 47 EU, which provides that nothing in the EU Treaty is to affect the EC Treaty and that it is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the EU Treaty do not encroach upon the powers conferred by the EC Treaty on the Community. The Court acknowledged that the framework decision did indeed entail partial harmonisation of the criminal laws of the Member States and that as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. However, the Court followed by noting that this 'does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an

[122] Cf. Case T-229/04 *Sweden* v. *Commission*, judgment of 11 July 2007, n.y.r. in the ECR.

[123] OJ 2003 L 41/26, emphasis added by the authors. Cf. Lee (2005) at 69-73.

[124] Case C-176/03 *Commission* v. *Council* [2005] ECR I-7879. See on European environmental criminal law in general Comte (2005) and Comte & Krämer (2004).

[125] OJ 2003 L 29/55.

principles of international law, this means that the Treaty in any event binds the parties with respect to the entire territory over which they are sovereign, unless the Treaty itself allows exceptions or applies special rules. As Article 249 EC does not contain any reference to the territory of the Member States, it cannot be regarded as limiting the territorial scope of the Treaty to territory which falls under the sovereignty (or full jurisdiction) of the Member States. The scope of the Treaty and other European law may indeed extend beyond that territory, to the extent international law allows the Member States to exercise a limited functional jurisdiction.

> Directive 2001/81 on national emission ceilings for certain atmospheric pollutant provides a clear example of an environmental measure explicitly expanding its scope beyond the 'territory' of the Member States.[159] Article 2 states: 'This Directive covers emissions in the territory of the Member States *and their exclusive economic zones* from all sources of the pollutants referred to in Article 4 which arise as a result of human activities.'[160] With respect to the Habitats Directive, we may also refer to an English High Court judgment applying that directive to the UK's Continental Shelf.[161]
>
> Examples outside the environmental sector are the competence of Member States in respect of the Continental Shelf, the fishery zones and any exclusive economic zones. Being able to exercise such powers outside the direct territory of the EU Member States is conditional on the subject matter of the functional jurisdiction falling within the material sphere of operation of the relevant Treaty provisions, and on the provisions themselves not containing any restriction limiting the territorial sphere of operation to the territory of the Member States. This view finds support in the case law of the Court, and particularly in the *Kramer* case.[162] One of the matters at issue was to what extent the authority of the EC extended to fishing on the high seas. After the Court had established that the European legislature had internal competence to adopt measures for the conservation of the biological resources of the seas, it continued 'it follows [...] from the very nature of things that the rule-making authority of the Community *ratione materiae* also extends – in so far as the Member States have similar authority under public international law – to fishing on the high seas.' This judgment was confirmed by the Court in the *Drift-Net* case, in which a prohibition on the use for fishing of drift-nets longer than 2.5 km was held to be valid.[163] The validity of the measure was disputed on the grounds that the EC was not competent to take measures to preserve fish populations in the open sea. The Court dismissed this line of reasoning here, too.

[159] OJ 2001 L 309/22.

[160] Emphasis added.

[161] English High Court, Queen's Bench Division (Maurice Kay J) 5 November 1999 *Regina* v. *Secretary of State for Trade and Industry*, ex parte *Greenpeace* [2000] Env. L.R. 221. Cf. Case C-6/04 *Commission* v. *UK* [2005] ECR I-9017, para. 119.

[162] Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279.

[163] Case C-405/92 *Etablissements Armand Mondiet* v. *Société Armement Islais* [1993] ECR I-6133.







A translation of the judgments in the *Kramer* and *Drift-Net* cases in terms of environmental law leads to the following conclusion. In so far as the Member States are competent under international law to protect the environment outside their own territories, the EC must also be regarded as being competent to take such measures, at least to the extent the subject matter of the measure falls within the scope of application of Article 174 EC. Action to protect the environment extraterritorially cannot therefore be regarded as being confined to international agreements or to those cases where regional or global problems are at issue. The fourth indent of Article 174(1) EC should not be interpreted restrictively. In view of the transboundary nature of the environment, this follows – to quote the *Kramer* judgment – 'from the very nature of things'.[164] However, it should be remembered that extraterritorial environmental powers must be exercised in accordance with international law, including the provisions of the WTO.[165] In exercising its extraterritorial powers in respect of the environment, the EC has to act with regard to international law constraints. As has been stated, any interpretation of Article 174 EC, which would bring the EC into conflict with its obligations under international law, must be rejected.

## 3.2 The Principles of European Environment Policy

Article 174(2) EC sets out the principles on which European environment policy is based.[166] These are:

- the high level of protection principle;
- the precautionary principle;
- the prevention principle;
- the source principle;
- the polluter pays principle and
- the safeguard clause.

European environmental legislation will have to translate these principles into concrete obligations for the Member States. It will then be possible to interpret directives and regulations in the light of these principles. In this chapter, section 2, we have discussed in the context of the integration principle the question to

[164] English High Court, Queen's Bench Division (Maurice Kay J) 5 November 1999 *Regina* v. *Secretary of State for Trade and Industry*, ex parte *Greenpeace* [2000] Env. L.R. 221 which ruled, relying *inter alia* on the *Kramer* case that the Habitats Directive is also applicable outside the territorial waters of the UK.

[165] See in a general sense the Court's judgment in Case C-286/90 *Anklagemindigheden* v. *Poulsen and Diva Navigation* [1992] ECR I-6019. See also Article 9 of Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements: 'Member States shall apply the provisions of this Directive without any discrimination in form or in fact against foreign ships and in accordance with applicable international law, including Section 7 of Part XII of the 1982 United Nations Convention on the Law of the Sea [...].' Cf. Wiers (2002) and Montini (2005) with respect to the WTO.

[166] Cf. in general De Sadeleer (2005) and on the way national courts apply the European environmental principles Macrory (2004).

what extent these principles are legally enforceable. We concluded that only in very exceptional cases would a measure be susceptible to annulment because the environmental principles of Article 174(2) EC were not sufficiently taken into account.

*High level of protection*

Article 174(2) EC provides that a European environment policy shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. This high level of protection principle is one of the most important substantive principles of European environment policy. It is stated at various places in the EC Treaty. It was the Treaty of Amsterdam which ensured that the principle was included in the general objectives of the EC Treaty. Under Article 2 EC, it is a task to promote 'a high level of protection and improvement of the quality of the environment'. Nevertheless, it should be quite clear that a high level of protection is not the same thing as the *highest* possible level of protection.[167]

As such, this 'high level of protection' principle is of course not new. The 'old' Article 100a(3) EEC, included in the Treaty by the Single European Act, provided that the Commission, in its internal market proposals in the field of environmental protection would take as a base a high level of protection. This proposal was criticised as being directed only at the Commission and that the Council, as the ultimate decision-making body, could depart from the Commission's proposals. It was also doubtful to what extent the obligation in the article was open to review by the courts. Suppose the Council were to have taken its decision in conformity with the Commission's proposal. Could it then have been argued before the courts that the decision was invalid if it did not take as a base a high level of protection? It seemed hardly conceivable. As amended by the Amsterdam Treaty the Article 95(3) EC now reads as follows:

> 'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.'

This provision makes it quite clear that the high level of protection principle is directed not only at the Commission, but also at the European Parliament and Council in their legislative capacity. However, the 'seek to achieve' formulation still makes it doubtful indeed whether this principle is subject to review in a

[167] Cf. Case C-284/95 *Safety Hi-Tech Srl* v. *S. & T. Srl* [1998] ECR I-4301, para. 49: 'whilst it is undisputed that Article 130r(2) of the Treaty requires Community policy in environmental matters to aim for a high level of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be the highest that is technically possible.'







court of law to challenge the legality of the measures adopted by the Council.[168] Krämer however argues that where a Commission proposal is not based on high level of environmental protection, the European Parliament has right of action against the Commission under Article 230 EC. We fail to see however how a proposal of the Commission can be regarded as an 'act' in the meaning of Article 230 EC.[169]

That the enforceability of the principle is limited is also apparent from the text of Article 174(2) EC. European policy 'shall aim' at a high level of protection 'taking into account the diversity of situations in the various regions of the Community.' In fact this addition is totally unnecessary, as a similar formulation is also included in Article 174(3) EC, second indent. It is now stated twice.

An explicit reference to this principle can, for instance, be found in Directive 96/61 concerning integrated pollution prevention and control, the so-called IPPC Directive.[170] Its aim is to achieve integrated prevention and control of pollution 'in order to achieve a high level of protection of the environment taken as a whole.' Other examples of legislation containing such references in their preambles include Regulation 1013/2006 on shipments of waste and Directive 2002/49 relating to the assessment and management of environmental noise.[171] Also the, current, Sixth Community Environment Action Programme contains various references to this principle.[172]

*The precautionary principle*[173]

Since 'Maastricht' the Treaty has stated that Community policy on the environment shall be based on the precautionary principle. This principle has its roots in what is described in German environmental law as the *Vorsorgeprinzip*.[174] This means that, if there is a strong suspicion that a certain activity may have environmentally harmful consequences, it is better to act before it is too late rather than wait until full scientific evidence is available which incontrovertibly shows the causal connection.[175] In other words, the principle of precaution may therefore justify action to prevent damage in some cases even though the causal link cannot be clearly established on the basis of available scientific

[168] Cf. Van Caltster & Deketelaere (1998) at 15 and Krämer (2007) at 11-12.

[169] Krämer (2007) at 13.

[170] OJ 1996 L 257/26.

[171] OJ 2006 L 190/1 and OJ 2002 L 189/12.

[172] Decision 1600/2002 laying down the Sixth Community Environment Action Programme, OJ 2002 L 242/1.

[173] Cf. in general, Trouwborst (2006), De Sadeleer (2006) and Lee (2005) at 97 *et seq.*

[174] Cf. Marr & Schwemer (2003).

[175] Cf. also Principle 15 of the Rio Declaration: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

evidence.[176] Its objective is to avoid potential risks.[177] Or as some authors have put it: *in dubio pro natura*.[178] Another implication of the precautionary principle, at least according to the Commission, is that the EC has the right to establish the level of protection of the environment, human, animal and plant health, that it deems appropriate.[179]

According to the Commission guidelines the precautionary principle is all about 'risk-management', which does not mean that all risks must be reduced to zero. Judging what is an acceptable level of risk for society is a political responsibility. Where action is deemed necessary, measures based on the precautionary principle should be proportional to the chosen level of protection, non-discriminatory in their application, consistent with similar measures already taken, based on an examination of the potential benefits and costs of action or lack of action and subject to review in the light of new scientific data.

In the meantime, the precautionary principle has been applied by the Court of Justice in its case law. Where there is uncertainty as to the existence or extent of risks to human health, the *institutions* may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.[180] This case law show the consequences of the precautionary principle for the interpretation of the first sentence of Article 174(3) EC, which provides that in preparing its policy on the environment, the EC shall take account of 'available scientific and technical data'. In the 'old' days, this could easily have been used by the EC as a ground for not acting until there was absolute proof of the causes of certain undesirable environmental effects. Such an interpretation would now be at odds with the precautionary principle.

With respect to the Member States, the Court acknowledged the importance of the precautionary principle in applying so called 'safeguard clauses' in directives.[181]

With respect to the safeguard clause of Article 12(1) of Regulation 258/97,[182] the Court of Justice ruled that:[183]

[176] The Communication of the Commission Single Market and the Environment, COM (99) 263. Cf. Heyvaert (2006).

[177] Case T-229/04 *Sweden* v. *Commission*, judgment of 11 July 2007, n.y.r. in the ECR, para. 161.

[178] Backes & Verschuuren (1998) at 43.

[179] COM (2000) 1, containing Commission guidelines on how to apply the precautionary principle.

[180] Cf. Case C-157/96 *National Farmers' Union a.o.* [1998] ECR I-2211, para. 63 and Case C-180/96 *UK* v. *Commission* [1998] ECR I-2265, para. 99. Cf. also Joined Cases T-125/96 *Boehringer* [1999] ECR II-3427.

[181] See on safeguard clauses this chapter, section 3.2 in particular.

[182] Which reads: 'Where a Member State, as a result of new information or a reassessment of existing information, has detailed grounds for considering that the use of a food or a food ingredient complying with this regulation endangers human health or the environment, that Member State may either temporarily restrict or suspend the trade in and use of the food or food ingredient in question in its territory. It shall immediately inform the other Member States and the Commission thereof, giving the grounds for its decision.'

[183] Case C-236/01 *Monsanto* [2003] ECR I-8105.





> 'protective measures may be taken pursuant to Article 12 of Regulation No 258/97 interpreted in the light of the precautionary principle even if it proves impossible to carry out as full a risk assessment as possible in the particular circumstances of a given case because of the inadequate nature of the available scientific data [...].
>
> Such measures presuppose, in particular, that the risk assessment available to the national authorities provides specific evidence which, without precluding scientific uncertainty, makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available and the most recent results of international research that the implementation of those measures is necessary in order to avoid novel foods which pose potential risks to human health being offered on the market.'

Indeed, the inadequate nature of available scientific data does not preclude a Member State or the EC institutions from taking protective measures. However, the Court of Justice is not giving a *carte blanche* either in the sense that the burden of proof is reversed unreservedly.[184] Nor will mere hypothetical risks suffice for taking action.[185] Protective measures can be adopted only if a risk assessment has first carried out which is as complete as possible given the particular circumstances of the individual case, from which it is apparent that, in the light of the precautionary principle, the implementation of such measures is necessary in order to ensure that there is no danger for the human health and the environment.

The case law on safeguard clauses in directives is also relevant with respect to the application of Article 95(5) EC. This provision requires 'new scientific evidence' in order to accept Member States' introducing environmental legislation derogating from internal market measures. Article 95 EC should be interpreted in the light of the precautionary principle.[186] Of course, this does not mean that the precautionary principle implies that the conditions for application of that provision do not have to be met at all.[187] Finally, it is the authors' opinion that the Member States' powers under Article 30 EC and the 'rule of reason' must be interpreted in the same manner.[188]

[184] See, for instance, Case C-314/99 *Netherlands* v. *Commission* [2002] ECR I-5521, where the Court annulled Section 3 of the Annex to Commission Directive 1999/51 (tin, PCP and cadmium). The Commission acknowledged in that case that it did not possess sufficiently reliable scientific information for the measures taken.

[185] Case T-229/04 *Sweden* v. *Commission*, judgment of 11 July 2007, n.y.r. in the ECR, para. 161. This case concerned the annulment of Commission Directive 2003/112 to include paraquat as an active substance ex Article 5 of the Pesticide Directive 91/414.

[186] Cf. Commission Decision 1999/832, OJ 1999 L 329/25 (*Dutch creosote*). See also Chapter 3, section 6.

[187] Joined Cases T-366/03 and T-235/04 *Land Oberösterreich and Austria* v. *Commission* [2005] ECR II-4005, para. 71.

[188] See Chapter 6, section 5.3.

A fine example of the precautionary principle in secondary law can be found in Directive 98/81 on the contained use of genetically modified micro-organisms (GMMs).[189] Article 5(4) states that where there is doubt as to the appropriate classification of GMMs, the more stringent protective measures shall be applied unless sufficient evidence, in agreement with the competent authority, justifies the application of less stringent measures.

Another example can be found in Annex IV of Directive 96/61 (the IPPC Directive).[190] Annex IV contains considerations to be taken into account when determining best available techniques 'bearing in mind the likely costs and benefits of a measure and the principles of precaution and prevention'. One of the considerations is formulated as 'the need to prevent or reduce to a minimum the overall impact of the emissions on the environment and the risks to it'. With respect to definition of 'waste', it is also clear that this concept has to be interpreted in the light of the precautionary principle.[191]

With respect to the Habitats Directive, Article 6(3) must be mentioned. According to the first sentence of it, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The ECJ has held that the requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned.[192]

*The prevention principle*

European policy on the environment shall be based on the principle that preventive action should be taken. The principle of preventive action was included in the Treaty by the Single European Act. Put simply, prevention is

[189] OJ 1998 L 330/13. See also Article 1 of Regulation 1946/2003 on transboundary movements of genetically modified organisms, OJ 2003 L 287/1. Cf. also Case C-6/99 *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651, in which the French *Conseil d'Etat* asked the Court for a ruling on whether the precautionary principle permits national authorities to refuse market access for transgenic products, where the Commission has already approved the grant of such an authorisation. The Court said they could not, stating that observance of the precautionary principle was observed in Directive 90/220 itself.

[190] OJ 1996 L 257/26. See on this directive Chapter 8, section 5.

[191] E.g. Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paras. 22 and 23. See also Chapter 8, section 15.1.

[192] Case C-6/04 *Commission* v. *UK* [2005] ECR I-9017, para. 54. Cf. also Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee* [2004] ECR I-7405, para. 58. The Court ruled 'that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle'.





better than cure. The prevention principle allows action to be taken to protect the environment at an early stage. It is no longer primarily a question of repairing damage after it has occurred. Instead the principle calls for measures to be taken to prevent damage occurring at all.

This is demonstrated by Directive 94/62 on packaging and packaging waste.[193] The directive makes it quite clear that the best means of preventing the creation of packaging waste is to reduce the overall volume of packaging. Article 9 of the directive requires Member States to ensure that packaging may be placed on the market only if it complies with all essential requirements defined by the directive. The prevention principle must not be confused with the precautionary principle, which is in essence more far-reaching (see above).[194]

Pollution prevention is of course also the key word in the IPPC Directive.[195]

The Third Environmental Action Programme focused strongly on the prevention principle.[196] Prevention rather than cure was the central theme of this programme. According to the programme the following conditions must, *inter alia*, be met, if the prevention principle is to have full effect:

- the requisite knowledge and information must be improved and made readily available to decision-makers and all interested parties, including the public;[197]
- it is necessary to formulate and introduce procedures for judgment which will ensure that the appropriate facts are considered early in the decision-making processes relating to any activity likely to affect the environment significantly. The Environmental Impact Assessment (EIA) Directive should be noted in this connection.[198] The preamble to the EIA Directive, referring to the first three Environmental Action Programmes, states 'that

[193] OJ 1994 L 365/10.

[194] See for another example in the waste sector the 'Community Strategy for Waste Management' COM (96) 399 final. This states that, as regards the prevention principle, the following measures should be particularly developed promotion of clean technologies and products, reduction of the hazardousness of wastes, the establishment of technical standards and possibly EC-wide rules to limit the presence of certain dangerous substances in products, the promotion of reuse and recycling schemes, the appropriate use of economic instruments, eco-balances, eco-audit schemes, life-cycle analysis and actions on consumer information and education as well as the development of the eco-label system. Cf. also Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland* [2000] ECR I-4475, paras. 39-40 in which the Court of Justice relied on the prevention principle to interpret the concept of 'waste' of the Waste Framework Directive. Cf. also Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, where the Court used the precautionary principle and the prevention principle to interpret certain aspects of Annex II of the Waste Framework Directive.

[195] Directive 96/61 concerning integrated pollution prevention and control, OJ 1996 L 257/26.

[196] OJ 1983 C 46/1.

[197] See, for example, Directive 2003/4 on public access to environmental information, OJ 2003 L 41/26.

[198] Directive 85/337, OJ 1985 L 175/40.

the best environment policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects'. For the same reason, account should be taken of the consequences of planning and decision-making processes for the environment at as early a stage as possible. Environmental impact assessment is an excellent example of an instrument in which the principle of prevention plays a vital role;
- the implementation of adopted measures must be monitored to ensure their correct application and their adaptation if circumstances or new knowledge should so require. Relevant in this respect are provisions in directives concerning the adaptation of technical standards to technical and scientific progress.[199]

Another example is Directive 80/68 on the protection of groundwater.[200] This directive imposes extensive monitoring and survey requirements on Member States. Before the competent authorities may grant an authorisation to discharge substances, a detailed investigation of the effects on the environment must have been carried out.

Finally, we can mention Regulation 842/2006 on certain fluorinated greenhouse gases which contains various references to the prevention and minimisation of emissions of fluorinated greenhouse gases.[201]

*The source principle*

European policy on the environment shall be based on the principle that environmental damage should as a priority be rectified at its source. According to the source principle, damage to the environment should preferably not be prevented by using end-of-pipe technology. This principle also implies a preference for emission standards rather than environmental quality standards, especially to deal with water and air pollution. Environmental directives requiring the Member States to reduce the emissions is not dependent on the general environmental situation of the region in which the emissions occur.[202] This preference becomes abundantly clear if the water quality legislation is examined.[203]

Other references to the source principle can be found in Directive 2002/96 on waste electrical and electronic equipment[204] (WEEE Directive) and in the EIA Directive 85/337.

[199] For example, Article 13 of the Sewage Sludge Directive 86/278, OJ 1986 L 181/6.

[200] OJ 1980 L 20/43.

[201] OJ 2006 L 161/1.

[202] Cf. Case C-364/03 *Commission* v. *Greece* [2005] ECR I-6159, para. 34 with respect to emissions of sulphur dioxide and nitrogen oxide under Directive 84/360,

[203] Directive 2006/11 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community; OJ 2006 L 64/52. See also Chapter 8, section 10.3.

[204] OJ 2002 L 37/24





The principle was given an unexpected dimension in the *Walloon Waste* case, where the Court of Justice applied it in determining to what extent Walloon measures restricting imports of foreign waste were discriminatory.[205] The Court held that the principle means that every region, municipality or other local authority must take those measures which are necessary to ensure the reception, processing and removal of its own waste. The waste must be disposed of as close as possible to the place of production in order to limit its transport as far as possible. Consequently, the Court held that, in view of the differences between the waste produced at various locations and the connection with the place of its production, the Walloon restrictions could not be considered discriminatory. In this case, the source principle was thus equated with what is known as the proximity principle in waste law.[206]

In the waste case *Sydhavnens Sten & Grus*, the Court seems to be willing to apply the source principle in a more direct manner.[207] In that case, the Court ruled that the source principle could not serve to justify *any* restriction on waste exports, but only when the waste in question is harmful to the environment. By implication the Court acknowledged that Member States are entitled to impose export restrictions on waste if this is necessary for the protection of the environment. Moreover, the concept of protection of the environment is to be interpreted in the light of the source principle.

*The polluter pays principle*

Action is based on the principle that the polluter should pay. This principle was one of the cornerstones of a European environment policy even before it was incorporated into the Treaty. It was referred to as a principle of Community environment policy in the First Action Programme on the Environment.[208] In simple terms: this is the principle that the costs of measures to deal with pollution should be borne by the polluter who causes the pollution.

The polluter pays principle is set out in a Communication from the Commission to the Council in 1975 regarding cost allocation and action by public authorities on environmental matters.[209] As far as we know, the 1975 communication is still the guiding principle for policy in that respect. The communication is not as such binding. The Council has however recommended that Member States conform to the principles contained in the communication. Both the communication and the recommendation were prompted by the consideration that the costs connected with the protection of the environment against pollution should be allocated according to the same principles throughout the EU.

This is, on the one hand, to avoid distortions of competition affecting trade, which would be incompatible with the proper functioning of the common

[205] Case C-2/90 *Commission* v. *Belgium* [1992] ECR I-4431.

[206] See Chapter 8, section 15. See also Case C-422/92 *Commission* v. *Germany* [1995] ECR I-1097.

[207] Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, para. 48.

[208] OJ 1973 C 112/1. Cf. on the polluter pays principle in general Vandekerckhove (1994).

[209] OJ 1975 L 194/1.

market, and on the other, to further the aims set out in the First Action Programme on the environment. This programme is based on the principle that charging polluters the costs of action to combat the pollution they cause will encourage them to reduce that pollution and endeavour to find less polluting products or technologies. This would enable a more rational use to be made of scarce environmental resources. Apart from the use of charges, the principle can also be implemented by imposing environmental standards. Companies, which are required to observe environmental standards, will have to make various investments in their production process if they are to comply with the statutory standards. Setting standards in this way also helps ensure the polluter bears the cost of pollution.

The EU must therefore ensure, especially by laying down standards, environmental charges or creating a system of environmental liability,[210] that persons who are responsible for pollution in fact bear the cost. In other words, environmental protection should not in principle depend on policies which rely on grants of aid and place the burden of combating pollution on society. On the other hand, the polluter pays principle also seems to require that a European measure must avoid putting burdens on persons and undertakings for the elimination of pollution to which they have not contributed.[211]

The polluter pays principle is of particular relevance with respect to the Guidelines on state aid for environmental protection.[212] According to the Commission, the costs associated with protecting the environment should be internalised by firms just like other production costs. Aid control and environmental policy must, in the Commission's view, also support one another in ensuring stricter application of the polluter pays principle.[213]

Several references to the polluter pays principle can be found in EC secondary legislation. Article 15 of Directive 75/442 on waste[214] states that, in accordance with the polluter pays principle, the cost of disposing of waste must be borne by:

- the holder who has waste handled by a waste collector or by an undertaking authorised to carry out waste disposal activities or
- the previous holders or the producer of the product from which the waste came.

[210] Cf. Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 L 143/56. Article 1 reads: 'The purpose of this Directive is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage.'

[211] Case C-293/97 *Standley* [1999] ECR I-2603.

[212] OJ 2001 C 37/3. See Chapter 7, section 7.3.

[213] See, for example, the Commission Decision in the *Cartiere del Garda* case, OJ 1993 L 273/51, where the Commission directly examined a national aid measure in the light of the polluter pays principle. In that case the Commission concluded that the proposed aid 'does not meet the polluter pays principle'. For a discussion of this case see Chapter 7, section 7.1.

[214] OJ 1975 L 194/47.





Article 14 of Directive 75/439 on the disposal of waste oils[215] provides that indemnities may be granted to collection and/or disposal undertakings for services rendered. These indemnities may be financed by a charge imposed on products, which after use are transformed into waste oils, or on waste oils. The financing of indemnities must be in accordance with the polluter pays principle (Article 15). According to the Court of Justice in the *ADBHU* case, provisions like these do not conflict with the Treaty rules on state aid.[216]

Outside environmental law, in view of the integration principle, a reference can be found in Directive 2006/38 on the charging of heavy goods vehicles for the use of certain infrastructures.[217] A fairer system of charging for the use of road infrastructure, for instance through the variation of tolls to take account of the environmental performance of vehicles, was felt necessary by the European legislature in order to encourage sustainable transport in the EU.

*The safeguard clause*

Harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures; for non-economic environmental reasons, subject to a European inspection procedure.

This clause is clearly of a different order from the above principles. It is debatable whether its place in the Treaty, next to the true principles, is well chosen. The second paragraph of Article 174(2) EC provides that a directive or regulation may include a safeguard clause allowing Member States to take measures to protect the environment in cases of urgency.

In practice, there are many examples where this kind of safeguard clause is actually embodied in the legislative act in question. For example, Article 11 of Directive 91/414 concerning the placing of plant protection products on the market[218] provides that, where a Member State has valid reasons to consider that a product which is authorised under the directive constitutes a risk to human or animal health or the environment, it may provisionally restrict or prohibit the use and/or sale of that product on its territory.

Another example of such a safeguard clause can be found in Article 32 of the Biocides Directive: 'Where a Member State has valid reasons to consider that a biocidal product which it has authorised, registered or is bound to authorise or register pursuant to Articles 3 or 4, constitutes an unacceptable risk to human or animal health or the environment, it may provisionally restrict or prohibit the use or sale of that product on its territory. It shall immediately inform the Commission and the other Member States of such action and give reasons for its decision. A decision shall be taken on the matter within 90 days'.[219]

[215] OJ 1975 L 194/31.

[216] Case 240/83 *ADBHU* [1985] ECR 531. See also XXIVth Competition Report, point 388.

[217] OJ 2006 L 157/8.

[218] OJ 1991 L 230/1.

[219] Directive 98/8, OJ 1998 L 123/1.

Similar safeguard provisions can be found particularly in those environmental directives where there is a strong link with the functioning of the Internal Market. It is the authors' opinion that these safeguard clauses must be interpreted in line with the precautionary principle.[220]

## 3.3 The Policy Aspects to be Taken into Account

According to Article 174(3) EC the Community shall, in preparing its policy on the environment, take account of:

- available scientific and technical data;
- environmental conditions in the various regions of the Community;
- the potential benefits and costs of action or lack of action;
- the economic and social development of the Community as a whole and the balanced development of its regions.

By comparison with the formulation of, for instance, the integration principle in Article 6 EC ('must be integrated'), the language of this paragraph ('take account of') is much less forceful. Account shall be taken of the policy aspects referred to in it. The Treaty does not therefore prescribe observance of these criteria in all cases. It is true that inclusion of these policy aspects does not imply that the environmental objectives of Article 174(1) EC are in a legal sense subordinate to them. However, in practice, Member States will no doubt seize on them to delay environmental policies that do not suit them.

*Available scientific and technical data*

It is said that the function of this criterion under the Single European Act was to ensure the EC would only act when sufficient scientific data was available to prove that a given activity or product – for example, CFCs in aerosols – would have a harmful effect on the environment – in this case depletion of the ozone layer. As has already been shown in the discussion of the precautionary principle, a different interpretation would now seem more appropriate.[221] Indeed, all kinds of provisional, indicative and tentative scientific data may now be sufficient to require protective measures and action by the EC.

[220] See this chapter, section 3.1.

[221] See this chapter, section 3.1. See for an example of connecting the precautionary principle with this policy aspect: Annex II of Directive 2001/18 on the deliberate release into the environment of genetically modified organisms (OJ 2001 L 106/1). According to this annex the environmental risk assessment to be carried out prior to a release of GMOs should be carried out 'in accordance with the precautionary principle' 'in a scientifically sound and transparent manner based on available scientific and technical data'.





References to 'available scientific and technical data' can, *inter alia*, be found in the Bathing Water Directive and in the Water Framework Directive.[222] The Nitrates Directive, for instance, requires in Article 5 that the action programmes be established in respect of so-called 'vulnerable zones'. The action programmes shall take into account 'available scientific and technical data, mainly with reference to respective nitrogen contributions originating from agricultural and other sources'.[223]

The case law of the Court shows that decisions based on inadequate scientific and technical data can result in an annulment.[224]

*Environmental conditions in the various regions*

Application of this criterion entails a differentiated environmental policy based on the quality of the environment in a given region.

A good example can be found in the Nitrates Directive. The action programmes to be established in respect of vulnerable zones have to take into account 'environmental conditions in the relevant regions of the Member State concerned'. With respect to recovery of costs for water services the Water Framework Directive requires (Article 9) 'have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected'.

This criterion may also give rise to the assumption that there is a preference for environmental quality objectives rather than emission limits. After all, the quality of the receiving environment would then determine the extent of emission of pollutants. However, from the point of view of the source principle, there is a preference for emission standards rather than environmental quality standards. It is up to the European legislature to consider in more depth the relative merits of these different aspects.

On the other hand, the criterion could also be applied differently. Additional protective measures might well be called for precisely in order to conserve those areas in which the environmental quality is high.

See, for example, the 'old' air quality directives of the 1980s.[225] These directives enable Member States to lay down more stringent air quality standards than those set out in the directives, for zones, which in the view of the Member State, require

[222] Directive 2006/7 concerning the management of bathing water quality, OJ 2006 L 64/37 and Directive 2000/60 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1.

[223] Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ 1991 L 375/1.

[224] E.g. Case C-3/00 *Denmark* v. *Commission* [2003] ECR I-2643. See also Chapter 3, section 6.

[225] See for instance Article 4(2) of Directive 85/203 on air quality standards for nitrogen dioxide (OJ 1985 L 87/1): 'In zones which the Member State concerned considers should be afforded special environmental protection, it may fix values which are generally lower than the guide values in Annex II'.

eral environmental conventions models of clarity and precision.[61] The advantage to the EC and its Member States is that they are still able to operate with some degree of flexibility. The disadvantage of such an imprecise declaration to the other parties is, however, that it is not always clear which party they can call to account for performance of the obligations under the Convention.

## 3 Article 95 EC[62]

Article 95 EC provides that the Council, acting in accordance with the co-decision procedure, shall adopt the measures for the approximation of national legislation 'which have as their objective the establishment and functioning of the internal market.' It will be clear that many measures which can be characterised as environmental measures may also have a significant impact on the establishment of the internal market. This is recognised in the Treaty. The provisions of Article 95(3) EC, by which the Commission, in its proposals on, *inter alia*, environmental protection, will take as a base a high level of protection, indicates that at any rate certain environmental measures fall within the scope of Article 95 EC. The Court also held that whenever the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the European legislature cannot be prevented from relying on that legal basis on the ground that 'public health protection' is a decisive factor in the choices to be made. It is the authors' opinion that, in view of Article 95(3) EC, the same can be said with respect to 'environmental protection'.

Thus it could be said that the harmonisation of the conditions under which certain environmentally harmful products are placed on the market is important for attaining the free movement of goods. After all, as long as the environmental product standard rules continue to differ in the various Member States, there can be no question of the free movement of environmentally hazardous goods. Harmonisation of the conditions under which such products are allowed to be placed on the market and/or used will thus often fall within the scope of Article 95 EC.[63] However, many other environmental measures may also relate to the

[61] Cf. with respect to UNCLOS, Case C-459/03 *Commission* v. *Ireland* [2006] ECR I-4635 (*MOX* case), para. 105 *et seq.* where the ECJ ruled that within the specific context of that Convention the Declaration of Community competence confirms that a transfer of areas of shared competence, in particular in regard to the prevention of marine pollution, took place within the framework of the Convention, subject only to the *existence* of EC rules.

[62] The Reform Treaty will reverse the order of Articles 94 and 95 EC. Article 94 EC shall be renumbered Article 115 FEU and Article 95 EC shall be renumbered Article 114 FEU.

[63] But not always as is shown by the *Chernobyl II* case; Case C-70/88 *EP* v. *Council* [1991] ECR I-4529. Regulation 3954/87 laid down maximum permitted levels of radioactive contamination of foodstuffs and feeding-stuffs. Products with too high a level of contamination may not be placed on the market. The Court held that the regulation was designed to protect the general public and that as a result the regulation falls outside the scope of Article 100a (now Article 95).





functioning of the internal market. In general one could say that any national rule concerning production conditions has an effect on competition and may therefore be subject to decision-making under Article 95 EC. This has been acknowledged by the Court of Justice. In the *TiO2* case concerning emission limit values, the Court of Justice, referring to its judgment in Case 92/79[64] observed:

> 'Action intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition in that sector is conducive to the attainment of the internal market and thus falls within the scope of Article 100a, a provision which is particularly appropriate to the attainment of the internal market.' The Court held that the content of Directive 89/428 on the reduction of pollution caused by waste from the titanium dioxide industry[65] fell within the scope of Article 100a EEC. The directive contains rules prohibiting or requiring the reduction of the discharge of waste and lays down timetables for the implementation of the various provisions. An unusual feature of this case was of course that the directive applied to a specific industry. The Court referred to this in its judgment.

The question which accordingly arises is to what extent environmental measures which have a more diffuse effect on the competitive position of companies could in principle fall within the scope of this article. In its judgment in the *Waste Framework Directive* case on the validity of Directive 91/156 on waste,[66] the Court acknowledged that the obligation contained in Article 4 of that directive – under which Member States are required to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without harming the environment – can have a *certain* harmonising effect.[67] However, the mere fact that the internal market is *concerned* was insufficient to cause Article 95 EC to apply. It therefore seems that this case can be used to show that a measure does not fall within the scope of Article 95, if the effect of attaining market integration is only incidental.

It is reasonable to conclude that the scope of Article 95 EC is in principle more than sufficient to serve as a basis for measures approximating national laws on environmental product standards and for environmental measures which regulate conditions of production and remove distortions of competition in a particular industry. In those cases it could be argued that the primary objective of the measure is related to 'the establishment or functioning of the internal market'. For more general environmental measures, which rather than

[64] Case 92/79 *Commission* v. *Italy* [1980] ECR 1115, discussed in Chapter 1, section 1.

[65] OJ 1989 L 201/56.

[66] OJ 1991 L 78/32.

[67] Case C-155/91 *Commission* v. *Council* [1993] ECR I-939. The Court's approach in the *Waste Framework Directive* case has been confirmed in its judgment concerning the legal basis of Regulation 259/93 (Basel Regulation), Case C-187/93 *EP* v. *Council* [1994] ECR I-2857.

having a *specific* effect on the competitive position of companies have a more *diffuse* effect, it can be concluded from the case law that when the effects are of an incidental nature, the measure falls outside the scope of Article 95 EC and should therefore be based on Article 175 EC.

Examples of environmental measures the Council has based on Article 95 EC and its 'predecessor' the 'old' Article 100a EEC are:

- Directive 90/220 on the deliberate release into the environment of genetically modified organisms;[68]
- the 'old' and 'new' Batteries Directive;[69]
- Directive 92/112 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry;[70]
- Directive 94/62 on packaging and packaging waste;[71]
- the Biocides Directive;[72]
- Directive 2006/40 relating to emissions from air conditioning systems in motor vehicles;[73]
- Regulation 1907/2006 on the Registration, Evaluation and Authorisation of Chemicals (REACH).[74]

These are indeed measures in which the preamble states that European action is needed on the one hand because the laws in force in the Member States may constitute a barrier to trade or result in unfair conditions of competition and on the other because measures are necessary from the point of view of protecting the environment.

## 4 Article 175 EC or Article 95 EC?

It is settled case law that the choice of the legal basis for a European measure must be based on objective factors which are amenable to judicial review and include in particular the aim and content of the measure.[75] In other words, the European legislature is not free to choose a legal basis as he sees fit. With respect to the use of Article 175 or Article 95 EC (or any other legal basis), it is important to look for the 'centre of gravity' of the measure. Or in the words of the Court of Justice:

[68] OJ 1990 L 117/15, later amended.

[69] Directive 91/157, OJ 1991 L 78/38, repealed by Directive 2006/66, OJ 2006 L 266/1.

[70] OJ 1992 L 409/11.

[71] OJ 1994 L 365/10.

[72] Directive 98/8, OJ 1998 L 123/1.

[73] OJ 2006 L 161/12.

[74] OJ 2006 L 396/1; See on this regulation Chapter 8, section 13.1.

[75] Case 45/86 *Commission* v. *Council* [1987] ECR 1493, para. 11; Case C-300/89 *Commission* v. *Council* (*TiO2*) [1991] ECR I-2867, para. 10; Case C-268/94 *Portugal* v. *Council* [1996] ECR I-6177, para. 22; and Case C-176/03 *Commission* v. *Council* [2005] ECR I-7879, para. 45.





> 'If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component'.[76]

The fact that a measure pursues an environmental objective does not necessarily imply that Article 175 EC is the correct legal basis.[77] The main rule is: a single legal basis, either Article 175 EC or Article 95 EC. And indeed, it is clear from the practice of the past few years that environmental directives and regulations are based either on Article 175 or Article 95 EC. Exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on both legal bases, the Court followed in Case C-178/03. This is provided that the procedures laid down for each legal basis are not incompatible with each other and the use of two legal bases does not undermine the rights of the Parliament.[78] Where different decision-making procedures are combined, their modalities must also be combined. In practice this means that the 'more demanding' of the procedures must be adhered to plus any additional requirements of the less demanding procedure.

> Recent practice shows a few examples of environmental measures which have a dual legal basis. Take for instance Regulation 842/2006 on certain fluorinated greenhouse gases.[79] According to the EU legislature, it is the primary objective of the regulation to reduce the emissions of the fluorinated greenhouse gases covered by the Kyoto Protocol and thus to protect the environment and that therefore the legal base should be Article 175(1) EC. Nevertheless, the legislature felt it appropriate to take measures on the basis of Article 95 EC to harmonise requirements on the use of fluorinated greenhouse gases and the marketing and labeling of products and equipment containing fluorinated greenhouse gases.

This example demonstrates that the combination of the decision-making procedures of Article 95 EC and Article 175(1) EC is clearly possible. Both provide for use of the co-decision procedure. However, when combined, the Committee of the Regions must be consulted. [redacted]

[76] Case C-178/03 *Commission* v. *EP and Council* [2006] ECR I-107, para. 42.

[77] E.g. Case C-377/98 *Netherlands* v. *EP and Council* [2000] ECR I-6229. The case concerned an application for annulment of Directive 98/44 on the legal protection of biotechnological inventions; OJ 1998 L 213/13.

[78] Case C-178/03 *Commission* v. *EP and Council* [2006] ECR I-107, para 59. But see already Case C-300/89 *Commission* v. *Council* (*TiO2*) [1991] ECR I-2867.

[79] OJ 2006 L 161/1. See for another example Directive 2006/66 on batteries and accumulators and waste batteries and accumulators, OJ 2006 L 266/1.

Selected paragraphs from:

Onida, M.

**Europe and the environment: legal essays in honour of Ludwig Krämer**

Groningen: Europa Law Publishing (2004), pp. 65-85

## 1. Origin and development

### *1.1 First European Community instrument on Environmental Impact Assessment*

Whether through rational or other means, societies have always sought to predict the future and to forecast the effects of human actions.

Environmental impact assessment (EIA) is a predictive tool of the late twentieth century. Originating in the United States, it shows the influence of several different disciplines, notably land-use planning and the environmental sciences. It is one of the fruits of the rapid increase in environmental consciousness that took place in the nineteen sixties, a period that laid decisive foundations for today's policies on environmental protection and improvement.[1]2

In essence, EIA is a process of gathering and using information in order to guide decisions likely to affect the environment. In its most evolved forms, it exemplifies and interweaves three of the basic principles or approaches to safeguarding the environment. It is science and knowledge-based, aiming to underpin decisions with information that is relevant, reliable and sufficient. It involves a participative process, and recognizes the wisdom of making use not only of different professional disciplines but also of the fund of experience and concerns of the individual citizen and the general public. It is preventive in purpose, seeking to avoid problems from the outset, rather than addressing them once they emerge.

If the launch of the Community's first environmental action programme in 1973[2] 3 is taken as the effective start-date of EC environmental policy, it is clear that certain of these principles and approaches were already present from the outset in the minds of the Community's first environmental policy-makers.[3] However, given the novelty of EIA and the lack of an express Treaty reference to the environment, it is still a measure of the boldness of those policy-makers that an initiative on EIA began in the mid-nineteen seventies. It is a measure of the legislative caution that subsequently emerged that five years elapsed between the publication of a Commission proposal in 1980[4] and the adoption of the first EIA instrument, Directive 85/337/EEC[5] on the assessment of the effects of certain public and private projects on the environment.

Delayed in adoption and limited in scope to projects, the first Community instrument on EIA nonetheless represents an important milestone and achievement. In place of the *ad hoc* practices and bits and pieces of national law on impact assessment that preceded it, Directive 85/337/EEC presents a coherent logic and framework for determining the need for, and for undertaking EIA. It is true to the

---

[1] Jendroska (note 26 below) has observed that *'In the modern affluent society we have abundance not only of material products but also of 'non-material' products: ideas, theories and visions.'* In this sense, the nineteen sixties and early nineteen seventies were especially bountiful in innovative concepts and principles for protecting the environment.

[2] OJ 1973 C 112/1.

[3] In its Title II, the First Environmental Action programme not only refers to the principle of preventing environmental harm at source and the polluter pays principle but also notes that *'Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes. The environment cannot be considered as external surroundings by which man is harassed and assailed; it must be considered as an essential factor in the organization and promotion of human progress. It is therefore necessary to evaluate the effects on the quality of life and on the natural environment of any measure that is adopted or contemplated at national or Community level and which is liable to affect these factors.'*

[4] OJ 1980 C 169/14.

[5] Directive 85/337/EEC, OJ 1985 L 175/40, amended by Directive 97/11/EC, 0J 1997 L 73/5.

features that characterize EIA in its evolved forms. In the breadth of the science and knowledge that it potentially embraces - from the modeling of air emissions and water discharges to the interpretation of historic landscapes, it has never been surpassed by any other EU environmental instrument - or, indeed, it can probably safely be said, by any other piece of secondary Community legislation. In its provisions for public participation, the Directive can be considered as the first important example of EU-derived 'environmental rights'[6] legislation. It is clear in its endorsement of the preventive principle.

Indeed, in the time since its adoption, the key conceptual strands of the 1985 Directive have, in a wider sphere, grown in importance. Specialist studies and disciplines in the field of the environment have continued to develop. Environmental rights legislation has expanded in the direction of access to information and access to justice. The principle of prevention has been joined by the precautionary principle.

With regard to EIA specifically, the period since 1985 can be described by reference to three themes: the consolidation and refinement of rules on project-related EIA under the 1985 Directive; the appearance of new instruments and initiatives on EIA that extend the exercise to plans and programmes; and efforts to ensure that, in practice, different assessment requirements are co-ordinated with each other and with other legal requirements.

### 1.2 Refinement and consolidation of project-related EIA

The 1985 Directive is explained in more detailed below, but it is useful to briefly outline the main developments that followed its adoption.

The Directive allowed Member States a period of three years to take the necessary measures to respect its requirements. During the 1990s, compliance with the Directive became a touchstone issue in environmental controversies about major projects across the EC, especially in those Member States going through a phase of rapid infrastructure-building, such as Spain, Portugal, Greece and Ireland. Amongst environmental complaints submitted to the Commission and the European Parliament, the Directive established itself as the most-cited EC instrument, a position it still occupies.[7]

With the Directive gaining a high profile, legal issues arose and, following preliminary references for interpretation from national courts as well enforcement action taken by the Commission against certain Member States, the Court of Justice provided useful clarification. Its rulings confirmed the Directive's broad purpose and scope.

In 1993 and 1997, under an in-built review mechanism[8], two reports were drawn up by the Commission to provide an overview of implementation of the Directive.[9] Influenced by the findings of the first of these reports as well as the developing case-law of the Court and developments at the international level, the Commission proposed amendments to the Directive in 1994[10] and 1996[11], and an amending Directive was adopted in 1997.[12] Without departing from the original framework, the amendments clarify and reinforce several key provisions, for example those concerning the selection of individual projects to undergo EIA. A third Commission report has since appeared.[13]

The consolidating effects of case-law, implementation reports and the 1997 revision were augmented by several other initiatives. In 1999 and 2001, the European Commission services published a series of guidelines to assist practitioners and other stakeholders on several aspects of

---

[6] Conceiving of public consultation purely in terms of environmental rights may be somewhat misplaced, since the benefits of consultation accrue to decision-makers and society at large as well as to those who participate. By providing information to public authorities and by helping to fill knowledge gaps, consultees can be considered as rendering a public service. An analogy may be made with participation in a census.

[7] For an account of the implementation of the Directive in this early phase, including the sorts of issues that figured in complaints to the Commission, see Krämer (1997a) 240-257. As then head of the legal unit in the Commission's environmental directorate-general, Ludwig Krämer exercised an influential role in the Directive's implementation.

[8] Article 11(1) and (3). These provisions provide for an exchange between Member States and the Commission on experience gained in applying the Directive. On this basis, the Commission is required to send a report to the European Parliament and Council every five years.

[9] The first report was published as COM (93)28 of 2.4.93. The second report is available at http://ec.europa.eu/environment/eia-support.htm.

[10] OJ 1994 C 130/8.

[11] OJ 1996 C 81/14.

[12] OJ 1997 L 73/5.

[13] This is available at http://ec.europa.eu/environment/eia/report_en.pdf.

the Directive.[14] The Commission undertook several studies and in 1997 a strategy was published for undertaking research on environmental impact assessment.[15]

The influence of developments at international level can be seen in the adoption of Directive 2003/35/EC,[16] which amongst other things, introduces specific provisions on access to justice into Directive 85/337/EEC.

### *1.3 New instruments and initiatives on EIA*

The 1985 Directive was adopted before the EC Treaty contained any specific reference to the environment. In the following decade and a half, the Treaty underwent three substantial revisions, with eventual consequences for the role of EIA. The first of these revisions, the Single European Act (1987), was the most significant for environmental policy. It saw the insertion of an environmental chapter into the EC Treaty, which has not been radically altered by subsequent revisions. The new chapter included reference to the principle of environmental integration, i.e. the principle that the environment should not be dealt with as a policy apart but as an integral aspect of the design and implementation of all EC policies.[17] This principle received a further boost when stronger wording was inserted into a more prominent part of the EC Treaty by the Treaty of Amsterdam (1997).[18]

EIA is, *par excellence*, an instrument for achieving integration. The Treaty recognition that the environment should be an integral part of all EC policies considerably reinforced arguments for a wider use of EIA at higher tiers of decision-making, *i.e.* at the level of decision-making on land-use plans, sectoral plans and programmes, policies and legislation. Environmental impact assessment at this level is commonly referred to as strategic environmental assessment (SEA). The influence of the Treaty became apparent in the area of Community funding in the first half of the nineteen nineties, when a form of environmental assessment (*ex ante* evaluation) was introduced for proposed EC regional spending. This was intended to help avoid the sort of environmental mistakes that had emerged through poor instrument design in other areas of EC activity, notably agricultural policy.[19]

This early effort at a form of strategic EIA was disappointing in substance,[20] but it was a pointer to the general direction in which the EC was moving. In fact, the nineteen nineties were marked by a general trend towards greater analytical preparation of EC policy initiatives, evidenced not only by a recognition of the role of EIA but also of the role of other forms of assessment, such as analysis of the financial implications of new proposals. The Treaty of Amsterdam was accompanied by a declaration on SEA.[21] Against the background of a general effort to improve the formulation of EU legislation and policy, the Commission in 2002 published a communication on impact assessment.[22] This provided for the amalgamation of previous forms of impact assessment, environmental and non-environmental, and the introduction of an extended impact assessment (exIA) for Commission proposals likely to have substantial economic and/or social effects. Detailed internal technical guidelines on implementing exIA were separately introduced.

---

[14] In 1999, the Commission services published 'Guidelines on the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions', ISBN 92-894-1337-9. In 2001, they published separate guidance documents on screening, ISBN 92-894-1334-4, scoping, ISBN 92-894-1335-2, and on reviewing environmental impact statements, ISBN 92-894-1336-0. These documents are obtainable at http://ec.europa.eu/environment/eia/eia-support.htm.

[15] See http://ec.europa.eu/environment/eia/eia-support.htm.

[16] Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ 2003 L 156/17.

[17] Article 130r, second paragraph provided that *'Environmental protection requirements shall be a component of the Community's other policies.'*

[18] A new Article 6 of the EC Treaty provided that *'Environmental protection requirements must be integrated into the definition and implementation of the European policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.'*

[19] An example is widespread erosion damage in several parts of Europe linked to production subsidies that encouraged farmers to overstock land with farm animals.

[20] Evaluations tended to be meager or superficial. An imperative to rapidly approve spending programmes militated against any rigorous quality control.

[21] Declaration 12 stated that *'The Conference notes that the Commission undertakes to prepare environmental impact studies when making proposals which may have significant environmental implications.'*

[22] COM (2002) 276 final.

Thus, the integration principle ultimately proved a significant influence on the Communities own processes for launching policy initiatives. However, in the late nineteen eighties and first half of the nineteen nineties, the climate was not immediately propitious for a general Community initiative on the EIA of plans and programmes at Member State level. The 1985 Directive was going through a teething period, and Member States showed little inclination to accept additional EIA commitments, despite recognition amongst experts that project-related EIA often came too late in to the decision-making process to meaningfully influence outcomes.

The first significant breakthrough came with the adoption in 1992 of Directive 92/43/EEC,[23] an instrument to conserve the Community's most important natural habitats and endangered plant and animal species. Although limited to the sphere of nature conservation, this introduced a specific requirement on Member States to environmentally assess plans. Chronologically, this can, therefore, be considered the second major EC instrument on EIA. It is discussed in more detail below.

A further stimulus to the introduction of more strategic forms of EIA was provided by Community participation in initiatives launched by the United Nations Economic Commission for Europe (UNECE). Older (1947) and with a wider membership than the EU (55 Member States), UNECE has, over the past quarter century, developed into a significant source of international environmental law. During the 1990s, it sponsored two key conventions relevant to EIA.

The first was the Convention on environmental impact assessment in a transboundary context, known as the Espoo Convention after the city in Finland where it was adopted in 1991. Through the use of environmental impact assessment, the Convention aims to prevent, reduce and control significant transboundary environmental impacts from a number of activities.[24] The EC ratified the Convention in 1997. The primary focus of the Espoo Convention is on project-related assessment. However, it contained an express, albeit limited, reference to SEA.[25] The Convention subsequently served as a forum for further work on SEA, with an important protocol being concluded in 2003.[26]

The second UNECE Convention is the Convention on access to information, public participation in decision-making and access to justice in environmental matters, adopted in Aarhus in Denmark in 1998, and hence now known as the Aarhus Convention. The Convention promotes government accountability, transparency and responsiveness in the field of the environment by granting the public rights and imposing on parties and public authorities obligations regarding access to information, public participation and access to justice.[27] The European Community was one of the Convention's signatories.

Other international conventions and initiatives may also be mentioned. In 1992, at the United Nations Conference on Environment and Development ('the Rio Conference') the Convention on Biological Diversity was signed. Amongst other things, this makes reference to project EIA as well as to arrangements to ensure that the environmental consequences of programmes and policies likely to have significant adverse impacts on biodiversity are duly taken into account.[28] The Rio Conference also marked the signing of the Rio Declaration on Environment and Development which made a broad reference to the role of EIA.[29]

In their broad references to EIA, these international conventions are an example of the influence of international fora on EU environmental policy-making. They helped pave the way for an EU instrument on assessment of plans and programmes, and the Aarhus Convention has also had an influence on subsequent EU rules on project EIA.

Against a background increasingly favorable to the EIA of plans and programmes, the Commission in 1996 published a proposal for a Directive on SEA[30], which led to the adoption of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment[31], discussed in more detail below.

---

[23] OJ 1992 L 206/7.

[24] For detailed information on the Convention, see web-site http://www.unece.org/env/eia/.

[25] Article 2(7) provides that *'To the extent appropriate, the Parties shall endeavor to apply the principles of environmental impact assessment to policies, plans and programs.'*

[26] For an account of the origins and development of the SEA Protocol, see Jendroska (2003) 281-293.

[27] For further information on the Convention, see web-site http://www.unece.org/env/pp/.

[28] Article 14. For a detailed commentary, see Glowka *et al.* (1994).

[29] See principle 17.

[30] COM (1996) 511 final, OJ 1997 C 129/14 and COM (99) 73 final, OJ 1999 C 83.

[31] OJ 2001 L 197/30.

### *1.4 Wider developments requiring co-ordination of EIA and other legal requirements*

The creation of a broad and wide-ranging set of EC rules on EIA has taken place while the volume of EC environmental legislation has been generally increasing. As a result, issues of co-ordination have arisen not only as between the three main EIA instruments mentioned above - i.e. Directives 85/337/EEC, 92/43/EEC and 2001/42/EC, but also as between substantive requirements on EIA and substantive requirements on other topics.

With the growth in assessment requirements, a challenge has emerged to make different assessment instruments interact coherently. For example, the same project may require assessment under Directives 85/337/EEC and 92/43/EEC. The Commission has tried to address this challenge in guidance documentation.[32] In addition, some specific assessment provisions are the subject of explicit cross-reference.[33] However, given that the assessment of plans and programmes has hardly yet begun to widely feature, the full extent of the co-ordination challenge across different assessment instruments is only likely to be felt in the future.

Because of the nature and scope of project-related and strategic EIA, it is inevitable that it will have cross-cutting relevance to other environmental measures. This relevance stems from the fact that certain plans and project classes covered by EIA requirements are subject to other requirements under EC environmental law. In some cases, EC environmental law obliges the making of plans or programmes or the proposal of projects that either require EIA or need to be screened for it. Examples include the making of waste management plans[34] and the proposed construction of waste-water collection systems and treatment plants.[35] In other cases, projects that require EIA will need to satisfy other procedural or substantive obligations.[36] New landfills will need to comply with detailed authorization requirements.[37] Industrial facilities that present a major accident risk are subject to detailed risk-assessment.[38] Integrated pollution prevention and control requirements (IPPC) apply across a broad range of activities.[39] EIA processes should therefore not be seen in isolation.

## 2 Present situation: Applicable rules

EIA legislation in the EU currently consists of three principal instruments: Directive 85/337/EEC, Directive 92/43/EEC and Directive 2001/42/EC. However, impact assessment techniques crop up elsewhere in Community law.

### *2.1 Project-related impact assessment: Directive 85/337/EEC as amended*

Being the first and longest-established of the EIA instruments, Directive 85/337/EEC has, until now, commanded the greatest attention.

The essential elements of the Directive are three-fold. Its application is related to listed types of *project*. It contains rules as to *when* an EIA is required. It also contains rules as to *how* an EIA should be carried out. Questions of implementation and interpretation revolve around these elements. In addition, it is relevant to consider the effects of EIA, and some other issues.

---

[32] See note 83.

[33] For example, Article 3 of Directive 2001/42/EC contains an explicit cross-reference to Article 6 of Directive 92/43/EEC.

[34] See Directive 75/442/EEC on waste, OJ 1975 L 194/39, amended by Directive 91/156/EEC, OJ 1991 L 78/32.

[35] See Directive 91/271/EEC concerning urban waste water treatment, OJ 1991 L 135/40.

[36] These additional requirements have implications for the outcome of the EIA process, i.e. the information generated in the process may help to determine the precise conditions that are imposed to comply with authorization-related and similar obligations derived from other EC environmental legislation.

[37] Directive 1999/31/EC on the landfill of waste, OJ 1999 L 182/1.

[38] Directive 96/82/EC on the control of major accident hazards involving dangerous substances (known as 'Seveso II'), OJ 1997 L 10/13.

[39] Directive 96/61/EC (IPPC), OJ 1996 L 257/26. Article 6(2) of the Directive includes a specific cross-reference to Directive 85/337/EEC.

*2.1.1 What is a 'project'?*

In considering whether an intervention is a 'project' for purposes of the Directive, regard must be had to the definition of 'project', the scope of the project lists set out in Annexes I and II of the Directive, and the case-law of the Court of Justice.

'Project' is defined in Article 1(2) to mean:

'- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.'

This indicates that an intervention must have a physical dimension. While construction will often be a central, it is not a necessary feature. It may be argued, for instance, that a significant change of use may amount to a 'project', as where it is proposed to introduce a new fuel stock to operate a power plant.

Furthermore, the intervention must fall within a class of project listed in Annex I or II of the Directive.[40] These lists are extensive. Their broad scope can be gleaned from the class categories set out in Annex II: agriculture, silviculture and aquaculture; extractive industry; energy industry; production and processing of metals; mineral industry; chemical industry; food industry; textile, leather, wood and paper industries; rubber industry; infrastructure projects; other projects; tourism and leisure. Certain classes of project, such as the urban development one,[41] are potentially very wide. Although extensive, the lists are not exhaustive. For example, rural telecommunication infrastructure is not covered.

By virtue of the 1997 amending Directive, there is explicit provision for modifications of projects, Annex II.13 describing the following project class: *'any change or extension of projects listed in Annex I or Annex II, already authorized, executed or in the process of being executed, which may have significant adverse effects on the environment'*.[42] Even before this explicit provision, the Court of Justice had interpreted the original text as potentially covering project modifications.

Case-law provides additional guidance. In Case C-72/95[43], *Kraaijeveld*, the Court noted: *'The wording of the Directive indicates that it has a wide scope and a broad purpose.'*[44] This consideration argues in favor of project classes being interpreted broadly rather than narrowly, once likely significant environmental effects are identified. However, there are limits. In Case C-392/96[45], *Commission v. Ireland*, the Court was not convinced from the evidence submitted by the Commission that sheep grazing constituted a project for purposes of the Directive.

*2.1.2 When should an EIA be undertaken?*

There are several aspects to this question, which, to some extent, overlaps with the previous one. Consideration needs to be given the type of decision-making that is involved, to the date on which the project was initiated, to whether the project falls within Annex I or II of the Directive and to whether any exceptions apply.

In the first place, EIA is related to a decision-making process. The decisive duty is formulated as follows: *'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects'*.[46] This formulation, combined with the definition of *'development consent'*[47] indicates that project-EIA is not required in respect of stages of consideration that, formally, convey no

[40] Articles 2(1) and 4.
[41] Annex II.10(b).
[42] This is the currently applicable text. However, Article 3(8) and (9) of Directive 2003/35/EC introduce amendments which need to be transposed into national law by 25 June 2005.
[43] [1996] ECR I-5403.
[44] Paragraph 31.
[45] [1999] ECR I-5901.
[46] Article 2(1).
[47] This is defined in Article 2(2) to mean *'the decision of the competent authority or authorities which entitles the developer to proceed with the project'*.

entitlement to execute a project. For example, a proposed intervention may figure in a plan or official programme of interventions, but still require a formal approval process before it can be carried out. For purposes of the Directive, an EIA falls to be considered at the stage when an application is made to allow the project to be carried out. In Case C-201/02[48], *Delena Wells*, the Court has provided further clarification of the notion of what constitutes development consent. It confirmed that the interpretation of what constituted a development consent lay within its jurisdiction. It further confirmed that, in a consent procedure comprising several stages, assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment.

With regard to timing, the 3 July 1988 deadline fixed by Directive 85/337/EEC for national laws to be adapted to it became the subject of a number of Court rulings. In Case C-396/92[49], *Bund Naturschutz in Bayern and others*, the Court ruled that late adaptation of national laws was not an excuse for exempting projects from EIA, where the development consent procedure was initiated after the 3 July 1988 deadline. On the other hand, in Case C-431/92[50], *Commission v. Germany ('Grosskrotzenburg')*, the Court found that the Directive did not apply where the development consent procedure was initiated before this deadline. During the nineteen nineties, the latter ruling proved significant to several high-profile 'pipeline' projects, *i.e.* projects proposed before 3 July 1988 but still awaiting decision after this date. A further qualification was provided in Case C- 81/96[51], *Burgemeester en wethouders van Haarlemmerliede en Spaarnwoude*, when the Court ruled that the Directive was applicable in the case of a re-initiated development consent procedure. In order to fix a clear dividing line between projects that are subject to the Directive's original requirements and those that are subject to the current ones, Directive 97/11/EC included an explicit transitional provision.[52]

For those projects listed in Annex I to the Directive, EIA is, as a general rule, compulsory.

For those projects listed in Annex II to the Directive, Member States must operate a screening system in order to determine whether individual projects require an EIA. The screening system may take the form of thresholds or case-by-case examination or a combination of both. Whatever the chosen form, a set of selection criteria introduced by Directive 97/11/EC must be taken into account. These are set out in the current Annex III and relate to the characteristics of projects, their location and the characteristics of the potential impact.

Even before the amendments introduced by Directive 97/11/EC, the Court confirmed that Member States' discretion with regard to Annex II had significant limits. In Case C-133/94[53], *Commission v. Belgium*, the Court found that Member States are not entitled to exclude generally and definitively from assessment one or more project classes mentioned in Annex II.[54] In *Kraaijeveld*, the Court found that the question of whether a Member State went beyond the limits of its discretion in creating a screening system for Annex II projects cannot be determined in relation to the characteristics of a single project. It depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State.[55] In Case C-392/96[56], *Commission v. Ireland*, which concerned the use of size thresholds for afforestation, peat extraction and land reclamation projects, the Court found that, when establishing a screening system, Member States must take account not only of the size of projects, but also of their nature and location, since certain kinds of small project in sensitive locations might warrant assessment. Furthermore, Member States must take measures to avoid a screening system being circumvented by 'project-splitting' or 'salami-slicing' (*i.e.* the fragmentation of proposed developments into component parts that fall below the thresholds set for mandatory assessment).

The Directive sets out a number of possible exceptions in relation to the need for EIA. Projects serving national defense purposes are not covered by the Directive.[57] However, in Case C-435/97[58], *World Wildlife Fund (WWF) and others*, the Court indicated that a mixed-use project - in the specific case, an airport serving both civil and military purposes, but whose main use was commercial - was

---

[48] Not yet reported.
[49] [1994] ECR I-3717.
[50] [1995] ECR I-2189.
[51] [1998] ECR I-3923.
[52] Article 3(2) of Directive 97/11/EC.
[53] [1996] ECR I-2323.
[54] Paragraphs 41-43.
[55] Paragraph 52.
[56] [1999] ECR I-5901.
[57] Article 1(4).
[58] [1999] ECR I-5613.

not necessarily excluded.[59] The Directive does not apply to projects the details of which are adopted by a specific act of national legislation.[60] In cases C-435/97, *World Wildlife Fund (WWF) and others* and C-287/98[61], *Linster*, the Court interpreted this exception strictly. Finally, subject to several conditions, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in the Directive.[62] To date, very limited use has been made of this provision.

*2.1.3 How should an EIA be undertaken?*

For detailed information on this, the reader is referred to Commission guidance documentation.[63]

EIA under the Directive is a step-wise procedure. It may begin with an exercise in *scoping*.[64] This involves the authorities providing a developer at his request with an opinion on the information that the developer is to supply. In relation to the next step in the process, scoping may enable the developer to concentrate on the most important aspects of the project in terms of environmental impacts.

Whether or not any prior scoping is involved, the developer must submit certain environmental information to the authorities in order for the EIA to proceed further.[65] The required information can potentially extend across a wide spectrum of topics, from the effects on the environmental media and plants and animals to those on the archaeological heritage and the landscape. There is also provision for information on project alternatives. In practice, developers generally hire experts to compile the information for them, and across the EU a small service industry has grown up around the requirements of EIA.

The developer's information becomes the basis on which consultation takes place with a number of different categories of consultee, including environmental authorities and the *'public concerned.'*[66] The detailed arrangements for consulting the public are left to Member States.[67] Some projects may have effects in Member States other than the Member State where they are proposed to be located, and the Directive makes explicit provision for transboundary consultation.[68]

*2.1.4 Effects of EIA and the absence of EIA*

It is commonly assumed that the conduct of an EIA does not tie the hands of decision-makers and that a project may proceed despite predicted negative effects. However, certain qualifications deserve to be mentioned.

First of all, the information gathered from the developer and through consultation must be taken into consideration in the development consent procedure.[69] This duty has not yet been interpreted by the Court of Justice and it may be wondered whether, having regard to the principle of prevention underlying the Directive, decision-makers are completely free to ignore the negative findings of an EIA. In particular, the decision on the project must be a reasoned one, and include *'a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects'*.[70] Furthermore, the findings of an EIA may raise issues of substantive compliance with other EU environmental legislation. For example, an EIA may predict that a project will lead to breaches of binding water quality objectives, or it may disclose the presence of breeding site and

[59] Paragraphs 64-67.
[60] Article 1(5).
[61] [2000] ECR I-6917.
[62] Article 2(3).
[63] See note 14.
[64] Article 5(2).
[65] Article 5 in combination with Annex IV.
[66] Article 6.
[67] In practice, complaints to the Commission have focused on the short length of time that some Member States give to the public to express an opinion, and on the degree of publicity given to public notices that a consultation has started. One Member State, Ireland, is unique in requiring the public to pay a participation fee to express an opinion - see Ryall (2002) 317-329. The Commission has announced a legal challenge to this participation fee.
[68] Article 7.
[69] Article 8.
[70] Article 9.

resting place of an animal species protected under Directive 92/43/EEC.[71] In these circumstances, it is hard to see how the findings of an EIA can be validly ignored.

EIA has implications with regard to *when* a project is executed. The Directive is a preventive instrument and allowing a project to be executed in whole or in part before the decision-making process is completed is inconsistent with its requirements.

What are the *consequences* of a failure to undertake an EIA where one ought to have been carried out?

At the Community level, the Commission can bring infringement proceedings under Article 226 of the Treaty.[72] It is, in principle, also possible for the Commission to seek interim relief, *i.e.* to ask the Court to halt a project being executed pending the completion of an EIA. In practice, the Commission has never done this. On the only occasion when the Commission sought interim relief with regard to an EC environmental obligation, it was unsuccessful.[73] As a separate matter, the Commission can suspend the payment of Community funds where no EIA is undertaken for a Community co-financed project.

With regard to the national level, the Court of Justice has provided important clarification, notably in *Delena Wells*.[74] In the latter case, it declared that:

> 'Under Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337.'

The Court noted that a Member State is required to make good any harm caused by the failure to carry out an EIA[75] and it declared that:

> 'it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.'

The Court further clarified that, in relation to the detailed national procedural rules used to remedy a failure to undertake an EIA, a principle of equivalence and a principle of effectiveness needed to be respected, *i.e.* the rules should be no less favorable than those governing similar domestic situations and they should not make it impossible or excessively difficult to exercise rights under the Directive.

*2.1.5 Access to justice*

The right of an individual to invoke the Directive before the national courts is closely related to the issue of the consequences of a failure to undertake an EIA (or, *mutatis mutandis*, to otherwise comply with Directive 85/337/EEC).

In this regard, the judgment in *Delena Wells* is very significant. The Court confirmed that, under certain circumstances, an individual is entitled to invoke before a national court the provisions of Directive 85/337/EEC in relation to a failure to carry out an EIA.

The position established by *Delena Wells* is set to be reinforced by an amendment to the 1985 Directive. One of the aims of the Aarhus Convention is to facilitate access to justice in relation to information and participation rights.[76] In order to align Community law with this aspect of the Convention, Directive 2003/35/EC[77] inserts additional clauses into Directive 85/337/EEC.[78] Under these clauses, Member States are obliged to ensure that members of the public have access to a

---

[71] Article 12.

[72] On 29 April 2004, in Case C-117/02, *Commission v. Portugal* (not ret reported), the Court rejected a Commission challenge to a decision of the Portuguese authorities not to submit a tourism complex in the Sintra-Cascais Natural Park to an EIA. The judgment provides valuable clarification on the standard of proof that must be met in such cases (see paragraphs 82 to 88).

[73] Case C-57/89 *Commission v. Germany ('Leybucht Dykes')* [1991] ECR I-883. The Commission sought to halt work on a sea dyke project on the basis that it would give rise to a contravention of Directive 79/409/EEC on the conservation of wild birds (OJ 1979 L 103/1).

[74] Case C-201/02, not yet reported.

[75] Paragraph 66 of the judgment.

[76] Article 9 of Convention.

[77] OJ 2003 L 156/17.

[78] Article 3(7) of Directive 2003/35/EC inserts a new Article 10a into Directive 85/337/EEC.

judicial review to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive. Any procedure put in place to respect this obligation *'shall be fair, equitable, timely and not prohibitively expensive'*. Specific reference is made to the role of non-governmental organizations. The deadline for adapting national laws to these new clauses is 25 June 2005.

It remains to be seen how significant these clauses will prove. Complaints to the Commission sometimes refer to the current prohibitive cost of seeking judicial review of EIA in certain Member States.

### *2.2 Assessment of habitat impacts: Directive 92/43/EEC*

Under Directive 92/43/EEC, specific assessment provisions have been created to help protect the EU's richest concentrations of biodiversity from threats posed by damaging plans and projects.

The impact assessment provisions of Directive 92/43/EEC are found in its Article 6(3) which provides that:

> 'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.'

These provisions relate to the first step of a process governing plans or projects likely to have a significant effect on sites making up the Natura 2000 network. This EU nature conservation initiative - described as *'the EU's flagship contribution to safeguarding global bio-diversity'* [79] - aims to conserve important habitats and species' habitats and covers, in total, more than 15% of the EU's land surface. The assessment provisions form part of a wider set of site safeguards.

In practice, the importance of the assessment provisions stems from the physical extent of the network, the network's crucial role in ensuring the healthy long-term status of the EU's biodiversity, and the other substantive requirements that are linked to the assessment provisions. Their importance is further underlined by the extent of political commitments to better safeguarding biodiversity[80] and by the degree to which nature conservation figures in citizen complaints to the European Commission.

The process for considering significant plans and projects is, in part, a reaction to the decision of the Court of Justice in Case C-57/89, *Commission v. Germany ('Leybucht Dykes')*.[81] On the one hand, it was felt that the decision of the Court might overly constrain necessary developments in protected nature sites. On the other, it was thought necessary to define a careful and proportionate approach to considering the possibility and the acceptability of site damage.

The result was a stepwise procedure. This involves potentially significant plans and projects first undergoing assessment. If, following assessment, these are deemed to have damaging effects, they should not, in principle, be approved. However, subject to conditions, exceptions are possible under the terms of Article 6(4).[82] Where there is no alternative solution, damaging plans or projects may be approved for reasons of overriding public interest. In some circumstances, a prior opinion is required from the European Commission. Compensatory measures must be provided, i.e. nature must receive some recompense for the damage that results from the plan or project going ahead.

---

[79] See, for example, Commission press release IP/03/1109.

[80] At the European Council held in Göteburg in June 2001, Member States committed themselves to halting biodiversity decline within the EU by 2010.

[81] See paras 21 and 22 of the judgment. The Court ruled that the reduction of an SPA can be justified only on exceptional grounds. Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of Directive 79/409/EEC. In that context, economic and recreational requirements do not enter into consideration.

[82] Article 6(4) provides that *'If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*
*Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'*

The formulation of the procedure in Article 6(3) and (4) is succinct, but it repays close attention, being substantively innovative and rich in legal content. In 2000, the Commission published a guidance document on the legal aspects of Article 6.[83]

The *scope* of the assessment requirement is at once broader and narrower than that of Directive 85/337/EEC. It is broader in that it refers to plans and potentially encompasses all project types (instead of being limited to specified ones) and narrower in that it is solely concerned with impacts on nature. Directive 92/43/EEC was drafted within a unit of the Commission that, at the time, also had responsibility for Directive 85/337/EEC. The limitations of the earlier instrument in terms of higher tiers of decision-making, and the long-term ambition of extending assessment to plans were factors that influenced the formulation. Even though the prospects of the Council approving a general instrument on plan assessment were judged slim at the time, it was seen as feasible to introduce plan assessment in the nature sector - correctly as it turned out.

Perhaps because of its novelty, the provision for assessment of plans has since been widely ignored, both in national implementing legislation and practice, leading to Commission infringement proceedings against several Member States. Conclusive judicial interpretation is still lacking, but in Case C-256/98[84], *Commission v. France*, the Advocate General remarked, with regard to the notion of 'plan':

> 'In the context of Article 6(3), the term plan must in my view be interpreted extensively. The sites likely to be affected by such plans are, by definition, sites of Community importance, which benefit from the protection regime established in accordance with Article 6 (1) and (2); the adoption of a narrow interpretation of the term plan would be contrary to both the wording of Article 6(3) ([any] plan or project), and the conservation objectives which the designation of SACs seeks to pursue. As the possible future development of a site depends primarily on the assessment, it stems to me that the obligation ratione materiae to carry out a site assessment must therefore cover all development activities with the exception of those which are unlikely to have any significant effect, either individually or in combination with other development activities, on the site's conservation objectives. This is consistent with the principle of Community law that exceptions to the general rule (here, development activities which do not require a site assessment) are to be interpreted restrictively'.

Although, thanks to Directive 85/337/EEC, project assessment is more established, the dividing line between what constitutes a 'plan or project' and what constitutes an established activity[85] is not always clear. In 2003, a Dutch Court made a preliminary reference on the question of whether a long-established activity that is annually licensed came within the scope of Article 6(3).[86]

*2.2.1 When is an assessment under Article 6(3) required?*

The determination of when an assessment is required has two aspects. There is the substantive aspect of determining whether a threshold of significance has been reached. Then there is the aspect of the provisions' application date.

With regard to the substantive aspect, clear parallels can be drawn with Directive 85/337/EEC, which features the same 'trigger' formula, namely 'likely to have significant effects.'

With regard to the application date, the position cannot be described as straight-forward. The assessment requirement is linked to two distinct components of Natura 2000: sites classified under the terms of Directive 79/409/EEC on the conservation of wild birds[87] (which are referred to as special protection areas or SPAs); and sites that come forward under the multi-stage process of site nomination, listing and designation laid down in Directive 92/43/EEC itself (which will ultimately become special areas of conservation or SACs). Any determination of the application date needs to take into account differences as between these two components.

By virtue of Article 7 of Directive 92/43/EEC, the provisions of Article 6(3) and (4) of Directive 92/43/EEC apply to SPAs from the date of their classification, but many important ornithological sites deserving of protection have still not been classified. The Court has ruled that, pending classification,

---

[83] 'Managing Natura 2000 sites, The provisions of Article 6 of the 'Habitats' Directive'. This document is obtainable at http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf. It needs to be read with some circumspection, as subsequent case-law of the Court of Justice differs from the guidance on the applicability of Article 6(2), (3) and (4) to important bird sites that have not been designated.

[84] [2000] ECR I-2487, paragraph 33.

[85] Established activities can be considered covered by a general duty to avoid site deterioration and significant species disturbance set out in Article 6(2) of Directive 92/43/EEC.

[86] Case C-127/02, *Landelijke Vereniging tot behoud van de Waddenzee and others*, not yet decided.

[87] OJ 1979 L 103/1.

the latter are subject to an older protection regime - the regime applied in *Leybucht Dykes*.[88] This older regime does not specifically refer to assessment. However, in such circumstances, an assessment may be independently warranted for a project covered by Directive 85/337/EEC.

According to the strict wording of Directive 92/43/EEC,[89] the assessment requirements of Article 6(3) apply to other sites once they have been placed on a list of sites of European importance adopted by the Commission in co-operation with the Member States. Uncertainty stems from the fact that, because Member States did not respect the delays for nominating sites, the list was not adopted within the deadline stipulated in the Directive, *i.e.* June 1998. The list remains incomplete. Are Member States free to ignore the need for assessment - as well as other site safeguards - until the list is ready? The answer is ultimately for the Court of Justice to give.[90] There are good arguments based on existing case-law and Article 10 EC for already giving effect to the assessment requirements of Article 6(3). In practice, most Member States seem inclined to accept the current need for site safeguards.

*2.2.2 How should an assessment be carried out for purposes of Article 6(3) and what are its consequences?*

The Directive does not explicitly specify the methodology for assessing plans and projects. To complement the legal guidance on Article 6, the Commission published guidance documentation on how to apply Article 6(3) and (4), including the assessment provisions.[91]

A particular challenge arises from the linking of the assessment requirement to 'in combination' effects. Sometimes, nature sites will be threatened not by a single large plan or project but by a multiplicity of smaller interventions. Taken individually, these may not be consequential: taken together, they may seriously compromise a site's conservation objectives.

The Commission has taken the view that an EIA under Directive 85/337/EEC can, in principle, also satisfy the assessment requirements of Article 6(3). However, unlike the assessment requirements of Directive 85/337/EEC, the assessment requirements of Article 6(3) are an integral part of a wider set of safeguards. The decision-maker is, therefore, more constrained than in situations where Natura 2000 is not involved. Furthermore, the need to ensure that Natura 2000 retains its overall coherence suggests that the features of Member States' methodologies and the skills with which they are employed should not deviate to the extent of producing scientifically or technically inconsistent outcomes.

Added to these general considerations is the factor of specificity. Natura 2000 hosts many different types of living environments, with very different susceptibilities to human influence. Assessment methodologies should take account of this factor.

With regard to the consequences that may flow from an Article 6(3) assessment, it is important to stress the link to other obligations. In Case C-209/02[92], *Commission v. Austria*, the Court found that Austria was in breach of Article 6(3) and (4) for approving a golf course extension despite an assessment that it would have negative effects on the habitats of the Corncrake, *Crex crex*, a globally endangered wild bird species.

### *2.3 Environment Assessment of Plans and Programmes: Directive 2001/42/EC*

From the beginning, the European Commission had seen that the rationale for environmental impact assessment did not apply solely to projects. The original proposal for a Directive on project impact assessment[93] alludes to the step-by-step introduction of assessment principles to decision-making land-use plans, regional development programmes and economic programmes, including those in particular sectors.[94] However, as is evident from the recitals to Directive 2001/42/EC (now commonly

[88] Case C-374/98, *Commission v. France ('Basses Corbières')* [2000] ECR I-10799.
[89] Article 4(5).
[90] A preliminary reference from an Italian Court is currently awaiting a decision by the Court of Justice (Case C-117/03).
[91] 'Assessment of Plans and Projects Significantly Affecting Natura 2000 sites, Methodological guidance on the provisions of Article 6(3) and (4) of the Habitat, Directive 92/43/EEC'. The document is available at http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf
[92] Not yet reported.
[93] OJ 1980 C 169/14.
[94] See fourth and fifth recitals.

referred to as 'the SEA Directive')[95], the progression to an instrument covering the assessment of plans and programmes was neither direct nor rapid.

In structure, Directive 2001/42/EC has clear parallels with Directive 85/337/EEC. It sets rules for defining when individual plans and programmes should undergo assessment,[96] just as the earlier instrument did with regard to individual projects. It contains provisions governing the way in which an assessment should be carried out.[97] As with Directive 85/337/EEC, these entail public consultation and an assessment process that is to be undertaken before rather than after decisions are adopted. In addition, there is a comparable inbuilt review mechanism.[98] However, there are also differences. Of particular note is a requirement to carry out monitoring of the significant environmental effects of the implementation of plans and programmes in order, amongst other things, to identify unforeseen adverse effects and to be able to undertake appropriate remedial action. This is an advance on Directive 85/337/EEC, which contains no equivalent provision. National rules to give effect to the Directive need to be in place before 21 July 2004.[99] This is also a decisive date for determining whether individual plans and programmes should undergo strategic assessment.[100]

The Directive sets out a broad definition of 'plans and programmes',[101] encompassing European Community co-financed plans and programmes,[102] as well as plans and programmes adopted through a legislative procedure. The basic requirement to carry out an environmental assessment is defined broadly in terms of sectoral and land-use plans and programmes which 'set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC' or which 'have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC'.[103] This underscores a dynamic relationship between the three Directives concerned. In addition to this basic requirement, Directive 2001/42/EC provides for the possible environmental assessment of other types of plans and programmes likely to have significant environmental effects.[104]

While greatly enlarging the scope of environmental assessment requirements under Community law, Directive 2001/42/EC is not comprehensive. In particular, financial or budget plans and programmes are excluded from its provisions.[105] This omission is of potentially considerable significance, given the influence that budgetary measures such as tax breaks may exert on activities that impinge on the environment.[106]

In 2003, the Commission services published a non-binding guidance document on the Directive.[107] This was intended to promote a clear understanding of the Directive's requirements amongst Member States, public authorities and the general public.

---

[95] For an extensive account of the Directive and its background, see Sheate (2003) 331-347.
[96] Articles 2 and 3.
[97] Articles 4 to 9.
[98] Article 13.
[99] Article 13(1).
[100] Article 13(3).
[101] Article 2(a).
[102] Although excluding plans and programmes concerning the current round of Structural Funding and Rural Development - see Article 3(9). Furthermore, because addressed to Member States, the Directive relates to plan and programme-making under the responsibility of the Member States. Some programmes are initiated by the Commission itself.
[103] Article 3(2).
[104] Article 3(3)-(7).
[105] Article 3(8).
[106] For example, fiscal incentives may be created that favor new construction rather than building conservation in historic urban areas, contributing to a loss of archaeological heritage independently of land-use plans or individual projects.
[107] 'Implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment', European Communities, 2003, ISBN 92-894-6098-9. This is available at http://ec.europa.eu/environment/eia/home.htm.

# LECTURE 12

## Environmental Law: Habitat and Air Quality

22 March 2012

# The Impact of the EU Air Quality Standards on the Planning and Authorisation of Large Scale Infrastructure Projects in the Netherlands

*Floor Fleurke and Niels Koeman**

*The implementation of the first Daughter Directive on Air Quality had a considerable effect on decision-making concerning large scale infrastructure projects. It was the Dutch administrative court that enforced the air quality standards in the Netherlands by ruling that the limit values are absolute standards to be applied at all levels of decision-making. Faced with the consequences of this interpretation the Dutch government tried to soften the economic and social effects of the court's policy. This analysis of the debate that followed illustrates the two opposing approaches. The first approach is to interpret EC air quality standards literally, meaning that the limit values have to be applied by all competent authorities. Those supporting the second approach argue that the limit values must be attained, in the first place, by national measures dealing with the sources of pollution, making use of technical solutions. The Dutch government has shifted slightly from the first to the second approach, as is clear from the Air Quality Order of 2005. However, it remains doubtful whether this will be sufficient to lift the current deadlock on infrastructure projects and attain the environmental limit values.*

The implementation of the first Daughter Directive on Air Quality had a considerable effect on decision making concerning large scale infrastructure projects. It was the Dutch administrative court that enforced the air quality standards in the Netherlands by ruling that the limit values are absolute standards to be applied at all levels of decision-making. Faced with the consequences of this interpretation the Dutch government tried to soften the economic and social effects of the court's policy. This analysis of the debate that followed illustrates the two opposing approaches. The first approach is to interpret EC air quality standards literally, meaning that the limit values have to be applied by all competent authorities. Those supporting the second approach argue that the limit values must be attained, in the first place, by national measures dealing with the sources of pollution, making use of technical solutions. The Dutch government has shifted slightly from the first to the second approach, as is clear from the Air Quality Order of 2005. However, it remains doubtful whether this will be sufficient to lift the current deadlock on infrastructure projects and attain the environmental limit values.

## I. Introduction

Recently there has been considerable turmoil in the Netherlands concerning decision-making on large scale infrastructure projects. The reason for this turmoil is the Dutch Air Quality Order (Besluit Luchtkwaliteit) which implemented the Daughter Directive concerning limit values for sulphur dioxide, nitrogen dioxide, suspended particulate matter and lead in the air (Directive 99/30/EC). Some of the limit values set by the Directive, and accordingly by the Air Quality Order, came into force at the begin-

* Floor Fleurke is a PhD-researcher at the Centre for Environmental Law of the University of Amsterdam, Niels Koeman is Professor in Environmental Law and Director of the Centre for Environmental Law of the University of Amsterdam, as well as Partner at the law firm Stibbe in Amsterdam.

ning of 2005, while others will not come into force until 2010. It is clear that the limit values for several pollutants will be very difficult to attain in the Netherlands, specifically, NO2 (nitrogen dioxide) and PM 10 (particulate matter). The most important causes of pollution are traffic and industrial activities (in some cases outside the Dutch borders) as well as natural sources, like sea salt. Limit values for other substances do not cause serious problems.

Since April 2004 the Dutch administrative court (Administrative Law Division of the Council of State) has examined a number of administrative decisions concerning permits for industrial installations, the development of industrial areas and the broadening of motorways which may affect air quality, with a view to the requirements of the Air Quality Order, and set them aside where they conflicted with the Order. The main reason for this was that the limit values set by the First Daughter Directive were interpreted as absolute limit values. Therefore it is not just a matter of an increase in the burdens for the administration in preparing decisions on infrastructure projects, as was the case when the court first applied the Habitat and Birds Directives, but whether the proposed projects will actually be able to take place at all. The impact of these decisions has been considerable. It has been said that the Netherlands has come to "a deadlock" due to this new case law.

This article will analyse how the Dutch government and the Dutch administrative court have responded to this issue and tried to reduce the problems to acceptable proportions by enacting a new regulation. The focus will be on the implementation of the limit values for NO2 and PM10, which are the cause of huge problems in the Netherlands. It will show that the storm in the political and legal debate has not calmed down, because the new regulation will not produce any drastically different results. Two approaches in the debate will be distinguished. The formalistic approach considers the limit values as absolute limits, to be taken into consideration by all authorities at all levels of government in the execution of all their legal tasks which could have an impact on air quality. The other, more moderate, approach recognizes that the limit values must be considered as obligations as to result, but that they must be achieved primarily by designing and executing new national programmes that have a direct influence on the sources of pollution. On this interpretation, the European Directive does not oblige all authorities to include the limit values as a consideration in all of their decisions, specifically not with regard to the area of spatial planning. The aim of this article is to discuss both approaches, and to explore which point of view can provide a way out of the deadlock situation in which the Netherlands currently finds itself, while at the same time taking account of the EU air quality standards.

## II. European Air Quality Framework

Air quality is first and foremost a European issue. Research has shown that most national measures to combat against the most harmful effects have only a limited effect. For example, in the Netherlands, the concentration of PM10 consists to a substantial degree of so-called "background-concentration", caused by numerous sources within a radius of approximately twelve-hundred kilometres of the place where the concentration was first measured.

During the 1990s the EU evaluated the existing Directives on air quality: on sulphur dioxide and particulate matter (80/779/EC), on lead (82/884/EC), on nitrogen dioxide (85/203/EC) and on ozone (92/72/EC) and it became clear that these Directives had been implemented differently in the different Member States. As a result it was decided to harmonise air quality legislation. A Framework Directive was adopted in 1996 laying down the main elements of air quality policy in the European Union[1]. The Framework Directive defines the basic principles of a common strategy. These basic principles were inserted into the Dutch Environmental Management Act[2].

The Directive establishes and defines objectives for ambient air quality in the Community which are intended to avoid, prevent or reduce harmful effects to human health and the environment as a whole. It lays down rules to assess the ambient air quality in Member States on the basis of common methods and criteria. It also includes provisions on how to obtain adequate information on ambient air quality and ensure that it is made available to the

1 Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management.

2 Staatsblad 1998, 221.

public, as well as how to maintain ambient air quality where it is good and improve it in other cases[3].

Article 7(1) requires Member States to take the necessary "measures" to ensure compliance with the limit values. Article 7(2) specifies that such "measures" must,

a. take into account an integrated approach to the protection of air, water and soil;
b. not contravene Community legislation on the protection of safety and health of workers at work;
c. have no significant negative effects on the environment in other Member States.

Article 7(3) requires that Member States draw up action-plans, indicating what short term measures should be taken when there is a risk of limit values being exceeded, as well as to minimise that risk and limit the duration of such occurrences. These plans may involve the suspension of activities which contribute to the limit values being exceeded, including motor-vehicle traffic.

Article 8 is concerned with measures for zones where the levels are above the limit values. Article 8(3) requires Member States to draw up plans or programmes for situations where the standards are not met, or are about to be infringed. The competent authorities are responsible for implementing these plans and ensuring that the limit values are attained in time. It therefore seems essential that concrete measures are presented in an action plan where it is explained how the limit values are going to be attained.

The Framework Directive establishes a system for air quality aims (limit values, alert thresholds, target values) and provides mechanisms to assess air quality with regard to 13 groups of substances. These quality objectives for ambient air as defined in the Framework Directive are specified in four Daughter Directives:

- Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air;
- Directive 2000/69/EC of the European Parliament and of the Council of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air;
- Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air;
- Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel, and polycyclic aromatic hydrocarbons in ambient air.

## 1. First Daughter Directive on air quality

The first Daughter Directive was adopted in 1999 and had to be implemented by 19 July 2001. It specifies the limit values for five substances (of thirteen). One substance was new, PM10 (particulate matter), the levels of which are exceeded in the whole territory of the Netherlands. Concerns about meeting the limit values for this substance and for $NO_2$ (nitrogen dioxide) were therefore already raised during the negotiations for this Directive by the Netherlands and some other countries. It was argued that the limit values for nitrogen dioxide and particulate matter could not realistically be achieved within the required time-frame for the entire country. This resulted in the inclusion of an article which foresaw an evaluation of the Directive in 2003, which might have lead to a proposal to approve or change the standards. The revised EU strategy and the start of the Clean Air for Europe (CAFE) program however prevented this review, with the effect that no adjustment to the first Daughter Directive has been made so far. This has led to a situation where the limit values must be respected, although in certain countries this is not feasible without disproportionate costs. As part of the CAFE program, which aims to achieve an integrated treatment of European air pollution problems, the first Daughter Directive is being reevaluated[4].

## 2. Scope and margins

The core features of this Directive are limit values, margins of tolerance, alert thresholds, assessment of concentrations, reporting and information and evaluation. A limit value is a level fixed on the basis of scientific knowledge with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be

3 Article 1 Council Directive 96/62/EC.

4 Mak, "Luchtkwaliteitseisen: niet nieuw wel hot", M&R 2004/6, p. 252.

attained within a given period and not to be exceeded once attained[5]. The Directive obliges Member States to take measures necessary to ensure that the concentrations do not exceed the limit values[6]. Although the European Court of Justice has not yet ruled on the specific limit values set by the first Daughter Directive, there are a number of judgments which make clear that limit values are to be understood as obligations to achieve specified results[7]. In the German TA Luft cases the Court considered that limit values have to be transposed into obligations of national law. If the limits are exceeded, stakeholders must have the right to appeal to the courts[8]. In the French air-cases it became clear that these limit values also create obligations for individuals[9]. In the context of water pollution, the ECJ also stressed that limit values leave no room for derogation[10].

Margins of tolerance are set because it takes time for policy measures to take effect. The limit values for PM10 came into force in 2005 and the limit values for $NO_2$ will become effective in 2010. In the time preceding their entry into force margins of tolerance apply. These specify an annually decreasing percentage by which a limit value may be exceeded. Where concentrations exceed the limit value plus the margin of tolerance, the first Daughter Directive obliges Member States to draw up plans or programmes to improve air quality and achieve compliance with the limit values by the dates laid down[11]. For sulphur dioxide and nitrogen dioxide alert thresholds have been set[12]. These are levels beyond which there is a risk to human health from brief exposure and at which immediate steps must be taken by the Member States as laid down in the Framework Directive on air quality[13]. It also contains detailed provisions on the assessment of concentrations. A minimum number of measurement sites is specified, as well as criteria for the location of measurement sites (both macro and micro-scale criteria). In more crowded areas (agglomerations) more measurements must be performed than in other areas (zones). The method of assessment is through measurements, through calculations or a combination of measurements and calculations[14] depending on how severely the limit values are being exceeded. Calculations are only allowed if concentrations are sufficiently low. Also, public and other concerned organisations must have access to recent information[15] and Member States have an obligation to report to the Commission. The Commission has a duty to act by reporting to the European Parliament, the Council and the Member States. This may lead to a review of the annual limit values of $NO_2$ and PM10[16]. No such review has yet taken place as a result of a changed EU strategy and the start of the Clean Air for Europe (CAFE) program. Consequently, there has been no amendment to the limit values in the first Daughter Directive so far.

## III. Transposition of the first Daughter Directive into national law – the Dutch Air Quality Order 2001

Since the first Daughter Directive was implemented in the Netherlands with the enactment of the Dutch Air Quality Order in June 2001, spatial and planning developments in the Netherlands have been delayed or brought to a complete halt due to violations of the air quality standards. The Dutch Air Quality Order 2001 implements the first Daughter Directive in a general manner. It requires all public authorities to take the limit values into account when carrying out their relevant legal functions so that the limits will be met[17]. The explanatory memorandum to the Order states that this not only applies to decision making with regard to environmental issues, but also to spatial planning and traffic issues. Therefore it not only concerns plans

5 Article 2 sub 5 of Council Directive 1999/30/EC of 22 April relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air.

6 Articles 3, 4, 5 and 6 Council Directive 1999/30/EC.

7 Jans, European Environmental Law, Groningen 2000, p. 140 (145 and 209).

8 ECJ, Cases C-361/88 and C-59/89 – Commission v Germany (TA Luft).

9 ECJ, Cases C-13/90, C-14/90 and C-64/90 – Commission v France.

10 ECJ, Case C- 58/89 – Commission v Germany. See also ECJ Case C198/97 – Commission v Germany and Case C-278/01 – Commission v Spain.

11 Article 8 sub 3 of Council Directive 96/62/EC.

12 Articles 3 and 4 Council Directive 1999/30/EC.

13 Article 2 sub 6 of Council Directive 1999/30/EC.

14 Article 7 of Council Directive 1999/30/EC.

15 Article 8 of Council Directive 1999/30/EC. This information must be updated on a daily basis and is to be found in the Netherlands at: www.lml.rivm.nl.

16 Article 10 sub 2 of Council Directive 1999/30/EC.

17 Articles 8, 12 and 13 of Air Quality Order 2001.

affecting air quality directly but also more general spatial plans, like the development of an office block which attracts additional traffic and must thus be assessed as to the consequences of the proposed activity on PM10 and $NO_2$ pollution. Compared with other Member States this link between the limit values in the Directive and spatial and planning decision-making is rather unique.

In principle, the limit values apply to all ambient air (except in workplaces). No distinction is made between sensitive and non sensitive areas. The Air Quality Order, in its specification of limit values, makes no distinction between limit values to protect human health and limit values for vegetation. It has however been inferred from Annex VI of the Directive and from the guidelines issued by the Commission that no measurements or calculations are necessary in atypical situations such as immediately next to a chimney or other point emission sources. One of the most striking characteristics of the implementation of the first Daughter Directive is that the limit values are understood as absolute limit values which means that they are not open to a balancing process against other interests when decisions on permits for spatial developments are made[18]. For example, if models show that future limit values will not be met, then even a realignment of a road that will reduce air pollution is not allowed under the Order 2001. It will only be allowed if it can be shown how the decision regarding the road fits into an overall plan which will guarantee that the limit values are attained.

The Order contains very little substance on the obligation to prepare action plans as required by Article 8(3) of the Framework Directive. Where the specified alert thresholds for $NO_2$ are being exceeded, local governments have to propose action plans to improve the local situation. Usually, this takes the form of traffic circulation plans[19]. These plans should ensure that the limit values for $NO_2$ are attained before 2010. The secretary for Housing, Regional Development and the Environment is responsible for preparing an action plan to combat PM10 pollution[20]. The Order does not specify how these action plans should be designed.

Under Dutch law, citizens living in the vicinity of the planning area and non-governmental organisations have a right to object to these plans. Increasing numbers of stakeholders have seized this opportunity to challenge national and local infrastructure decision making. For example, in an attempt to reduce the number of traffic jams on motorways, the Dutch government made plans to increase the number of lanes on 33 motorways sections across the Netherlands. Some of these plans have already been approved because there were no objections, but recently three plans have been rejected by the courts following objections by stake holders.

## Application of the Air Quality Order by the Dutch court

Since the Air Quality Order came into force in 2001, more than 40 plans proposed by the authorities have been objected to on the grounds of possible violations of air quality limit values. In about a third of the cases the highest court upheld the objections for air quality reasons[21]. These plans mainly concerned large scale infrastructure projects such as road construction or modifications, zoning plans designating land for the development of business activities or housing construction, as well as permits for industrial activities. As to the scope of the Air Quality Order the Dutch court is clear. In a case concerning a zoning plan for the reconstruction of the station island of Amsterdam, the city council of Amsterdam argued before the court that the Air Quality Order is not clear about the legal obligations to which the limit values apply. The Dutch court did not accept this argument and referred to the explanatory memorandum of the Order which states that limit values need to be considered in the exercise of any power which has con-

18 In contrast, other countries (Belgium, France, UK) do not apply the limit values absolutely. If the exceeding is not very high or other important interests are at stake, a future exceeding is not a reason to reject a future development per se. See Backes/van Nieuwerburgh/Koelemeijer, "Transformation of the first Daughter Directive on air quality in several EU Member States and its application in practice", European Environmental Law Review, 2005, p. 161.

19 Article 25 Air Quality Order 2001. Many municipalities have made their action plan, see attachment B.1 and B.2 of the National Air Quality Plan, Kamerstukken II 2004-2005, 28663, No. 32.

20 National Air Quality Plan, Kamerstukken II 2004-2005, 28663, No. 32.

21 Backes/van Nieuwerburgh/Koelemeijer, "Transformation of the first Daughter Directive on air quality in several EU Member States and its application in practice", European Environmental Law Review, 2005, p. 157.

22 ABRvS 9 February 2005, 200400323, M &R, 2005/6, No. 61. This also applies to a regional plan, ABRvS, 3 November 2004, 200308644/1.

sequences for air quality[22]. In another case concerning the grant of a permit for the development of a football stadium the Dutch court held expressly that local authorities should not only have to investigate the level of local PM10 concentrations, but also look into the possibilities of taking local measures. In this regard local authorities have their own responsibilities and should work to bring down emissions as far as possible[23]. However, it remains unclear when local efforts are sufficient and what is to be understood by "as far as possible". Limit values for the protection of human health are applicable in the entire country (except workplaces). Examples where consequences on air quality were only assessed at locations where people may be exposed to them were rejected by the court[24]. The Dutch courts have consistently taken the view that a plan is allowed if – on balance – it results in an improvement[25]. In order to be able to assess this it has to be known what PM10 and $NO_2$ concentrations occur at a specific location. However, in later rulings the Dutch court restricted the possibility of compensating negative consequences with positive ones and no longer regarded it sufficient if a mere improvement takes place. If in a situation, limit values are being exceeded, the competent authority has to investigate whether the reduction in pollution makes a sufficient contribution to the attainment of the limit values. Additional measures should be considered which could further reduce local air pollution[26].

A quick glance at Dutch case law and it becomes clear that projects that contribute to limit values being exceeded even further than they are already, are likely to be rejected by the courts if objections are made. Although most cases were rejected by the court because the consequences for air quality had not been adequately investigated by the authorities granting consent, it is clear that it is not just a formal question of investigation. More importantly, projects are being refused if the expected air quality does not comply with the limit values. Another interesting point to note is that the case law discussed above only concerned intended projects. Since then, new appeals have been lodged in respect of existing projects, either to reduce exceedances, or undo projects altogether.

After the effects of the application of the Air Quality Order 2001 to decision-making procedures regarding spatial plans and infrastructure projects became clear, the government proposed a new regulation to solve the biggest problems. The first main change would have been to make a distinction between sensitive areas (houses, schools, hospitals, etc) and non-sensitive ones. Limit values would only have applied in sensitive areas. When the proposal was passed to the Council of State (the main advisory body for central government), it was so strongly criticised that it did not survive and was withdrawn. The Council of State pointed out that the text of the Directives leaves no room for such an interpretation. The Directives on air quality contain an obligation for results, leaving it up to the Member States as to how to achieve this. The Council added however, that when a project has no negative and perhaps some positive effects on the air quality, then even though limit values may already have been exceeded prior to the project, there is no reason to consider such a project an infringement of the requirements of the Directive. This, of course, does not detract from the Netherlands' obligation to attain the limit values within the time frame set by the Directive.

The second main amendment that would have resulted from the proposed regulation would have been to put the responsibility for PM10 primarily in the hands of the Secretary for Housing, Regional Development and the Environment, and the Secretary for Transport and Public Works. Under the proposal local and regional authorities would have had an obligation to prescribe the best available techniques when granting permits in cases where the limit values are being exceeded. In other cases, exposure to PM10 would have had to be limited as best "as reasonably possible". The Council of State did not agree with this perspective. It stated that according to Article 3 of the Framework Directive Member States should appoint the authorities responsible for the implementation of the Directive. Nevertheless, all national authorities have to comply with European obligations to the extent to which it is within their capabilities.

23 ABRvS 26 January 2005, 200400463, Gst. 2005, 7225.

24 ABRvS 12 May 2004, BR 2004/681, ABRvS 22 September 2004, 200307780/1, AB 2004/455 and ABRvS 13 April 2005, 200407748/1, JB 2005/151.

25 ABRvS 12 May 2004, 200308160, M&R 2004/6, No. 61, ABRvS 21 July 2004, 200305714, LJN AQ3643.

26 ABRvS 15 September 2004, 200401178 M&R 2004, No. 97, ABRvS 9 February 2005, 200400323/1, Gst.2005, 7225, ABRvS 13 April 2005, 200407748/1, JB 2005, No. 151.

## IV. New Air Quality Order of 2005

The Air Quality Order 2005[27] replaces the earlier one of 2001 and, at the same time, implements the second Daughter Directive[28] (for benzene and carbon monoxide in ambient air) and the EC Participation Directive[29]. The scope of the Order has remained unchanged. It imposes the requirement on public authorities to take into account the limit values in performing all relevant tasks which have consequences for air quality[30]. As under the former order, the limit values apply everywhere except workplaces[31].

Changes made by the Air Quality Order of 2001 compared with the old one include minor amendments as well as deliberate relaxations of the standards changes of the latter type are:

Firstly, concentrations that are by nature present in ambient air and not harmful to human health can be omitted from the examination of the air quality concerning PM10. A comparable provision is made for concentrations of PM10 due to natural causes.

Secondly, Article 2.2 of the new Order leaves the stand still principle out of consideration which means that small deteriorations can be accepted as long as the limit values are not exceeded.

Thirdly, and most importantly, Article 7.3 of the Order contains an arrangement for the compensation of negative consequences by positive effects, the so-called per balance system. Two different situations are being distinguished:

The competent authorities can exercise their competences, so long as – on balance – the concentration of a relevant substance in the ambient air has improved or at least stayed at the same level as a consequence of the decision made by the competent authorities, notwithstanding that the air quality does not satisfy the limit values;

A limited increase of the concentration of the relevant substance is permissible, if on balance the air quality is improved due to the measure taken or to due to an effect caused by such a measure[32].

Contrary to the replaced Order, the Air Quality Order 2005 states in what circumstances account must be taken of the limit values. However, the given list is not exhaustive[33]. If in a particular situation effects on air quality are not to be expected, it is not necessary to give consideration to the limit values. If this is not clear initially, a global check of possible effects is needed. The explanatory memorandum also mentions that it should be checked whether a contemplated action will lead to an increased exposure to air pollution[34]. This is not required by the Framework Directive which concentrates on the air quality rather than exposure to certain air pollutants. This is surprising given that the Dutch administrative court has stressed that the limit values apply generally, i.e. independent of the question of exposure[35]. It has to be noted here that the Dutch government plans to substitute an Act on air quality for the current Air Quality Order 2005. This Act will enhance the on balance system and apply it to wider areas. A deterioration in an agglomeration would then be acceptable providing a considerable improvement could be achieved elsewhere.

## V. Current and future debate

The aim of the Air Quality Order 2005 is to soften the social and economic consequences of the original Air Quality Order 2001 as much as possible whilst still correctly applying and implementing the EC Directives[36]. However, the political and legal debate about air quality and air quality standards will not subside even after the implementation of the new Air Quality Order 2005. The political debate will not end, because the interests at

27 Order of 20 June 2005, Stb. 2005, 316.

28 Directive 2000/69/EC of November 16 2000, PbEU L313.

29 Directive 2003/35/EC of May 26 2003, PbEU L156.

30 Article 5 sub 1 of Environmental Management Act, and Articles 5, 8, 12, 13, 15, 16 and 17 Air Quality Order 2005.

31 Article 2.1 of Air Quality Order 2005 and par. 2 of explanatory memorandum, Stcr. 2005/86, p. 16.

32 The explanatory memorandum refers to a situation where the deterioration of the air quality at a specific location, for example a road, can be outbalanced by the improvement of the air quality in a larger area. A larger area is called an area that at max covers the agglomeration or zone where the local situation is located.

33 Article 7.2 Air Quality Order 2005.

34 Article 7.1 Air Quality Order 2005, see also explanatory memorandum, Stb. 2005, 316, p. 17.

35 Although the aim of the Directive is the protection of human health and the environment, the means to achieve this is limited to the sources of air pollution, Borgers, "Het besluit Luchtkwaliteit: de recente jurisprudentie in vogelvlucht", M&R 2005/6, p. 344.

36 See par.1 of the explanatory memorandum of the Air Quality Order 2005, Stb. 2005, 316, p. 17.

stake are fundamental to social values and daily life. There is an urgent need for the construction of infrastructure projects such as housing and roads to solve traffic congestion. On the other hand human health and the environment are threatened by air pollution. The legal debate will continue, because it is not only highly doubtful whether the amendments to the Air Quality Order 2005 and the intended Act on air quality will lead to the prescribed level of air quality, but also questionable whether these new amendments are in accordance with EC law.

The Dutch debate on air quality seems to be led by two camps, the formalists and the moderates. Both sides agree that the limit values are minimum standards and that they imply an obligation to implement them by the date set by the Directive. There is however disagreement on how and by what means this is to be achieved. The formalistic school holds that the limit values, set by the European Directive, are absolute limits, to be taken into consideration by all authorities at all levels of government in the exercise of all their functions which could have an impact on air quality. If there is a chance that a limit value may be exceeded, decisions on all activities causing an increase of emissions of the relevant air pollutant, even if it is only a minor pollutant, should be subject to an impact assessment. This view is reflected in both the first and the second Air Quality Orders, backed up by the Council of State and national case law. It is a strict interpretation of the first Daughter Directive, according to which the limit values are fixed levels to be attained within a given period and Member States must take the measures necessary to ensure that the limit values will be met from the date they enter into force[37]. This leaves no room for any balancing against other interests. Indeed, the limit values themselves define how often they may be exceeded. The 24-hour limit value for particulate matter, for instance, may be exceeded 35 times a year. It is claimed that such a provision would be ineffective, if further infringements were regarded as acceptable on the basis of a balancing exercise of the limit values as against other interests[38]. Furthermore, Article 3 of the Framework Directive requires Members States to appoint the authorities responsible for the execution of the Directive. This implies that all national authorities must comply with European obligations to the extent to which this is within their capabilities.

From an EC point of view the formalistic approach is a safe option: no infringement actions are to be expected from Brussels. The downside of this approach is that even projects and plans with a comparatively marginal effect on air quality have to be assessed as to their impact. This not only applies to new projects or plans, old projects or plans could also be re-opened for an impact assessment. Predictably this is going to cause serious delays in planning and spatial decision-making and may even lead to some deadlock situations. Additionally, but not unimportantly, there are the consequences for the EU's image in the eyes of citizens and institutions, who depend on the development of large scale infrastructure projects.

The other approach is more moderate in its perspective. It argues that the limit values should be achieved, in the first place, at national level, through national measures rejecting the interpretation that all activities which have only a limited effect on air quality must be subject to an impact assessment. It draws attention to the lack of effectiveness of the strict interpretation. The obligation on all government bodies to take account of the limit values in exercising any tasks which could have an effect on air quality by no means guarantees that pollution levels already exceeding the limit values are reduced. Instead, therefore, the moderate approach distinguishes not only between different levels of government, but also regarding the substance of the matter. The limit values are minimum standards creating an obligation as to the result to be achieved. They are absolute, but this does not mean that the Air Quality Order should become the overriding concern in all decisions on spatial planning or infrastructure projects. In this context a distinction is made between decision-making on projects that have a direct effect on the sources of air pollution, and spatial planning projects that are not themselves direct sources of air pollution but which contribute indirectly to an increase in pollution, for example by attracting more traffic[39]. According to this view, particular

37 Articles 3-6 Council Directive 1999/30/EC.

38 Backes/van Nieuwenburgh/Koelemeijer, "Transformation of the first Daughter Directive on air quality in several EU Member States and its application in practice", European Environmental Law Review 2005, p. 162.

39 Van der Feltz, "Luchtkwaliteit in planologie en milieurecht", M &R 2004, p. 329; Koeman, "Het Besluit luchtkwaliteit: hoe nu verder?", Bouwrecht 2005, pp. 504-509.

attention should be given to highly polluting industrial installations and more generally to plans falling under the Integrated Pollution Prevention and Control (IPPC) Directive[40] or for which an Environmental Impact Assessment (EIA)[41] is required. The emphasis is therefore on the large scale reduction of air pollution. This also means that more substantial efforts must be made in the sense of Article 7(1) of the Framework Air Quality Directive, which is phrased very generally. Another characteristic of the moderate approach is that it looks to the potential of existing and future technologies. In general, authorities are inclined to prohibit activities and substances without investing in innovative technological alternatives. Technical solutions are often possible. For example, from a recent plan dealing with the problem of air pollution in the province of Zuid-Holland it has become clear that the reconstruction and redevelopment of industrial facilities could lead to 30 % decrease in PM10 emissions, compared with the emissions in 2000. With additional measures concerning road traffic a reduction of 50 % could even be achieved.

In conclusion, the moderate approach is the more flexible one. Its starting point is a national level perspective to deal with the largest polluters first. An advantage of this approach is that it does not interfere with infrastructure plans which are needed and have social benefits. The disadvantage is that it takes time to conceive complex policies based on innovative technology. This time has already run out, at least for PM10, where the deadline for attaining the limit values has already passed.

## VI. Conclusion

Air quality in the Netherlands is not just an environmental and legal issue, but above all a social and political issue. Due to the lack of timely and adequate implementation policies, it was the Dutch administrative court that eventually enforced the limit values set by the first Daughter Directive. That the Dutch judges were up to their task is clear from the numerous plans and projects rejected by the court. Confronted with this result, the Dutch government vainly tried to change the tide and the secretary for Housing, Regional Development and the Environment enacted a "concept regulation" which, among others, proposed to make a distinction between sensitive and non-sensitive areas. This concept was withdrawn after strong criticism and replaced by the Air Quality Order 2005, which took effect retroactively from May 4, 2005.

Looking at the pure crisis management conducted by the Dutch government, it appears that there has been a slight shift towards a more moderate approach. Some flexibility has been built in, which is clear from the new on balance system, from the exclusion of sea salt as a pollutant and the deletion of the provision that contained the "stand-still" principle. It is however doubtful if this will do the trick as all administrative decisions by all authorities will still have to be assessed as to their effects on air quality. Also, from an environmental point of view scientists have already predicted that the Air Quality Order 2005, the action plans and the measures taken will not be sufficient to fulfill the European air quality standards

The legal boundaries have been stretched. Although the European Court of Justice has not ruled on the air quality limit values, it can be concluded from earlier case law that the Court interpreters them as a strict obligation to be complied with by Member States. The solution to the current problems therefore has to come from a policy change in Brussels, which takes into account the different characteristics and circumstances in the Member States. For example, for the Netherlands, the ability to comply with the uniformly set limit values is limited by 'structural' realities, like a high population density, a particular geography (the entire country is exposed to the influence of the sea) and the fact that the Netherlands has become a transportation centre. These special conditions make it very difficult to implement the currently uniform Directives on air quality. In the end, the solution to air quality problems in the Netherlands, as in the rest of Europe, has to be sought in the European political arena.

40 Council Directive 96/61/EC of 24 September, 1996.

41 Council Directive 85/337/EEC as amended by Directive 97/11/EC.

uropean Commission

Selected chapters from:

# MANAGING NATURA 2000 SITES

## The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC

© M. O'Briain

Luxembourg: Office for Official Publications of the European Communities, 2000

ISBN 92-828-9048-1

© European Communities, 2000







### 1.1. Placed within the overall scheme of Directives 92/43/EEC and 79/409/EEC as well as within a wider context

Before addressing Article 6 in detail, it is worth recalling its place within the overall scheme of Directive 92/43/EEC as well as that of Directive 79/409/EEC (1) and its relationship with a wider legal context.

The first chapter of Directive 92/43/EEC, comprising Articles 1 and 2, is entitled 'Definitions'. This chapter sets out the aim of the directive which is to *'contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies'* (2). It also provides a general orientation, referring to the need for measures taken pursuant to the directive to be designed to maintain or restore certain habitats and species *'at favourable conservation status'* (3), while, at the same time, referring to the need for measures taken pursuant to the directive to *'take account of economic, social and cultural requirements and regional and local characteristics'* (4).

The main specific requirements of Directive 92/43/EEC are grouped under the two subsequent chapters. The first is entitled 'Conservation of natural habitats and habitats of species' and comprises Articles 3 to 11 inclusive. The second is entitled 'Protection of species' and comprises Articles 12 to 16 inclusive.

The 'Conservation of natural habitats and habitats of species' chapter addresses the most ambitious and far-reaching challenge of the directive — the establishment and conservation of the network of sites known as Natura 2000. Within this chapter, Article 6 sets out provisions which govern the conservation and management of Natura 2000 sites. Seen in this context, Article 6 is one of the most important of the 24 articles of the directive, being the one which most determines the relationship between conservation and land use.

The article has three main sets of provisions. Article 6(1) makes provision for the establishment of the necessary conservation measures, and is focused on positive and proactive interventions. Article 6(2) makes provision for avoidance of habitat deterioration and significant species disturbance. Its emphasis is therefore preventive. Article 6(3) and (4) set out a series of procedural and substantive safeguards governing plans and projects likely to have a significant effect on a Natura 2000 site. Within this structure, it can be seen that there is a distinction between Article 6(1) and (2) which define a general regime and Article 6(3) and (4) which define a procedure applying to specific circumstances.

Considered globally, the provisions of Article 6 reflect the general orientation expressed in the recitals of the directive. This involves the need to promote biodiversity by maintaining or restoring certain habitats and species at 'favourable conservation status' within the context of Natura 2000 sites, while taking into account economic, social, cultural and regional requirements, as a means to achieve sustainable development.

Apart from the place of Article 6 within the overall scheme of Directive 92/43/EEC, it is also relevant to mention its *relationship with the scheme of Directive 79/409/EEC* on the conservation of wild birds.

(1) OJ L 206, 22.7.1992, p. 7 and OJ L 103, 25.4.1979, p. 1 respectively.

(2) Article 2(1).

(3) Article 2(2).

(4) Article 2(3).

- In the first place, the scheme of the earlier directive is broadly comparable with that of the latter. In particular, the 'Conservation of natural habitats and habitats of species' chapter of Directive 92/43/EEC has its parallel in Articles 3 and 4 of Directive 79/409/EEC.
- In the second place, there has been an important degree of merger or fusion between the schemes of both directives. First, special protection areas (SPAs) classified under the earlier directive are now an integral part of the Natura 2000 network (4). Second, the provisions of Article 6(2), (3) and (4) of Directive 92/43/EEC have been made applicable to SPAs (5). In this document, most comments on Article 6 are framed by reference to sites proposed under Directive 92/43/EEC. Generally speaking, these comments will apply, *mutatis mutandis*, to sites classified under Directive 79/409/EEC.

Seen in a wider context — that of the Treaty establishing the European Community — Article 6 can be regarded as a key framework for giving effect to the principle of integration, since it encourages Member States to manage the protected areas in a sustainable way and since it sets the limits of activities which can impact negatively on protected areas while allowing some derogations in specific circumstances.

Seen in an **international context**, Article 6 helps achieve the aims of relevant international nature conservation conventions such as the Berne Convention (6) and the Biodiversity Convention (7), while at the same time creating a more detailed framework for site conservation and protection than these conventions themselves do.

**Article 6 is a key part of the chapter of Directive 92/43/EEC entitled 'Conservation of natural habitats and habitats of species'. It sets out the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. It is relevant to special protection areas under Directive 79/409/EEC as well as to sites based on Directive 92/43/EEC. The framework is a key means of achieving the principle of environmental integration and ultimately sustainable development.**

## 1.2. Relation with protection of species chapter

As mentioned above, the chapter of Directive 92/43/EEC entitled 'Protection of species' covers Articles 12 to 16 inclusive and deals with strictly protected animal and plant species listed in Annex IV of the directive.

Articles 12, 13 and 14, which are applicable from the date of implementation of Directive 92/43/EEC, i.e. 10 June 1994, cover certain plant and animal species which also figure in Annex II of the directive, and which therefore benefit from the provisions of Article 6 within the Natura 2000 sites hosting them.

As a consequence, an action may at the same time fall within the scope of both chapters.

(4) Article 3(1) of Directive 92/43/EEC provides that 'the Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC'.

(5) Article 7 of Directive 92/43/EEC.

(6) Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the Conservation of European Wildlife and Natural Habitats (OJ L 38, 10.2.1982, p. 1).

(7) Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ L 309, 13.12.1993, p. 1).



For example, the destruction of a resting place of the brown bear, *Ursus arctos*, may contravene the prohibition of Article 12(1)(d) while also running counter to Article 6 if the resting place is within a Natura 2000 site for the species.

While this may appear to result in duplication, a few points should be noted.

- In the first place, certain species of plant and animal covered by Articles 12, 13 and 14 do not figure within Annex II. Thus, they do not benefit directly from site conservation and protection within Natura 2000.
- In the second place, for species such as *Ursus arctos* which benefit from both the chapter on conservation of natural habitats and habitats of species and the chapter on protection of species, the protection afforded by Article 6 is limited to the Natura 2000 network whereas the protection afforded by the chapter on protection of species is not geographically limited (subject to any restriction mentioned in the annexes to the directive). Thus, Article 6 is concerned with **site** conservation and protection whereas the chapter on protection of species is more narrowly focused on the species (though this will obviously have implications for sites where species occur, in particular the breeding sites and resting places of animals).

**While certain plant and animal species benefit from both the chapter on conservation of natural habitats and habitats of species and the chapter on protection of species, the scope and the nature of the relevant provisions are different.**

## 1.3. Putting Article 6 into national law: the duty of transposition

It is important to note that the provisions of Article 6 require transposition into national law (i.e. they need to be the subject of provisions of national law giving effect to their requirements). In this respect, they come within the scope of Article 23 of the directive which states 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'*. The deadline for transposition was 10 June 1994 (or 1 January 1995 in the case of Austria, Sweden and Finland).

This reflects the type of Community instrument that has been used, namely a directive. A directive is binding as to the result to be achieved, but leaves a Member State some choice as to the form and methods of achieving that result. For most directives, the required result will need national legislation.

**Depending on the Member State concerned, Article 6 needed to be transposed into national law by 10 June 1994 or 1 January 1995.**

## 1.4. Time of application of Article 6: from which date do the obligations of Article 6 apply?

In general, a distinction needs to be made between the deadline for transposition of the provisions of Article 6 into national law and the date from which these provisions apply to individual sites.

As regards individual sites, a distinction needs to be drawn between special protection areas classified under Directive 79/409/EEC and other sites.

### 1.4.2. Sites based on Directive 92/43/EEC

Article 6(1) applies to special areas of conservation (SACs). According to Article 4(4) of the directive, SACs come into being by way of designation by the Member States. Such designation is only possible after a site has been adopted as a site of Community importance (SCI) in accordance with Article 4(2) of the directive. An SCI must be designated as an SAC *'as soon as possible and within six years at the most'*. This means that the final deadline for SAC designation — and therefore for compliance with Article 6(1) — is 10 June 2004.

Article 4(5) of Directive 92/43/EEC provides as follows:

> *'As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'*

Thus, in contrast to the provisions of Article 6(1) which apply only when an SCI has been designated as an SAC, the provisions of Article 6(2), (3) and (4) become applicable as soon as a site becomes an SCI and before it is designated as an SAC. Member States are also free to choose an earlier date for the implementation of Article 6(2), (3) and (4), and some national legislation already provides for such earlier implementation.

According to Article 4 of Directive 92/43/EEC, Member States ought to have submitted their national lists by 10 June 1995 and the Commission adopted the Community list by 10 June 1998. However, no Community list could be adopted by 10 June 1998 owing to delays in submission of complete national lists.

The text of Directive 92/43/EEC seems to indicate that Member States do not need to pay attention to the provisions of Article 6 before the Community list has been adopted. However, other provisions of Community law as interpreted by the European Court of Justice need to be taken into consideration.

Article 10 (ex Article 5) of the Treaty establishing the European Community provides as follows:

> *'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'*

The European Court of Justice has, on several occasions, held that, even in the absence of transposing measures or the implementation of specific obligations resulting from a directive, the national authorities, when interpreting national law, should take all possible measures in order to achieve the results aimed at by a directive.

Furthermore, the European Court of Justice ruled in *Santoña Marshes* that a Member State could not escape from its duty to protect a site which, according to relevant scientific criteria, deserved protection, by not classifying it as a special protection area. It is possible that this principle could be used, by analogy, in questions arising from Directive 92/43/EEC.

In the light of the foregoing, Member State authorities are advised to ensure that sites on their national list of proposed SCIs are not allowed to deteriorate before the Community list of SCIs is adopted. Where the national list remains incomplete, they are advised to also ensure the non-deterioration of sites that, according to scientific evidence based on the criteria of Annex III of Directive 92/43/EEC, should be on the national list. One practical suggestion is to make correct use of environmental impact assessment (EIA) under Directive 85/337/EEC (impact assessment) in relation to potentially damaging projects. The European Court of Justice has already confirmed the importance which should be attached to sensitive natural sites when deciding whether projects should undergo an EIA under this directive.

The above considerations can be summarised in the following table:

| Site status | pSCI | SCI | SAC |
|---|---|---|---|
| Deadline foreseen by the directive | June 1995 | June 1998 | June 2004 |
| Applicability of Article 6 provisions | Optional for 6(1), (2), (3) and (4), need for measures to avoid site deterioration | 6(2), (3) and (4) | 6(1), (2), (3) and (4) |

Once the Community list is established, the position will become clear as to what requires site protection under the directive, and the advice on provisional site protection will no longer be applicable.

**As regards sites based on Directive 92/43/EEC, it can be argued that Member States, particularly after the date for adoption of the Community list expired on 10 June 1998, have certain obligations to act in a way so as to ensure that the aims of the directive are not jeopardised. Even in the absence of a Community list, Member States' authorities are therefore advised to at least abstain from all activities that may cause a site on the national list to deteriorate. Where a complete national list has not been submitted, the same advice applies to a site which, on the basis of the scientific criteria of the directive, clearly ought to be on the national list.**

# 2. Article 6(1)

Clarification of the concepts of conservation measures; statutory, administrative or contractual measures; and management plans.

## 2.1. The text

*'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.'*



## 2.2. Scope

Article 6(1) lays down a general conservation regime which has to be established by the Member States for the special areas of conservation (SAC).

Article 6(1):

- provides for **positive** measures, involving management plans and statutory, administrative or contractual measures, which aim to achieve the general objective of the directive. In that regard, Article 6(1) is distinguished from the three other paragraphs of Article 6 which provide for preventive measures to avoid deterioration, disturbance and significant effects in the Natura 2000 sites;
- has a value of **reference** for the logic and the overall comprehension of Article 6; the structured reading and the comprehension of the three other paragraphs of Article 6 require a preliminary reading and comprehension of paragraph 1;
- establishes a general conservation regime which applies to **all** SACs of the Natura 2000 network without exception and to **all** the natural habitat types of Annex I and the species of Annex II present on the sites, except those identified as non-significant in the Natura 2000 standard data form (see Section 4.5.3);
- concerns the **SACs specifically**: Article 6(1) does not apply to the special protection areas (SPAs), unlike Article 6(2), (3) and (4). In this way, the legislator established:
  - a regime laying down special conservation measures for the **SPAs** classified under the 'Birds' directive, according to its Article 4(1) and (2);
  - a regime laying down conservation measures for the **SACs** designated under the 'Habitats' directive, according to its Article 6(1);
- relates to Article 2(3) which specifies that *'the measures ... take account of economic, social and cultural requirements and regional and local characteristics'.*

**For all the SACs, Member States are required to draw up conservation measures. These are positive and apply to all the natural habitat types of Annex I and the species of Annex II present on the sites, except those whose presence is non-significant according to the Natura 2000 standard data form.**

## 2.3. What should be the content of the 'necessary conservation measures'?

### 2.3.1. The conservation concept

The conservation concept appears in the sixth recital of the directive which reads: *'Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable';* and in its eighth recital: *'whereas it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued'.*

It is then defined in Article 1, point (a) of the directive: *'(a) conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);'.*

Member States have to adopt the conservation measures necessary to achieve the general aim of the directive as set out in its Article 2(1): *'The aim of this directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies'.* There is therefore a **result obligation.**

Article 2(2), in particular, specifies the objective of the measures to be taken under the terms of this directive: *'Measures taken ... shall be designed to maintain or to restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of Community interest'.* These measures have, according to Article 2(3), to *'take account of economic, social and cultural requirements and regional and local characteristics'.*

Article 3 specifies that it is the Natura 2000 network *'composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II'* which has to ensure the objective pursued by Article 2(2).

The necessary conservation measures have therefore to aim at maintaining or restoring the favourable conservation status of the natural habitat types and the species of Community interest. They are connected with the general objective of the directive which applies to the Natura 2000 network, as defined in Article 3.

**The fulfilment of the aim laid down in Article 2(1) largely depends on conservation measures that the Member States have to take in order to maintain or restore the natural habitat types and species at a favourable conservation status. These measures are implemented through the Natura 2000 network defined in Article 3(1), taking into account economic, social and cultural requirements and regional and local characteristics.**

## 2.3.2. The conservation status

The conservation status is defined in Article 1 of the directive:

- For a **natural habitat**, Article 1(e) specifies that it is: *'the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species ...'.*
- For a **species**, Article 1(i) specifies that it is: *'the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its population ...'.*

The Member State has therefore to take into account all the influences of the environment (air, water, soil, territory) which act on the habitats and species present on the site.

The **favourable conservation status** is also defined by Article 1(e) for natural habitats and Article 1(i) for species.

- For a **natural habitat**, it occurs when:
  - *'its natural range and areas it covers within that range are stable or increasing;*
  - *the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future;*
  - *the conservation status of its typical species is favourable'.*
- For a **species**, it occurs when:
  - *'the population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats;*
  - *the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future;*
  - *there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis'.*

The favourable conservation status of a natural habitat or species has to be considered across its natural range, according to Articles 1(e) and 1(i), i.e. at biogeographical and, hence, Natura 2000 network level. Since, however, the ecological coherence of the network will depend on the contribution of each individual site to it and, hence, on the conservation status of the habitat types and species it hosts, the assessment of the favourable conservation status at site level will always be necessary.

**The conservation status of natural habitat types and species present on a site is assessed according to a number of criteria established by Article 1 of the directive. This assessment is done both at site and network level.**

## 2.3.3. The ecological requirements

Article 6(1) specifies that the necessary conservation measures have to correspond *'to the ecological requirements of the natural habitat types of Annex I and the species in Annex II present on the sites'.* It is therefore in relation to the ecological requirements of the natural habitat types and the species that Member States have to determine the conservation measures.

Although the directive does not contain any definition of the 'ecological requirements', the purpose and context of Article 6(1) indicate that these involve all the ecological needs of abiotic and biotic factors necessary to ensure the favourable conservation status of the habitat types and species, including their relations with the environment (air, water, soil, vegetation, etc.).

These requirements rest on scientific knowledge and can only be defined on a case-by-case basis, according to the natural habitat types of Annex I, the species of Annex II, as well as the sites which host them. Such knowledge is essential to make it possible to draw up the conservation measures, on a case-by-case basis.

The ecological requirements can vary from one species to another but also for the same species from one site to another.

Thus, for the bats included in Annex II of the directive, the ecological requirements differ between the period of hibernation (when they rest in underground environments, in hollow shafts or in dwellings) and the active period, from spring onwards (during which they leave their winter quarters and resume their activities of insect hunting).

For the Annex II amphibian *Triturus cristatus*, the ecological requirements vary during its life cycle. The species hibernates in the ground (cavities, fissures), then lays its eggs in spring and at the beginning of the summer in ponds. It then leaves the aquatic environment and lives on land during the summer and autumn. For the same species, the ecological requirements can therefore vary according to the sites (aquatic or land).

The identification of the ecological requirements of the natural habitat types of Annex I and the species of Annex II present on the sites is the **responsibility of the Member States.** The latter may wish to exchange their knowledge in this field, with the support of the European Commission and the European Environment Agency — European Topic Centre for Nature Conservation.

**The conservation measures have to correspond to the ecological requirements of the natural habitat types in Annex I and of the species in Annex II present on the site. The ecological requirements of those natural habitat types and species involve all the ecological needs necessary to ensure their favourable conservation status. They can only be defined on a case-by-case basis and on the basis of scientific knowledge.**

## 2.4. What form can the necessary conservation measures take?

The conservation measures can take at least two forms: the form of *'appropriate statutory, administrative or contractual measures...'* and *'if need be'*, the form of *'appropriate management plans'.*

### 2.4.1. Management plans

The necessary conservation measures can involve *'if need be, appropriate management plans specifically designed for the sites or integrated into other development plans'.* Such management plans should address all foreseen activities, unforeseen new activities being dealt with by Article 6(3) and (4).

The words 'if need be' indicate that management plans may not always be necessary. If management plans are chosen by a Member State, it will often make sense to establish them before concluding the other measures mentioned in Article 6(1), particularly the contractual measures. Contractual measures will often involve a relationship between the competent authorities and individual landowners and will be limited to individual land-holdings which are normally smaller than the site. In such circumstances, a management plan focused on the site will provide a wider framework, and its contents will provide a useful starting point for the specific details of contractual measures.

The management plans must be *'appropriate and specifically designed for the sites'*, therefore be targeted at the sites of the Natura 2000 network, **or** *'integrated into other development plans'.* The latter provision is in conformity with the principle of integration of the environment in the other Community policies. This integration has to contribute to the coherence of the network mentioned in Article 3(1). In any case, it may be necessary to apply Article 6(3) to those aspects of the management plan which are not connected to conservation management (see commentary on Article 6(3) under Section 4.3.3).

**Member States can establish management plans which superimpose themselves on the other categories of measures. They are not always necessary but, if they are used, they should take into account the characteristics specific to each site and all foreseen activities. They may be stand-alone documents or incorporated into other development plans when those exist.**



### 2.4.2. Statutory, administrative or contractual measures

The phrase *'if need be'* refers only to the management plans and not to the statutory, administrative or contractual measures. Thus, even if a Member State considers that a management plan is unnecessary, it will nonetheless have to take such measures.

The division into these three categories of measures has to be considered in a broad sense. A variety of measures may be considered as appropriate to achieve the aim of the directive. In principle, this involves measures having a **positive effect** but, in some exceptional cases, it can also involve measures requiring **no action.** On the other hand, these measures are not necessarily new measures, since existing measures can be considered sufficient if they are appropriate.

Among measures involving positive action, *agri-environmental* or *sylvi-environmental* measures serve as a good example to illustrate how socioeconomic requirements can be taken into account according to Article 2(3).

1. *Agri-environmental measures:* for certain man-made, semi-natural Annex I habitat types (meadows, pastures) and Annex II species hosted in these habitats, agreements with farmers within the new rural development regulation (*) will be in most cases a sufficient contractual measure aiming at maintaining a favourable conservation status of habitat types and species.

2. *Sylvi-environmental measures:* appropriate measures might be an initiative by a forest company within the framework of a certain certification scheme provided that this initiative ensures that favourable conservation status is maintained.

In this perspective, all suitable EU funds (e.g. LIFE, rural development and regional funds) should be considered as a means for implementing these measures.

The choice between statutory, administrative or contractual measures, or even of the management plans, is left to the Member States. This is in conformity with the principle of subsidiarity. However, Member States must choose at least one of the three categories, i.e. statutory, administrative, contractual.

There is no hierarchy between these three categories. Thus Member States have the choice to use, on a Natura 2000 site, just one category of measures (e.g. only contractual measures) or combined measures (e.g. combination of statutory and contractual measures according to the conservation issues of the natural habitat types in Annex I and the species in Annex II present on the site). Moreover, in addition to the selected obligatory measures, Member States can establish and implement management plans.

The three categories of measures are qualified as 'appropriate'. This qualifier is not defined in the directive. However, in the case of Article 6(1), the statutory, administrative or contractual measures are embraced within the concept of conservation measures. The qualifier 'appropriate' has no other objective than to recall that whatever the type of measure chosen by the Member States, there is an obligation to respect the general objectives of the directive.

Thus, if a Member State chooses the contractual measures, it always has the obligation to establish in a permanent way the necessary conservation measures which correspond to *'the ecological requirements*

(*) Council Regulation (EC) No 1257/1999 of 17 May 1999, OJ L 160, 26.6.1999, p. 80.

*of the habitats of Annex I and the species of Annex II present on the sites'* and respect the general aim of the directive defined in Article 2(1).

**For SACs, Member States are required to use the appropriate statutory, administrative or contractual measures. These measures shall take into account socioeconomic requirements according to Article 2(3). They have to (a) correspond to the ecological requirements of habitats of Annex I and species of Annex II present on the sites and (b) fulfil the general objective of the directive to maintain or restore at a favourable conservation status the natural habitats and the species of fauna and flora of Community interest.**





# 3. Article 6(2)

Clarification of the concepts of *deterioration; disturbance; and significant effect*

## 3.1. The text

*'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 disturbances 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.'*

## 3.2. Scope

The article takes as a starting point the **prevention principle**: *'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration... as well as disturbances...'.*

These measures go beyond the simple management measures necessary to ensure conservation since these are already covered by Article 6(1). The words *'avoid'* and *'could be significant'* stress the anticipatory nature of the measures to be taken. It is not acceptable to await until deterioration or disturbances occur before taking measures (see under Section 4.4.2 the interpretation of *'likely to'* in Article 6(3)).

This article should be interpreted as requiring Member States to take all the appropriate actions which it may reasonably be expected to take, to ensure that no significant deterioration or disturbance occurs.

The scope of this article is broader than that of Article 6(3) and (4) which apply only to plans and projects requiring an authorisation. It is also applicable to the performance of activities which do not necessarily require prior authorisation, like agriculture or fishing.

Article 6(2):

- applies **permanently** in the special areas of conservation (SACs). It can concern past, present or future activities or events (for instance, in the case of a toxic spill affecting a wetland, this article would mean that all preventive measures should have been taken to avoid the spillage, even if its location is distant from the wetland). If an already existing activity in a SAC causes deterioration of natural habitats or disturbance of species for which the area has been designated, it must be covered by the necessary conservation measures foreseen in Article 6(1). This may require, if appropriate, that the negative impact is brought to an end either by stopping the activity or by taking mitigating measures. This can include economic compensation.
- **is not limited to intentional acts**, but could also cover any chance events that could occur (fire, flood, etc.), as long as they are predictable. In case of catastrophes this concerns only the obligation to take (relative) precautionary measures to decrease the risk of such catastrophes as long as they could jeopardise the aim of the directive.

The legislator envisaged certain **limits** to the responsibility of the Member States:

- **Spatial limit**. Measures aim only at species and habitats located *'in the SACs'*. On the other hand, measures may need to be implemented **outside** the SAC, i.e. if external events may have an impact on the species and the habitats inside the SAC. Indeed, the article does not specify that measures have to be **taken** in the SAC but to **avoid** in the SAC.
- **Limit of habitats and species concerned.** The appropriate measures concern only habitats and species *'for which the areas have been designated'*. In particular, the habitats and species concerned by the measures to be taken are those identified in the Natura 2000 standard data forms (see Sections 2.2 and 4.5.3). The aim is not therefore to take general conservation measures, but rather to take measures focused on the species and habitats which justified the selection of the special area of conservation. The disturbances and/or deterioration will thus be determined by the information which has been communicated by the Member States and which has been used to ensure the coherence of the network for the species and habitats concerned.







**Member States are required to take preventive measures to avoid deterioration and disturbances connected with a predictable event. These measures apply only to the species and habitats for which the sites have been designated, and should also be implemented, if necessary, outside the sites.**

## 3.4. Which conditions should trigger measures by the Member States?

There exists an apparent difference between the limit of acceptability for the deterioration of a habitat or the disturbance of a species.

- In the case of **disturbance**, the latter has to be **significant** (a certain degree of disturbance is tolerated). In addition, it is not necessary to prove that there will be a real significant effect, but the likelihood alone *('could be')* is enough to justify corrective measures. This can be considered consistent with the prevention and precautionary principles.
- In the case of **deterioration**, the legislator did not explicitly give this margin. This does not exclude however some room for manoeuvre in determining what can be described as deterioration (see below).

Deterioration is a physical degradation of a habitat. It can be directly assessed through a series of indicators (see below), for example, a reduction in the area or characteristics of the habitat.

On the other hand, disturbances do not directly affect the physical conditions. However, if they are significant, they may trigger changes in physical parameters, which have the same result as deterioration. If disturbances are significant enough to trigger changes in this way, they can be assessed in the same way as deterioration, using indicators of conservation status (see below).

**Disturbances are assessed in the same way as deterioration as long as they trigger change in indicators of the conservation status of protected species in such a way as to affect the conservation status of the species concerned.**

## 3.5. When should measures in relation to disturbance and deterioration be taken?

First, it should be stressed that measures must be **appropriate**. This means that they should fulfil the main objective of the directive in contributing to the conservation status of the habitats or species concerned while taking account of *'economic, social and cultural requirements and regional and local characteristics'.*

The inter-linkage of the recitals and articles of the directive provides the context for considering the appropriate measures to be taken by the Member States (see Section 2.3).

As mentioned in the previous paragraph 3.4, disturbance and deterioration should be assessed against the conservation concept, bearing in mind that according to Article 3(1) the network is composed of **sites** and shall enable the natural habitats types and the species' habitats concerned to be maintained at **favourable conservation status** in their natural range.

The favourable conservation status, as defined in Article 1 of the directive, can serve as a term of reference to fix the limit of acceptable disturbance and deterioration with respect to the objectives of the directive and to determine if the appropriate measures are properly implemented (see below).

The conservation status of a habitat or species in a site will be assessed according to the contribution of this site to the ecological coherence of the network, either:

- against its initial status at the time of transmission of site-related information provided in the Natura 2000 standard data forms (see Section 4.5.3) if this conservation status is favourable; or
- against an aim of improving the conservation status announced at the time of the setting-up of the network. Indeed, if a Member State is obliged to propose the classification of habitats in an unfavourable conservation status, it is only logical to assume that it will set a restoration target for these habitats so as to ensure their sustainability. When Community funds are granted for the improvement of the conservation status of a habitat or species in a site, it is this improved status that will be taken into consideration.

On a particular site the conservation status should reflect the dynamic nature of the habitats and species concerned. In that regard, the importance of **surveillance** of the conservation status of habitats and species, as required by Article 11 of the directive, should be stressed.

**Deterioration or disturbance is assessed against the conservation status of species and habitats concerned. At a site level, the maintenance of the favourable conservation status has to be evaluated against the initial conditions provided in the Natura 2000 standard data forms when the site was proposed for selection or designation, according to the contribution of the site to the ecological coherence of the network. This notion should be interpreted in a dynamic way according to the evolution of the conservation status of the habitat or of the species.**

## 3.6. Indicators of disturbance and deterioration

The conditions which govern the concepts of disturbance and deterioration are well defined, but they should be assessed by the Member State, on the one hand, against the general conservation status of the species or the habitats concerned (at biogeographical level) and, on the other hand, against the local conditions (at site level). As a general rule, on a particular site, disturbance or deterioration is assessed on a case-by-case basis, using indicators (see below), with respect to the significance of their change in value. This is measured against (a) the conservation status of the natural habitat or species concerned, and (b) the contribution of the site to the coherence of the Natura 2000 network.

### 3.6.1. Deterioration of habitats

Deterioration is a physical degradation affecting a habitat. The definition of the conservation status (Article 1(e) — see Section 2.3), means that the Member State has to take into consideration all the influences on the environment hosting the habitats (space, water, air, soils). If these influences result in making the conservation status of the habitat less favourable than it was before, the deterioration can be considered to have occurred.

To assess this deterioration against the objectives of the directive, one can refer to the definition of the **favourable conservation status of a natural habitat** set out in Article 1(e), on the basis of the following factors:

- *'The **natural range** and **areas** it covers within that range are **stable or increasing**.'*

Any event which contributes to the reduction of the areas covered by a natural habitat for which this site has been designated can be regarded as deterioration. For example, the importance of reduction of the area of the habitat has to be assessed in relation to the total surface occupied in the site according to the conservation status of the habitat concerned:

- *'The **specific structure and functions of the area necessary for its long-term maintenance exist** and are likely to continue to exist in the foreseeable future.'*

Any impairment of the factors necessary for the long-term maintenance of the habitats can be regarded as deterioration.

The functions necessary for the long-term maintenance depend of course on the habitat concerned (it would be useful to have common indicators enabling to assess these elements for each habitat type). Member States have to know these requirements (by means of studies, data collection, etc.) since Article 6(1) provides that they have to take measures *'which correspond to the ecological requirements of the habitats in Annex I and species in Annex II.'*

- *'The **conservation status of its typical species** is favourable as defined in (i)' (see Section 2.3 for the definition of item (i) of Article 1).*

**Habitat deterioration occurs in a site when the area covered by the habitat in this site is reduced or the specific structure and functions necessary for the long-term maintenance or the good conservation status of the typical species which are associated with this habitat are reduced in comparison to their initial status. This assessment is made according to the contribution of the site to the coherence of the network.**

### 3.6.2. Disturbance of species

Contrary to deterioration, disturbance does not directly affect the physical conditions of a site; it concerns the species and it is often limited in time (noise, source of light, etc.). The intensity, duration and frequency of repetition of disturbance are therefore important parameters.

In order to be significant a disturbance must affect the conservation status. The conservation status of a species is defined in Article 1(i) (see Section 2.3).

In order to assess whether a disturbance is significant in relation to the objectives of the directive, reference can be made to the definition of the **favourable conservation status of a species** given in Article 1(i), on the basis of the following factors.

- *'**Population dynamics data** on the species concerned indicate that it is maintaining itself on a long-term basis as a viable element of its natural habitats'.*

Any event which contributes to the long-term decline of the population of the species on the site can be regarded as a significant disturbance.

- *'The **natural range** of the species is **neither being reduced** nor is likely to be reduced for the foreseeable future'*

Any event contributing to the reduction or to the risk of reduction of the range of the species within the site can be regarded as a significant disturbance.

- *'There is, and will probably continue to be, a **sufficiently large habitat** to maintain its populations on a long-term basis'.*

Any event which contributes to the reduction of the size of the habitat of the species within the site can be regarded as a significant disturbance.

257

**Disturbance of a species occurs on a site when the population dynamics data for this site show that the species could no longer constitute a viable element of it in comparison to the initial situation. This assessment is done according to the contribution of the site to the coherence of the network.**



# 4. Article 6(3)

Clarification of the concepts of *plan or project; significant effect; appropriate assessment; site's conservation objectives; competent authorities; opinion of the public; integrity of the site*

## 4.1. The text

*'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.'*

## 4.2. Scope

As regards **purpose and context**, the role of the third and fourth paragraphs of Article 6 needs to be considered in relation to that of the first (or, in the case of SPAs, with that of the first and second paragraphs of Article 4 of Directive 79/409/EEC) and second paragraphs of Article 6. In particular, it is important to remember that, even if it is determined that an initiative or activity does not fall within the scope of Article 6(3), it will still be necessary to make it compatible with the other aforementioned provisions.

It may be noted that ecologically positive or ecologically compatible activities may already be accommodated within Article 6(1) and (2) — for example, traditional farming practices which sustain particular habitat types and species. The provisions of Article 6(3) and (4) constitute a form of development regime, setting out the circumstances within which plans and projects with negative effects may or may not be allowed. The provisions thus ensure that negative economic and other non-ecological requirements can be balanced against conservation objectives.

Article 6(3) and (4) define a **step-wise procedure** for considering plans and projects ([10]).

(a) The first part of this procedure consists of an assessment stage and is governed by Article 6(3), first sentence.

(b) The second part of the procedure, governed by Article 6(3), second sentence, relates to the decision of the competent national authorities.

(c) The third part of the procedure (governed by Article 6(4)) comes into play if, despite a negative assessment, it is proposed not to reject a plan or project but to give it further consideration.

The applicability of the procedure and the extent to which it applies depend on several factors, and in the sequence of steps, each step is influenced by the previous step.

As regards **geographical scope**, the provisions of Article 6(3) are not restricted to plans and projects which exclusively occur in or cover a protected site; they also target developments situated outside the site but likely to have a significant effect on it.

**Article 6(3) and (4) set out the circumstances within which plans and projects with negative effects may or may not be allowed. Activities not falling within the scope of Article 6(3) will still have to be compatible with the provisions of Article 6(1) — or, in the case of SPAs, Article 4(1) and (2) of Directive 79/409/EEC — and 6(2) of Directive 92/43/EEC.**

## 4.3. What is meant by 'plan or project not directly connected with or necessary to the management of the site'?

In as much as Directive 92/43/EEC does not define 'plan' or 'project', due consideration must be given to general principles of interpretation, in particular the principle that an individual provision of Community law must be interpreted on the basis of its wording and of its purpose and the context in which it occurs.

([10]) A simplified flow chart of this procedure is presented in Annex III at the end of this document.

There are two arguments for giving a broad interpretation to 'plan' or 'project'.

- Firstly, the directive does not circumscribe the scope of either 'plan' or a 'project' by reference to particular categories of either. Instead, the key limiting factor is whether or not they are likely to have a significant effect on a site.
- Secondly, a corollary of the continued applicability of Article 6(2) to activities excluded from the scope of Article 6(3) and (4) is that, the more narrowly 'plan' and 'project' are defined, the more potentially restricted is the means to balance a conservation interest against a damaging non-conservation interest. This may produce disproportionate or inconsistent results.

### 4.3.1. Project

Support for a broad definition of 'project' is reinforced, by analogy, if we refer to **Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment** (as amended by Directive 97/11/EC) ([11]). That directive operates in a similar context, setting rules for the assessment of environmentally significant projects. Article 1(2) of Directive 85/337/EEC provides that 'project' means:

*'the execution of construction works or of other installations or schemes — other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.'*

As can be seen, this is a very broad definition, which is not limited to physical construction. For example, a significant intensification of agriculture which threatens to damage or destroy the semi-natural character of a site may be covered.

### 4.3.2. Plan

The word 'plan' has a potentially very broad meaning ([12]). This point has already been noted in an Advocate-General opinion.

Of obvious relevance are **land-use plans**. Some have direct legal effects for the use of land, others only indirect effects. For instance, regional or geographically extensive spatial plans are often not applied directly but form the basis for more detailed plans or serve as a framework for development consents, which then have direct legal effects. Both types of land-use plans should be considered covered by Article 6(3) to the extent that they are likely to have relevant significant effects on a Natura 2000 site.

**Sectoral plans** can also be considered as within the scope of Article 6(3), again in so far as they are likely to have a significant effect on a Natura 2000 site. Examples might include transport network plans, waste management plans and water management plans.

However, a distinction needs to be made with 'plans' which are in the nature of policy statements, i.e. policy documents which show the general political will or intention of a ministry or lower authority. An example might be a general plan for sustainable development across a Member State's territory or a region. It does not seem appropriate to treat these as 'plans' for the purpose of Article 6(3), particularly if any initiatives deriving from such policy statements must pass through the intermediary of a land-use or sectoral plan. However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is very clear and direct, Article 6(3) should be applied.

([11]) OJ L 175, 5.7.1985, p. 40 and OJ L 73, 14.3.1997, p. 5 respectively.

([12]) The Commission has proposed a directive on the environmental assessment of plans and programmes (COM(96) 511 final, amended proposal COM(1999) 73) which may be of assistance in considering the term 'plan'. In that context, the terms 'plans' and 'programmes' can be used alternatively.

Where one or more specific projects are included in a plan in a general way but not in terms of project details, the assessment made at plan level does not exempt the specific projects from the assessment requirements of Article 6(3) in relation to details not covered by the plan assessment.

### 4.3.3. Not directly connected with or necessary to the management ...

From the context and purpose of Article 6, it is apparent that the term 'management' is to be treated as referring to the 'conservation' management of a site, i.e. the term 'management' is to be seen in the sense in which it is used in Article 6(1).

In making provision for conservation management plans, Article 6(1) of Directive 92/43/EEC envisages flexibility for Member States as regards the form such plans can take. The plans can either be specifically designed for the sites or 'integrated into other development plans'. Thus it is possible to have a 'pure' conservation management plan or a 'mixed' plan with conservation as well as other objectives.

The words *'not directly connected with or necessary to ...'* ensure that a non-conservation component of a plan or project which includes conservation management amongst its objectives may still require assessment.

For example, commercial timber harvesting may form part of a conservation management plan for a woodland designated as a special area of conservation. In as much as the commercial dimension is not necessary to the site's conservation management, it may need to be considered for assessment.

There may be circumstances where a plan or project directly connected with or necessary for the management of one site may affect another site.

For example, in order to improve the flooding regime of one site, it may be proposed to build a barrier in another site, with a possible significant adverse effect on the latter. In such a case, the plan or project should be the subject of an assessment as regards the affected site.

**The term 'project' should be given a broad interpretation to include both construction works and other interventions in the natural environment. The term 'plan' also has a broad meaning, including land-use plans and sectoral plans or programmes but leaving out general policy statements. Plans and projects related to conservation management of the site, either individually or as components of other plans and projects, should generally be excluded from the provisions of Article 6(3).**

## 4.4. How to determine whether a plan or project is 'likely to have a significant effect thereon, either individually or in combination with other plans or projects'

This phrase encapsulates a cause-and-effect relationship. On the one hand, it is necessary to explore what sorts of effects are covered *('significant effect')*, and then to explore what sorts of causes are likely to create such effects *('likely to have ... either individually or in combination')*.

Determining whether a plan or project is likely to have a significant effect will have practical and legal consequences. Therefore, when a plan or project is proposed, it is important that, firstly, this key issue is considered, and that, secondly, the consideration is capable of standing up to scientific and expert scrutiny.

Proposals that are considered as not likely to have significant effects can be processed without reference to the succeeding steps of Article 6(3) and (4). However, Member States are advised that the reasons for reaching such a conclusion should be justified, and that it is good and prudent practice to record them.

### 4.4.1. Significant effect

The notion of what is a 'significant' effect cannot be treated in an arbitrary way. In the first place, the directive uses the term in an objective context (i.e. it does not qualify it with discretionary formulae). In the second place, a consistency of approach to what is 'significant' is necessary to ensure that Natura 2000 functions as a coherent network.

While there is a need for objectivity in interpreting the scope of the term 'significant', clearly such objectivity cannot be divorced from the specific features and environmental conditions of the protected site concerned by the plan or project. In this regard, the conservation objectives of a site as well as prior or baseline information about it can be very important in more precisely identifying conservation sensitivities. Some of this information will be present in the data that accompanies the site selection process under Article 4 of Directive 92/43/EEC (see Section 4.5.3). Member States may also have available detailed site conservation management plans which describe variations in sensitivity within a site.

Against this background, it is clear that what may be significant in relation to one site may not be in relation to another.

For example, a loss of a hundred square metres of habitat may be significant in relation to a small rare orchid site, while a similar loss in a large steppic site may be insignificant.

**The notion of what is 'significant' needs to be interpreted objectively. At the same time, the significance of effects should be determined in relation to the specific features and environmental conditions of the protected site concerned by the plan or project, taking particular account of the site's conservation objectives.**

### 4.4.2. Likely to have ...

The safeguards set out in Article 6(3) and (4) are triggered not by a **certainty** but by a **likelihood** of significant effects. Thus, in line with the precautionary principle, it is unacceptable to fail to undertake an assessment on the basis that significant effects are not certain.

It is again useful to refer to Directive 85/337/EEC, since the formula 'likely to have a significant effect' is almost identical to the basic formula used to create the assessment duty of Member States under the earlier directive ([14]). Directive 85/337/EEC and amending Directive 97/11/EEC are also of assistance in setting out a range of factors which may contribute to a likelihood of a significant effect.

([14]) See Article 2(1) of Directive 85/337/EEC.

Any proposal which is deemed to require an assessment under Directive 85/337/EEC on the grounds, *inter alia*, that it is likely to significantly affect a Natura 2000 site can be judged to also come under the assessment requirement of Article 6(3).

Directive 85/337/EEC in its Article 2(1) refers in particular to the factors of nature, size and location of the project. Amending directive 97/11/EEC in its Annex III presents a more detailed set of factors comprising, *inter alia*: the size of a project; the production of waste; pollution and nuisances; the risk of accidents; existing land use; the relative abundance, quality and regenerative capacity of natural resources in the area; the absorption capacity of the natural environment, with particular attention to natural areas and sites classified or protected under Directives 79/409/EEC and 92/43/EEC; the extent of the potential impact; the magnitude and complexity of the impact; the probability of the impact; the duration, frequency and reversibility of the impact.

A likelihood of significant effects may arise not only from plans or projects located **within** a protected site but also from plans or projects located **outside** a protected site. For example, a wetland may be damaged by a drainage project located some distance outside the wetland's boundaries. For this reason, it is important that Member States, both in their legislation and in their practice, allow for the Article 6(3) safeguards being applied to development pressures which are external to a Natura 2000 site but which are likely to have significant effects within it.

**The procedure of Article 6(3) and (4) is triggered not by a certainty but by a likelihood of significant effects, arising not only from plans or projects located within but also outside a protected site.**

### 4.4.3. ... either individually or in combination with other plans or projects

A series of individually modest impacts may in combination produce a significant impact. Article 6(3) tries to address this by taking into account the combination of effects from other plans or projects. It remains to be determined what other plans and projects are covered. In this regard, Article 6(3) does not explicitly define which other plans and projects are within the scope of the combination provision.

It is important to note that the underlying intention of this combination provision is to take account of cumulative impacts, and these will often only occur over time. In that context, one can consider plans or projects which are **completed; approved but uncompleted;** or **not yet proposed:**

- In addition to the effects of those plans or projects which are the main subject of the assessment, it may be appropriate to consider the effects of already completed plans and projects in this 'second level' of assessment. Although already completed plans and projects are excluded from the assessment requirements of Article 6(3), it is important that some account is still taken of such plans and projects in the assessment, if they have continuing effects on the site and point to a pattern of progressive loss of site integrity.

  Such already completed plans and projects may also raise issues under Article 6(1) and (2) of Directive 92/43/EEC if their continued effects give rise to a need for remedial or countervailing conservation measures or measures to avoid habitat deterioration or species disturbance.

- Plans and projects which have been approved in the past and which have not been implemented or completed should be included in the combination provision.

- On grounds of legal certainty, it would seem appropriate to restrict the combination provision to other plans or projects which have been **actually proposed.** At the same time, it must be evident that, in considering a proposed plan or project, Member States do not create a presumption in favour of other as yet unproposed plans or projects in the future.

For example, if a residential development is considered not to give rise to a significant effect and is therefore approved, the approval should not create a presumption in favour of further residential developments in the future.

**When determining likely significant effects, the combination of other plans or projects should also be considered to take account of cumulative impacts. It would seem appropriate to restrict the combination provision to other plans or projects which have been actually proposed.**

## 4.5. What is meant by 'appropriate assessment of its implications for the site in view of the site's conservation objectives'?

The 'appropriate assessment' raises questions concerning form and content.

### 4.5.1. Form of the assessment

As pointed out above, the trigger for an assessment under Directive 85/337/EEC is almost identical to the trigger for an assessment under Directive 92/43/EEC, being essentially related to the likelihood of significant effects.

- The European Court of Justice has emphasised that, in relation to the transposition of Directive 85/337/EEC (and by implication its application), it is necessary to take into account sensitivity of location. For a project likely to have a significant effect on a site protected by Article 3, it will therefore often be appropriate to undertake an assessment that fulfils the requirements of Directive 85/337/EEC.

  Where an assessment for the purposes of Article 6(3) takes the form of an assessment under Directive 85/337/EEC, this will provide obvious assurances in terms of records and transparency.

- Where an assessment for the purposes of Article 6(3) does not take the form of an assessment under Directive 85/337/EEC, questions arise as to what may then be considered 'appropriate' in terms of form.

  In the first place, an assessment should be **recorded.** A corollary of the argument that the assessment should be recorded is the argument that it should be **reasoned.** Article 6(3) and (4) requires decision-makers to take decisions in the light of particular information relating to the environment. If the record of the assessment does not disclose the reasoned basis for the subsequent decision (i.e. if the record is a simple unreasoned positive or negative view of a plan or project), the assessment does not fulfil its purpose and cannot be considered 'appropriate'.

Finally, **timing** is also important. The assessment is a step preceding and providing a basis for other steps — in particular, an approval or refusal of a plan or project. The assessment should therefore be considered as only comprising what is in the record of the assessment pre-dating these further steps. Of course, where a plan or project undergoes redesign before a decision is taken on it, it is quite in order to revise the assessment as part of an iterative process. However, it should not be open to authorities to add retrospectively to an assessment once the succeeding step in the sequence of steps set out in Article 6(3) and (4) has been taken.

**In some cases, an assessment under Directive 85/337/EEC (as amended by Directive 97/11/EC) could accommodate an assessment under Article 6(3). The latter should anyhow be recorded and provide a basis for other steps; in particular it should be sufficiently reasoned to allow the right decision to be taken.**

In particular, an examination of possible **alternative solutions and mitigation measures** may make it possible to ascertain that, in the light of such solutions or mitigation measures, the plan or project will not adversely affect the integrity of the site.

As regards **mitigation measures**, these are measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion.

Mitigation measures are an integral part of the specifications of a plan or project. They may be proposed by the plan or project proponent and/or required by the competent national authorities. For example, they may cover:

- the dates and the timetable of implementation (e.g., not to operate during the breeding season of a particular species);
- the type of tools and operation to be carried out (e.g., to use a specific dredge at a distance agreed upon from the shore in order not to affect a fragile habitat);
- the strictly inaccessible areas inside a site (e.g., hibernation burrows of an animal species).

Mitigation measures are distinguishable from compensatory measures *sensu stricto* (see Section 5.4). Of course, well-implemented mitigation measures limit the extent of the necessary compensatory measures by reducing the damaging effects which require compensation.



### 4.5.3. How are 'the site's conservation objectives' established?

Article 4(1) requires Member States to propose a list 'indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host'. According to its second paragraph, the information on each site shall include a map of the site, its name, location, extent and the data resulting from the application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission (15).

The format requires that all Annex I habitat types present on a site and all Annex II species occurring at the site should be mentioned in the appropriate place in the data form. This information forms the basis for a Member State establishing 'the site's conservation objectives', for example through a management plan. The reason for a site's inclusion in the network is evidently the protection of those habitats and species. Sometimes, there may be competition between different habitat types and species, and it may, of course, be appropriate to prioritise when establishing the site's conservation objectives (for example, by giving precedence to a priority habitat type as against a competing non-priority habitat type).

Where the presence of the Annex I habitat type or Annex II species is deemed to be 'non-significant' for purposes of the format, these should not be considered as included in 'the site's conservation objectives'. The Member States are also invited to present information on other important species of flora and fauna than those listed in Annex II (point 3.3). This information has no relevance either for the determination of a site's conservation objectives.

**The information provided according to the standard data form established by the Commission forms the basis for a Member State's establishment of the site's conservation objectives.**

(15) Standard data form, established by Commission Decision 97/266/EC of 18 December 1996 (OJ L 107, 24.4.1997, p. 1).

# 5. Article 6(4)

Clarification of the concepts of *alternative solutions; imperative reasons of overriding public interest; compensatory measures; overall coherence; opinion of the Commission*

## 5.1. The text

*'If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*

*Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest'.*



## 5.2. Scope

This provision forms part of the procedure of the assessment and possible authorisation, by the competent national authorities, of plans and projects likely to affect the special area of conservation (SAC). Two fundamental considerations arise.

- On the one hand, it addresses specific situations (exceptions) with regard to the general rule of Article 6(3) according to which authorisation can only be granted to plans or projects not affecting the integrity of the sites concerned.
- On the other hand, its concrete application has to be done in respect of the various steps provided for and in the sequential order established.

The preliminary assessment of the impacts of a plan or project on the site, provided for in Article 6(3), enables the competent national authorities to arrive at conclusions regarding the consequences of the initiative envisaged in relation to the integrity of the site concerned. If these conclusions are positive, in the sense that there is a high degree of certainty that the initiative in question will not affect this site, the competent authorities can give their consent on the plan or project. In case of doubt, the precautionary principle should be applied and procedures under Article 6(4) followed, as in the case of negative conclusions.

Being a derogation from Article 6(3) this provision has to be **interpreted in a restrictive way**, so that its application is limited to circumstances where all the conditions required are satisfied. In this regard, it falls on whoever wants to make use of this exception to prove, as a prerequisite, that the aforementioned conditions indeed exist in each particular case.

> The provisions of Article 6(4) apply when the results of the preliminary assessment under Article 6(3) are negative or uncertain. The sequential order of its steps has to be followed.

## 5.3. Initial considerations

### 5.3.1. Examining alternative solutions

The **first step** of the competent authorities is to examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question. Such solutions should normally already have been identified within the framework of the initial assessment carried out under Article 6(3). They could involve alternative locations (routes in case of linear developments), different scales or designs of development, or alternative processes. The 'zero-option' should be considered too.

In conformity with the principle of subsidiarity, it rests with the competent national authorities to make the necessary comparisons between these alternative solutions. It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.

It rests with the competent national authorities to assess alternative solutions. This assessment should be made against the site's conservation objectives.

### 5.3.2. Examining imperative reasons of overriding public interest

In the absence of alternative solutions — or in the presence of solutions having even more negative environmental effects on the site concerned, with regard to the abovementioned conservation aims of the directive — the **second step** of the competent authorities is to examine the existence of imperative reasons of overriding public interest, including those of a social or economic nature, which require the realisation of the plan or project in question.

The concept of *'imperative reason of overriding public interest'* is not defined in the directive. However, Article 6(4) second subparagraph mentions human health, public safety and beneficial consequences of primary importance for the environment as examples of such imperative reasons of overriding public interests. As regards the *'other imperative reasons of overriding public interest'* of social or economic nature, it is clear from the wording that only public interests, promoted either by public or private bodies, can be balanced against the conservation aims of the directive. Thus, projects that lie **entirely** in the interest of companies or individuals would not be considered to be covered.

So far the European Court of Justice has not given clear indications for the interpretation of this specific concept. It may therefore be helpful to refer to other fields of Community law, where similar concepts appear.

The 'imperative requirement' concept was worked out by the Court of Justice as an exception to the principle of free movement of goods. Among these imperative requirements which can justify national measures restricting freedom of movement, the Court recognised public health and environment protection, as well as the pursuit of legitimate goals of economic and social policy.

Having regard to the **structure of the provision**, in the specific cases, the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the site affected by those initiatives and the abovementioned imperative reasons weighs in favour of the latter. This should be determined along the following considerations.

(a) The public interest must be **overriding:** it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the directive (see, for example, its fourth recital stating *'Community's natural heritage'*).

(b) In this context, it also seems reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short-term economic interests or other interests which would only yield short-term benefits for society would not appear to be sufficient to outweigh the long-term conservation interests protected by the directive.

(*) COM(96) 443, of the 11.9.1996.

(**) The public service obligations, in their turn, are characterised for the respect of some essential principles of operation, such as continuity, equal access, universality and transparency, but can vary from one Member State to the other, according to different situations, such as geographical or technical constraints, political and administrative organisation, history and traditions.

It is reasonable to consider that the 'imperative reasons of overriding public interest, including those of a social and economic nature' refer to situations where plans or projects envisaged prove to be indispensable:
- within the framework of actions or policies aiming to protect fundamental values for citizens' lives (health, safety, environment);
- within the framework of fundamental policies for the State and society;
- within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service.

## 5.4. Adopting compensatory measures

### 5.4.1. What is meant by 'compensatory measures' and when should they be considered?

The term *'compensatory measures'* is not defined in the 'Habitats' directive. Experience would suggest the following distinction.

- Mitigation measures in the broader sense, which aim to minimise or even cancel the negative impacts on the site itself (see Section 4.5).
- Compensatory measures *sensu stricto*: independent of the project, they are intended to compensate for the effects on a habitat affected negatively by the plan or project. For example, general tree-planting to soften a landscape impact does not compensate for the destruction of a wooded habitat with quite specific characteristics.

Measures required for the 'normal' implementation of the 'Habitats' or 'Birds' directives cannot be considered compensatory for a damaging project. For example, the implementation of a management plan or the proposal/designation of a new area, already inventoried as of Community importance, constitute 'normal' measures for a Member State. Compensatory measures should be additional to proper implementation.

The compensatory measures should be considered only after having precisely ascertained a negative impact on the integrity of a Natura 2000 site. Proposing compensatory measures from the beginning could not exempt from the need to respect beforehand the steps described in Article 6, in particular the study of alternatives and the comparative assessment of the interest of the project/plan in relation to the natural value of the site.

The compensatory measures constitute measures specific to a project or plan, additional to the normal practices of implementation of the 'Nature' directives. They aim to offset the negative impact of a project and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned. The compensatory measures constitute the 'last resort'. They are used only when the other safeguards provided for by the directive are ineffectual and the decision has been taken to consider, nevertheless, a project/plan having a negative effect on the Natura 2000 site.

### 5.4.2. Content of compensatory measures

The compensatory measures *sensu stricto* have to ensure the maintenance of the contribution of a site to the conservation at a favourable status of one or several natural habitats *'within the biogeographical region concerned'*. It results from the fact that:

- a site should not be irreversibly affected by a project before the compensation is indeed in place. For example, a wetland should normally not be drained before a new wetland, with equivalent biological characteristics, is available for inclusion in the Natura 2000 network;
- compensation must be additional in relation to the Natura 2000 network to which the Member State should have contributed in conformity with the directives.

In terms of the **'Birds' directive**, compensation cannot be the designation of an inventoried area which should have already been classified by the Member State. One could on the other hand accept, as a compensation, work to improve the biological value of an area (to be designated) or of a SPA (designated) so that the carrying capacity or the food potential are increased by a quantity corresponding to the loss on the site affected by the project. *A fortiori*, the re-creation of a habitat favourable to the bird species concerned is acceptable provided the created site is available at the time when the affected site loses its natural value.

In terms of the *'Habitats' directive*, the compensation could, similarly, consist of the re-creation of a comparable habitat, the biological improvement of a substandard habitat or even the addition to Natura 2000 of an existing site the proposal of which under the directive had not been deemed essential at the time of the drawing up of the biogeographical list.

In the latter case, one could argue that overall, the project will result in a loss for this habitat type at Member State level. However, at Community level, a new site will benefit from the protection provided for in Article 6, thus contributing to the objectives of the directive.



**The compensatory measures can consist of:**
**— recreating a habitat on a new or enlarged site, to be incorporated into Natura 2000;**
**— improving a habitat on part of the site or on another Natura 2000 site, proportional to the loss due to the project;**
**— in exceptional cases, proposing a new site under the 'Habitats' directive.**

**The result has normally to be operational at the time when the damage is effective on the site concerned with the project unless it can be proved that this simultaneity is not necessary to ensure the contribution of this site to the Natura 2000 network.**

### 5.4.3. 'Overall coherence' of the Natura 2000 network

The expression *'overall coherence'* appears in Article 6(4) in the context where a plan or project is allowed to be carried out for imperative reasons of overriding public interest and the Member State has to take measures to compensate for the loss.

It also appears in Article 3(1) which states that Natura 2000 is *'a coherent European ecological network of special areas of conservation'* and in Article 3(3) which stipulates that *'where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10'.*



Article 10, which deals more generally with land-use planning and development policy, stipulates that

> *'Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 200 network, to encourage the features of the landscape which are of major importance for wild fauna and flora.*
>
> *Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species.'*

The word 'ecological' is used both in Article 3 and Article 10 to explain the character of the coherence. It is obvious that the expression *'overall coherence'* in Article 6(4) is used in the same meaning.

Article 6(4) requires to 'protect' the overall coherence of Natura 2000. Thus, the directive presumes that the 'original' network has been coherent. If the derogation regime is used, the situation must be corrected so that the coherence is fully restored.

- Under the **'Habitats' directive** the selection of a site for the Natura 2000 network rests on:
  - — the taking into account of habitat and species in proportions (surfaces, populations) described in the standard data form;
  - — the inclusion of the site in a biogeographical region within which it is selected;
  - — the selection criteria established by the 'Habitats' Committee and used by the European Topic Centre — Nature Conservation to advise the Commission to retain a site on the Community list.
- The **'Birds' directive** does not provide for biogeographical regions, or selection at Community level. By analogy, one could consider that **the overall coherence of the network** is ensured if:
  - — compensation is ensured along the same migration path;
  - — the compensation site(s) are accessible with certainty by the birds usually occurring on the site affected by the project.

**In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: (a) address, in comparable proportions, the habitats and species negatively affected; (b) concern the same biogeographical region in the same Member State; and (c) provide functions comparable to those which had justified the selection criteria of the original site.**

**The distance between the original site and the place of the compensatory measures is not therefore an obstacle, as long as it does not affect the functionality of the site and the reasons for its initial selection.**

### 5.4.4. Who bears the cost of the compensation measures?

It appears logical that, in line with the 'polluter pays' principle, the promoter of a project bears the cost of the compensatory measures. It may include it in the total budget submitted to the public authorities in the event of co-financing. In this connection, the European funds could, for example, co-finance the compensatory measures for a transport infrastructure retained under the TEN (trans-European network).

A subsidy granted by a public authority for measures taken in order to compensate for damage to a Natura 2000 site can be considered as a **State aid** (within the meaning of Article 87 (ex 92) of the Treaty), should it be granted to an undertaking established in a Natura 2000 site, designated before or after the establishment of the undertaking. However, in the case of an undertaking acting as a contractor for a public authority to build an infrastructure, the subsidy would not be considered as a State aid as long as it is granted in exchange of works carried out.

**The Member State is bound to compensatory measures as from the entry into force of Article 6. Their financing can fall within its competence.**

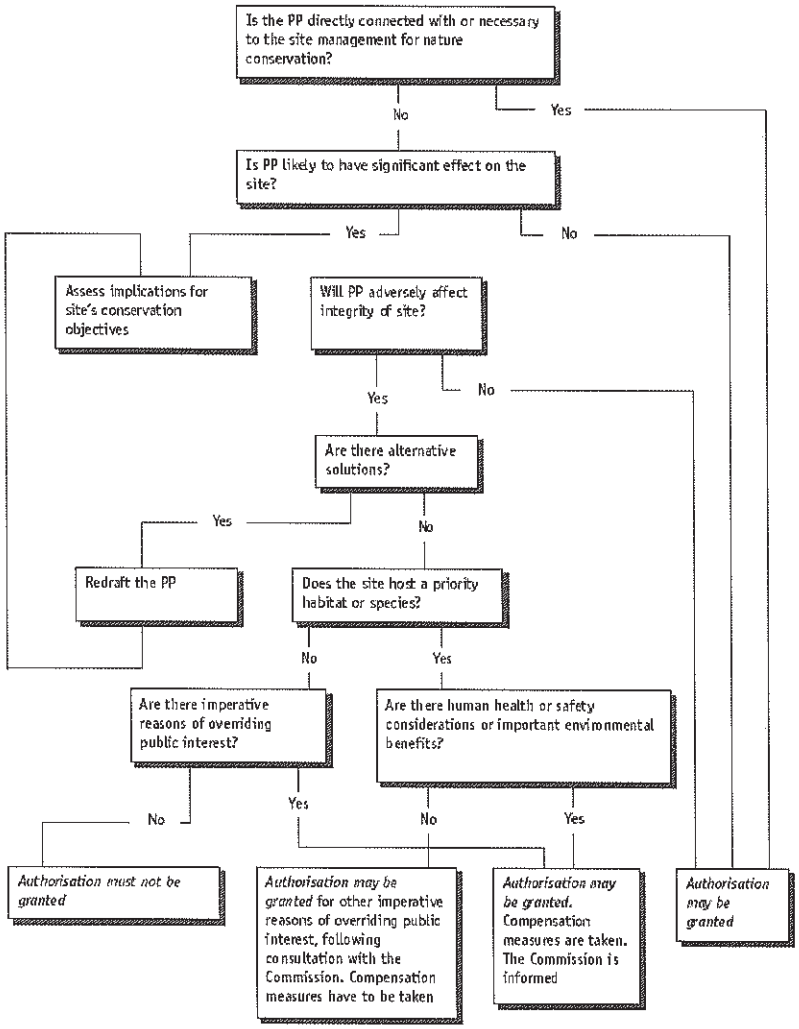






# Annex III

## Consideration of plans and projects affecting Natura 2000 sites



# Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC

Final version, February 2007

## I. CONTEXT

### *I.1 Species conservation within a wider political and legal context*

#### I.1.1 Political context

(1) Preserving, protecting and improving the environment, including biodiversity, are essential objectives of general interest pursued by the European Community, as provided for in Article 174 of the Treaty.

(2) In 2001, the EU Heads of State and Government made a commitment at the Spring Summit in Göteborg to *'halt the decline of biodiversity by 2010'*[2]. The same Göteborg Council adopted the EU Sustainable Development Strategy, which again stressed the need *'to protect and restore habitats and natural systems and halt the loss of biodiversity by 2010'.* The Sixth Environmental Action Programme (6th EAP)[3], which constitutes the EU's "environmental work plan" from 2002 to 2012 was adopted in 2002. The issue of nature and biodiversity conservation is one of the four priorities in the 6th EAP, with the focus on *'protecting, conserving, restoring and developing the functioning of natural ecosystems, natural habitats, wild flora and fauna with the aim of halting … the loss of biodiversity, including diversity of genetic resources, both in the European Union and at the global scale*' with a particular view to *'halting biodiversity decline with the aim to reach this objective by 2010'*.

(3) These EU efforts go hand in hand with the EC Biodiversity Conservation Strategy adopted in 1998, which was developed to meet the EC's obligations as a Party to the Convention on Biological Diversity (1992). Under this Strategy, four Biodiversity Action Plans were adopted in 2001 in various policy areas (natural resources, fisheries, agriculture, economic and development cooperation). With the latest Communication of May 2006 on halting the loss of Biodiversity by 2010[4], the Commission launches a new effort to pull together EU actors to meet the 2010 target and foster recovery of biodiversity.

(4) Within all these initiatives, the issue of species protection is at the forefront of debate and has an indicator role in judging the health of ecosystems. Our ability to ensure that species survive over the long term as part of our European natural heritage will show the extent to which our conservation and biodiversity policies are truly effective. The 'target date' of 2010 is very likely to accelerate progress. Accordingly, the full and proper implementation of both the Birds[5] Directive and the Habitats Directive, which seeks to *'… maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest'*, is of major importance and a test case as to how far our commitments can be achieved in practice.

---

2 'The European Council agrees that biodiversity decline should be halted with the aim of reaching this objective by 2010 as set out in the Sixth Environmental Action Programme.' Presidency Conclusions, Göteborg Council, 15 and 16 June 2001. SN/200/1/01 REV1, page 8. http://ue.eu.int/newsroom/newmain.asp?lang=1.

3 Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242 of 10/9/2002.

4 Communication from the Commission: Halting the loss of Biodiversity by 2010 – and beyond ; Sustaining ecosystem services for human well-being; 22 May 2006, COM (2006) 216 final

5 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 5 April 1979, p. 1).

*Summary: There are a wide range of political commitments within the EU aiming to protect nature and biodiversity, with species conservation at the forefront. With a view to meeting the objective of halting the decline of biodiversity by 2010, the full and proper implementation of both the Birds Directive and the Habitats Directive is a test case as to how far EU conservation policies are truly effective.*

### I.1.2 Legal context

(5) The Habitats Directive and its provisions for species protection should however be seen not only in a political context but also in the context of international conventions and other EC legal instruments.

(6) The legal instrument most closely related to the Habitats Directive is the **Birds Directive** of 1979, which shares not only common objectives (for birds in this case) and a similar conceptual structure, but also common provisions in relation to the network of protected sites (Natura 2000). Furthermore, Articles 5 to 9 of the Birds Directive contain similar provisions regarding species protection. In addition, the ECJ case law on these provisions is already quite extensive. The reasoning behind the judgments arising from the implementation of the Birds Directive is thus of great importance and can often be applied as well to Articles 12 and 16 of the Habitats Directive[6].

(7) Seen in an international context, the species protection provisions of the Habitats Directive help achieve the aims of relevant international nature conservation conventions such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora[7], the Bern Convention[8], the Bonn Convention[9] and the Convention on Biological Diversity[10].

(8) Of particular relevance here is the **Bern Convention**. The Bern Convention (signed in 1979) pre-dates the Habitats Directive and had an important influence on both its conception and drafting. The parallels between Article 6 of the Convention[11] and Article 12 of Directive 92/43/EEC are obvious. However, despite the equivalence of objectives and the similarities in wording, Directive 92/43/EEC creates a more detailed framework for site

---

6 For example, in its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017), the Court used the case law for the Birds Directive.

7 Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 61, 3.3.1997, p. 1).

8 Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (OJ L 38, 10.2.1982, p. 1).

9 82/461/EEC, Council Decision of 24 June 1982 on the conclusion of the Convention on the conservation of migratory species of wild animals (OJ L 210, 19/07/1982, p. 10).

10 93/626/EEC, Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ L 309, 13/12/1993 p. 1).

11 Article 6 of the Convention provides that *"each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II. The following will in particular be prohibited for these species:*

*(a) all forms of deliberate capture and keeping and deliberate killing;*

*(b) the deliberate damage to or destruction of breeding or resting sites;*

*(c) the deliberate disturbance of wild fauna particularly during the period of breeding, rearing and hibernation, in so far as disturbance would be significant in relation to the objectives of this Convention;*

*(d) the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty;*

*(e) the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the provisions of this Article."*

conservation and protection than does the Convention[12]. The differences between the two texts were confirmed by the Court in case C-75/01, relating to the transposition of Directive 92/43/EEC in Luxembourg. The Court considered that the national measures for transposing Article 12(1)(c) of the Directive, including a law approving the Bern Convention, were insufficient to ensure complete transposition due to the disparities between Annex II of the Bern convention and Annex IV(a) of Directive 92/43/EEC[13]. It follows that even if the Bern Convention and Directive 92/43/EEC have substantially similar objectives, this does not affect the autonomous character of the obligations under the Habitats Directive.

*Summary: The species protection provisions of the Habitats Directive have to be seen in the context of international conventions and other EC legal instruments, the most closely related being the Bern Convention and the Birds Directive.*

### *I.2 Species conservation within the overall scheme of Directive 92/43/EEC*

(9) The maintenance or restoration, at favourable conservation status, of the natural habitats and species of wild fauna and flora of Community interest is the primary objective of Directive 92/43/EEC. In order to attain this objective the Directive establishes different conservation instruments. Articles 12-16 thus form part of a general framework that aims to meet, along with other provisions, the broad objective of the Directive as set out in Article 2.

#### I.2.1. Primary aim of the Directive: the role of Article 2

(10) The aim of the Directive is laid down in Article 2. This provision does not in itself create obligations for the Member States, but it is relevant when considering the interpretation of other provisions of the Directive.

*Article 2 (Directive 92/43/EEC)*

*1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.*

*2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.*

*3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.*

(11) It should be noted that the Court has recognised the need for any interpretation of Community legislation to take into account the aims of that legislation. According to Article 2(1) of Directive 92/43/EEC, the main aim of the Directive is to contribute towards ensuring biodiversity conservation through the conservation[14] of natural habitats and of wild fauna

[12] Two important differences should be stressed. Firstly, the Convention has a greater species coverage, since its Appendix II contains a larger number of species than Annex IV(a) of the Directive (partly due to the larger geographic area covered by the Convention). Secondly, the word "deliberate" figures in Article 6(b) but is absent from Article 12(1) (d).

[13] See the judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraphs 55-58.

[14] According to Article 1(a) of the Directive, "conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status."

and flora in the European territory of the Member States. Following Article 2(2), measures taken by Member States must aim to maintain or restore, at favourable conservation status, the natural habitats and species of wild fauna and flora of Community interest[15]. Consequently, the strict protection obligations set out in Article 12 are important instruments for the achievement and effective implementation of the main aim of the Directive.

(12) In parallel, the economic, social and cultural requirements and regional and local characteristics referred to in Article 2(3) of the Directive should not be neglected when interpreting the species protection provisions. As set out further below, Article 2(3) is applicable to various implementation aspects of Article 12 and 16 (e.g. when defining the requisite measures, especially in the case of ongoing activities, when drafting codes of conduct, when producing species conservation plans, and of course when making use of the derogations system).

(13) Since Article 2(3) requires the protection of natural habitats and species to be balanced against other requirements, one may ask if this provision comprises an independent derogation from the general requirements of the Directive. For Directive 79/409/EEC, the Court has clearly confirmed that it does not[16]. *Mutatis mutandis*, it follows that Article 2(3) of Directive 92/43/EEC does not provide an independent derogation from the obligations and requirements of the Directive. Nonetheless, the Court's pronouncements show that Article 2 is not without relevance and weight when considering the interpretation of other provisions of the Directive. In this regard, the provisions of Article 2 have value as a general orientation guide as to what the Directive requires and allows.

*Summary: The strict protection obligations under Article 12 must be interpreted in terms of the overall aim of the Directive described in Article 2, to which they contribute. Article 2(3) cannot be regarded here as providing an independent derogation from the general requirements of the Directive.*

### I.2.2. Favourable conservation status

(14) The maintenance or restoration of "favourable conservation status" (FCS) is the overall objective for all habitat types and species of Community interest. Such species are listed in Annexes II, IV and V to the Directive. In simple terms, FCS could be described as a situation where a habitat type or species is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in future. The fact that a habitat or species is not threatened (i.e. not faced by any direct extinction risk) does not necessarily mean that it has favourable conservation status. The target of the Directive is defined in a positive way, as a 'favourable' situation to be reached and maintained, which needs to be defined based on the best available knowledge. Therefore, the obligation of a Member State

[15] Such species are listed or may be listed in Annex II, IV and V of the Habitats Directive.

[16] See judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 8. The Court noted: "In this context it is necessary to refer to Article 2 of the Directive, which requires Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, and from which it is therefore clear that the protection of birds must be balanced against other requirements, such as those of an economic nature. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the Directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation." In Case C-262/85 (judgment of 8 July 1987, Commission v Italy, ECR p.3073) the Court rejected arguments by the Italian government that departures from the requirements of Article 7(4) could be based directly on Article 2.

is more than just avoiding extinction. All measures taken under the Directive must aim to reach or maintain a favourable conservation status.

(15) FCS for species is defined in general terms in Article 1(i) of the Habitats Directive.

*"conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2. The conservation status will be taken as 'favourable' when:*

*- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and*

*- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and*

*- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis."*

(16) This definition contains the main parameters (population[17] dynamics, range, sufficient habitat, prospects of long-term viability) for defining and assessing both the current and target conservation status. It also provides a framework for more specific definitions on a species-by-species basis. All these parameters therefore need to be considered thoroughly when designing measures for a certain species. It is important to note that the assessment of conservation status not only includes an element of 'diagnosis' based on current conditions, but also an important element of 'prognosis' (foreseeable future) based on influences. Such foreseeable future influences could be specific or general threats, positive or negative, medium- to long-term impacts, etc.

(17) The concept of FCS is not limited to the Natura 2000 network or to the species protected by this network (i.e. Annex II species). It applies to the *overall situation* of all species of Community interest (Annexes II, IV and V), which needs to be assessed and surveyed[18] in order to judge whether it is favourable or not. Assessing and evaluating the conservation status of habitats and species *within* the Natura 2000 network is therefore not always enough, especially when the occurrences of habitats or species are only partly covered by the network, maybe even in some cases only to a relatively small extent.

(18) In April 2005 the Habitats Committee agreed on a harmonised framework for evaluating the conservation status of habitats and species (see document DocHab-04-03/03 rev.3 "Assessment, monitoring and reporting of conservation status – Preparing the 2001-2007 report under Article 17 of the Habitats Directive"[19]). Member States agreed to assess conservation status according to a common 3-grade assessment matrix within each of the biogeographic regions in their territory. The three grades are favourable = green, unfavourable/inadequate = amber and unfavourable/bad = red *("traffic light system")*.

(19) For assessing favourable conservation status, the meaning of the term "natural range" as used in the Habitats Directive was defined as follows:

---

[17] "Population" is defined here as a group of individuals of the same species living in a geographic area at the same time that are (potentially) interbreeding (i.e. sharing a common gene pool).

[18] Article 11 of the Directive requires surveillance of the conservation status of the natural habitats and species referred to in Article 2, with particular regard to priority natural habitat types and priority species.

[19] See http://forum.europa.eu.int/Public/irc/env/monnat/home (public site, no "sign in" needed) for all relevant documents

**The natural range of species and habitats — a dynamic concept**

The natural range describes roughly the spatial limits within which the habitat or species occurs. It is not identical to the precise localities (the area actually occupied) or territory where a habitat, species or sub-species permanently occurs. Such actual localities or territories might be patchy or disjointed for many habitats and species (i.e. habitats and species might not be evenly spread) within their natural range. If the reason for disjunction proves to be natural, i.e. caused by ecological factors, the isolated localities should not be interpreted as a continuous natural range. For example, for an alpine species the range may be the Alps and the Pyrenees, but not the lowlands between them. However, the natural range includes areas that are not permanently used: for example for migratory species, their "range" includes all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time during its normal migration[20].

A natural range as defined here is not static but dynamic: it can decrease and expand. A natural range can constitute one aspect for the assessment of (un)favourable conditions for a habitat or species. If the natural range is insufficient in size to allow for the long-term existence of that habitat or species, Member States are asked to define a reference value for a range that would allow for favourable conditions and work towards this, for instance by fostering expansion of the current range.

When a species or habitat spreads on its own to a new area/territory or when a species has been re-introduced into its former natural range (in accordance with the rules in Article 22 of the Habitats Directive), this territory has to be considered part of the natural range. Similarly, the restoration/re-creation or management of habitat areas, as well as certain agricultural and forestry practices, can contribute to the expansion of a habitat or a species and hence its range. However, individuals or feral populations of an animal species introduced deliberately or accidentally by man to locations where they have never occurred naturally, or where they would not have spread to naturally in the foreseeable future, should be considered to be outside their natural range and consequently not covered by the Directive. Vagrant or occasional occurrences would also not be considered as part of the natural range.

*Summary: The main parameters for defining the favourable conservation status of a species are given in Article 1(i) of the Habitats Directive. Roughly speaking, this status is a situation where species populations are doing well with good prospects for the future. Member States have agreed on a harmonised framework for* evaluating *conservation status in the report required by Article 17 under the Directive.*

### I.2.3. Species conservation instruments

(20) The Directive lays down a set of obligations and procedures that aim to meet the broad objective set out in Article 2. Two main concepts or "pillars" can be distinguished: the conservation of natural habitats and the habitats of species through the establishment of the Natura 2000 network (Articles 3 to 10) and the protection of animal and plant species (Articles 12 to 16).

[20] See also Article 1 of the Bonn Convention.

(21) The **1st pillar,** in relation to species[21], targets the conservation of the habitats of species[22], focusing on the maintenance (including positive management measures) and restoration of these habitats by establishing protected sites. The species for which this network of protected sites (Natura 2000) is established are listed in Annex II to the Directive.

(22) Article 6 is the central provision covering positive management (Article 6(1)) and avoidance of negative influences to the network (Article 6(2)); it also deals with plans or projects likely to have a significant negative impact on certain sites (Article 6(3)-(4)). The Commission services have produced two guidance documents explaining in detail the provisions of this Article:

1. "Managing Natura 2000 sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC", European Commission, 2000, ISBN 92-828-9048-1

2. "Assessment of Plans and Projects Significantly Affecting Natura 2000 sites - Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC", European Commission, 2002, ISBN 92-828-1818-7

(23) While the first document deals with the management of Natura 2000 sites in general, the second document focuses on the procedures for the nature impact assessment and its consequences under Article 6(3) and 6(4). Both documents are available at http://www.europa.eu.int/comm/environment/nature/home.htm.

(24) To enhance the effectiveness of the network, the provisions of Article 10 target the ecological coherence of the network by suggesting integrated land-use planning and the management of certain landscape features.

(25) The **2nd pillar** deals with direct influences on the species themselves as well as (in the case of animal species) their eggs, breeding sites and resting places. Provisions under this section are not restricted in geographical terms. They apply to the whole of the territory to which the Directive applies, albeit subject to very few specific geographical restrictions indicated in the annexes[23]. In contrast, the protection afforded by Article 6 is limited to the Natura 2000 network.

(26) A distinction can be made under this pillar between those provisions calling for a "system of strict protection" for Annex IV species (Articles 12 & 13) and measures to control the exploitation of species listed in Annex V (Articles 14 & 15[24]). While the "system of strict protection", as the name suggests, provides a stringent protection regime, species covered by Annex V can be exploited, although such exploitation should not jeopardise the objective of maintaining their favourable conservation status in any way.

(27) Both pillars allow for exceptions from the protection regimes. The system of protection envisaged under Articles 12-15 is qualified by the possibility of derogations under Article 16 of the Directive. Article 6(4) of the Directive addresses specific exceptions (i.e. from the protection granted by the Natura 2000 network) to the general rule of Article 6(3) that authorisation can only be granted to plans or projects not adversely affecting the

---

[21] The 1st pillar also deals with habitats and their typical species as listed in Annex I to the Directive.

[22] Article 1(f) states that the "*habitat of a species means an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle*".

[23] For example for *Vipera seoanni*, there is a geographical restriction which excludes the Spanish population from Annex IV and consequently from the provisions of Article 12.

[24] Article 15 contains elements that also relate to Annex IV(a) species in cases when derogations are applied.

integrity of the sites concerned. The application of Article 6(4) has to respect the various steps and the sequential order established in the Directive.

(28) So while there are certain similarities between both pillars, it should be stressed that the 1st pillar requires not only active maintenance but also restoration and improvement actions on sites, while the 2nd pillar has a more preventive character, requiring Member States to avoid and prevent a number of situations that could negatively impact a species.

(29) In consequence, it can be said that the two pillars are closely interlinked and are complementary in their approach, as their joint aim is the favourable conservation status of all habitats and species of Community interest[25].

*Summary: In order to achieve its objectives, the Habitats Directive provides for two main instruments: the Natura 2000 network of protected sites and the species protection provisions. The provisions for species protection apply to the whole of a Member State's territory and concern the physical protection of specimens as well as their breeding sites and resting places. Both regimes allow for exceptions under certain conditions. Both instruments are complementary and jointly aim to ensure a favourable conservation status for all species of Community interest.*

### I.2.3.a) The Annexes

(30) Which "pillar" applies to which species is specified by the annexes to the Directive. The fact that a species is frequently listed in more than one annex demonstrates the close interaction between the two pillars, which share the same objective.

***Purpose of Annex and number of references[26] listed (EU25)***

| | |
|---|---|
| **Annex II** | Animal and plant species of Community interest whose conservation requires the designation of special areas of conservation ("Natura 2000" sites"). Annex II lists a total of 869 references, of which 297 are animal and 572 plant species. |
| **Annex IV** | Animal and plant species of Community interest in need of strict protection. Annex IV lists a total of 922 references, of which 323 are animal and 599 plant species. |
| **Annex V** | Animal and plant species of Community interest whose taking in the wild and exploitation may be subject to management measures. Annex V lists a total of 77 references, of which 45 are animal and 32 plant species. |

(31) In total, the Directive lists 447 animal and 695 plant species. Although different species are listed in different annexes and therefore fall under different kinds of protection measures, many species are actually listed in more than one annex. For example, plant species listed in Annex II (except bryophytes) are automatically listed in Annex IV(b) as

[25] It should be noted that Articles 12 and 16 are applicable from the date on which Directive 92/43/EEC came into force, i.e. 10 June 1994. The Member States that joined the EU after 1994 were to comply with these provisions from the date of accession.

[26] "References" mostly refers to species but also includes some grouped taxa (e.g. *Alosa spp.*) and sub-species. Refers to annexes valid for the EU-25.

well, so are covered by the habitat protection provisions *and* the strict protection system of Article 13. On the other hand, a group of other plants is listed only in Annex IV. For animal species, such an 'automatic' parallel listing does not exist. The situation with animal species is therefore more complex:

***Overlap between Annexes – Animal species (EU25)***

| Annex | II & IV | II & V | only II | only IV | only V |
|---|---|---|---|---|---|
| % of the 447 animal references | 45% | 5% | 17% | 28% | 5% |

(32) How can this situation be explained? At the time of adoption, the legislator considered the level and type of threats to species as well as the best way to counteract threats based on the scientific information available at the time. While site designation and habitat management would be the appropriate approach for certain species, others might need a different regime of protection going beyond protected sites. The development of the annexes to the Habitats Directive follows the logic described below.

(33) A listing in Annex II was chosen for species for which the conservation of their (often quite specific) habitat is the principal factor determining their survival and well-being. The protection and management of sites were selected here as the appropriate instrument, which includes not only the maintenance of species habitats but also, where appropriate, their restoration. The group of species listed in Annex IV may be less suited to conservation by establishing protected areas, but instead needs "physical" protection of the actual species as well as protection of the most important parts of their habitat (i.e. their breeding sites and resting places) throughout the territory of a Member State. This is because of the specific threats they face, the measures needed to counteract them, the species' pattern of occurrence (e.g. scattered) or the type or specific character of their habitat. For the third group of species listed in Annex V, which may be exploited by human beings, this exploitation must be managed — if necessary — in order to ensure a favourable conservation status. Under Article 14 of the Directive, if Member States deem it necessary in the light of the surveillance provided for in Article 11, they have to take measures to ensure that the exploitation or taking in the wild of specimens of the species listed in Annex V is compatible with maintaining their favourable conservation status.

(34) Quite often, however, animal species do not perfectly fit into one of these groups. Usually species are subject to a combination of threats and should consequently be the target of a range of measures. This explains why most species of Community interest are actually listed in more than one annex. The most frequent combination is a listing in both Annex II and IV (see also the next chapter), which maximises the conservation effort by requiring management (maintenance and restoration) of the general habitats in protected sites (which should cover the most important populations) and the protection of the breeding sites and resting places as well as the species itself over the whole territory of a Member State.

(35) Since the development of these annexes, however, research and monitoring have developed further and the conservation status of a number of species may have changed, so that the picture today might be different from the one in the late 1980s/early 1990s when the Directive was prepared. As explained in chapter *I.2.4.b) "Appropriate and effective*

*character of measures taken"*, several reactions are possible. If it is found, for example, that a species in need of habitat restoration or active habitat management is listed only in Annex IV but would effectively need to be listed under Annex II, Member States may voluntarily take additional measures. Alternatively, based on good scientific evidence, the annexes could be amended to include the species in Annex II. On the other hand, the surveillance under Article 11, once collated and analysed at European level, might show that a species should be deleted from one or all the annexes it is listed in because it no longer fulfils the criteria for Community interest (as defined in Article 1(g) of the Directive).

(36) The efficient use of the different species conservation instruments requires **a species-by-species approach**[27]. Such an approach looks at the conservation needs of each species as well as the instruments available for its conservation and formulates on this basis the adequate measures to be implemented. Such an approach ensures flexible implementation of the Directive while at the same time optimum achievement of its objectives. The target of favourable conservation status should always be the guiding principle for all conservation efforts by the Member States and should be addressed by all appropriate means available (see also chapter I.2.4.b).

*Summary: The different annexes determine which instruments are available for which species. Most species are covered by more than one annex and therefore are subject to a combination of instruments, i.e. a combination of conservation approaches and measures. How these instruments are finally implemented should be considered on a species-by-species basis, taking account of the specific needs of each species.*

### I.2.3.b) The protection of animal species listed under both Annexes II and IV in Natura 2000 sites

(37) Since a large proportion (45%) of the animal taxa are listed in both Annex II and Annex IV, it is worth looking at which regime and which procedures apply to an Annex IV species within a Natura 2000 site. The Commission services consider that, within Natura 2000 sites, **a twofold regime applies** to Annex II/IV species. These species should benefit from both approaches: protection under the section on "Conservation of natural habitats and habitats of species", in particular the measures envisaged under Article 6, and the strict protection system envisaged under Article 12.

(38) This view is first of all justified by the different — and complementary — approaches followed by the two systems. Article 6 is concerned with site and habitat conservation and protection, whereas Article 12 is concerned with protecting the individuals of the listed species and their breeding sites and resting places. Furthermore, such an approach is in line with the general objective of the Habitats Directive, i.e. to contribute towards ensuring biodiversity through the maintenance or restoration, at favourable conservation status, of natural habitats and species of Community interest.

(39) It should be observed in this regard that for all Annex II species a coherent and complete network, based on an exhaustive list of sites, has to be established in accordance with the procedure and criteria set out in Annex III of the Directive. Based on a biogeographic approach, the network is established taking into account the threat status, ecology and distribution of a species. Depending on these and other scientific factors, a

[27] There might of course be cases where a whole group of species faces similar situations and has similar needs and can be treated together.

more or less complete coverage of habitats is agreed for inclusion in the network[28]. It therefore is all the more important that for species (listed in Annexes II and IV) not largely covered by the network, measures are also taken outside the network to maintain or restore their favourable conservation status. However, the fact that an Annex IV species is well covered in the Natura 2000 network does not replace the obligation to establish and effectively implement a strict protection system. It follows that, for animal species listed in Annex II and IV(a), within a site belonging to the Natura 2000 network, the simultaneous application of Articles 6 and 12 to 16 needs to be ensured.

(40) Given that these provisions contain similar elements, their simultaneous application may lead to situations where overlaps occur. This is for example the case with the protection of Natura 2000 sites under Article 6(1) and (2) and the protection of breeding sites and resting places under Article 12(1)(d). Both provisions deal with the protection of habitats of species. Breeding sites and resting places are central parts of the total habitat of a species, which has to be protected (maintained and restored) in its entirety in the Natura 2000 site. Natura 2000 therefore has a much more intensive and broader task, namely to maintain (and where needed restore) the entire habitat of a species at certain sites, while the provisions of Article 12 concentrate on preventing negative effects on the most central parts of such habitats, namely those that are essential in order to guarantee successful breeding and resting.

(41) It would be logical for measures taken under Article 6(1) (e.g. management plans) to make special reference to the protection requirements of Annex II & IV species occurring at the site. Also, where, for example, special measures are taken to avoid the deterioration of habitats or disturbance of species (Article 6(2)), these should logically respond to the requirements spelled out under Article 12(1)(a)-(d).

(42) With regard to the **simultaneous application of derogations** under Articles 6(3)-(4) and 16 to animal species listed in both Annexes II and IV, the Commission services consider that their simultaneous or parallel application is feasible in practical terms and meaningful in conservation terms.

(43) Without envisaging all possible scenarios, the Commission services consider that, if for example a project would be likely to destroy or damage the central parts of habitats within a Natura 2000 site, it can be assumed that both Article 6(3) and Article 16 come into play at the same time. It can be further assumed that the impact assessment thus triggered will cover both provisions — as they simultaneously have the same objective (although Article 12(1)(d) is more limited), i.e. the assessment under Article 16 will form part of the presumably broader (because covering the entire habitat) assessment undertaken under Article 6(3). Such a procedure should avoid any double assessment or incoherence in applying the provisions. It has to be ensured in such cases that the outcome of the impact assessment does not go against the species protection provisions. Of course, the decisions taken after the assessment will then have to take into account the requirements under both articles. Should, for example, a harmful project be allowed due to overriding public interest, compensation measures will have to be taken and reported under Article 6(4) and the project also has to be included in the Article 16 (derogation) reports.

(44) On the other hand, it may well be possible that a derogation is required under Article 16 for an activity in a Natura 2000 site even where no impact assessment under Article 6(3) is needed. This might for example be the case when a few specimens or eggs of an Annex

[28] Even where Community lists have been approved, the network still needs improvement for certain habitat types and species: so-called 'reserves' had to be included in the first Community lists of sites of Community interest to allow for completion later on.

II/IV species are to be taken for research purposes although this is unlikely to have any negative effect on the site and its population, or on the contrary will have a positive effect.

*Summary: Species listed in Annex II and IV benefit from complementary, twofold protection within Natura 2000 sites. Certain overlaps in the protection of habitats (entire habitat in the Natura 2000 site, including breeding and resting sites under Article 12) exist but can and should be dealt with in a coherent manner.*

### I.2.4 Basic principles of species conservation

#### I.2.4.a) Good knowledge and surveillance of conservation status

(45) Recital 19 of the Directive states that "the improvement of scientific and technical knowledge is essential for the implementation of this Directive", while Article 18 of the Directive stresses the necessity for research. Indeed, in order to implement meaningful species conservation measures under the Directive, a good knowledge of each species (range, occurrences, biology, ecology, threats & sensitivity, conservation needs, etc.) is a *conditio sine qua non*. Member States therefore need to collect and use the best available information from all reliable sources (e.g. conservation agencies, universities, conservation NGOs, etc.) when designing their conservation strategies. In addition, as the Directive's aims are framed in an EU and not a national context, it may often be important to look for information beyond regional and national borders in order to cooperate and coordinate with other regions/Member States (this may — among other things — take place in committees and working groups at EU level or through EC co-funded projects). Harmonised, transboundary approaches are valuable for the implementation of the Directive when for example two Member States share one population of a certain species and can only assess the full situation (and consequently define effective measures) when taking the situation 'on the other side of the border' into account.

(46) Besides the factual knowledge on a species, surveillance (or monitoring[29]), meaning long-term systematic observation, is required by the Directive to track trends in conservation status. The establishment of an appropriate surveillance system to monitor the conservation status of a species of Community interest (as listed in Annex II, IV and V) is an obligation arising from Article 11 of the Directive. According to the Court, *"the surveillance obligation is fundamental to the effectiveness of the Habitats Directive and it must be transposed in a detailed, clear and precise manner"*[30]. Thus, domestic law should set out the statutory duties of the national authorities to undertake surveillance of the conservation status of natural habitats and species, in order to guarantee that this surveillance is undertaken systematically and on a permanent basis[31].

[29] Article 11 of the Directive refers to the surveillance of the conservation status of natural habitats and species. The Commission services consider that the interpretation of the term "surveillance" and its scope should take into account the relevant definitions of Article 1(e) and (i).

[30] See the judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 26 and 65.

[31] In its judgment of 20 October 2005, the Court found that *"inasmuch as it is common ground that United Kingdom domestic law does not contain any statutory duty requiring the national authorities to undertake surveillance of the conservation status of natural habitats and species, that domestic law involves an element of legal uncertainty. Hence, it is not guaranteed that surveillance of their conservation status is undertaken systematically and on a permanent basis"* (Case C-6/04, paragraph 68).

*Article 11 (Directive 92/43/EEC)*

*Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.*

(47) The scope of Article 11 is not restricted to Natura 2000 sites, but requires monitoring of the conservation status of habitats and species of Community interest, as defined in Article 1 of the Directive, throughout the territories of all Member States.

(48) The position of Article 11, which comes at the end of the section on "conservation of habitats and habitats of species", could give rise to some ambiguity. However, the Commission services consider that this provision applies to the species covered by the 2nd pillar as well. This conclusion is based on several grounds. First of all, the text of Article 11 expressly refers to the surveillance of "the conservation status of the natural habitats and species referred to in Article 2", i.e. the natural habitats and species of wild fauna and flora of Community interest. Additionally, Article 14 of the Directive, which is in the 'protection of species' section, includes a reference to the "surveillance provided for in Article 11". This clearly illustrates that the compartmentalisation between these two sections of the Directive is not absolute. Furthermore, the recitals of the Directive refer to the need to set up a system "for surveillance of the conservation status of the natural habitats and species covered by this Directive" for the implementation of the Directive.

(49) A common framework for evaluating conservation status (in three grades) and reporting on this under Article 17 of the Directive was approved by the Habitats Committee in April 2005[32]. This framework defines what information is to be reported (and consequently collected) and gives rough guidelines on how to assess conservation status, so that conclusions at European level can be drawn from the national reports. Important elements of the agreement are that the 2007 report should include a first assessment of conservation status for each species and habitat of Community interest, based on the best available information. Reports thereafter (every 6 years) should be based on the surveillance systems put in place[33]. In order to know when a species or habitat has a favourable status, this favourable situation first needs to be defined. Member States are therefore encouraged to define "favourable reference values", to be used as benchmarks in the assessment process.

(50) The status of species should be determined at biogeographical level in Member States (for overviews, national/regional strategies, targets and reporting purposes) and at population level[34] where appropriate (for defining requisite measures, management and derogations). In the case of transboundary populations and species that migrate across the frontiers of the EU, their overall natural range, including migration zones outside the EU, should be considered as well where this is feasible. Repeated or regular monitoring will give an indication as to the appropriateness and effectiveness of the conservation measures chosen.

---

[32] DocHab-04-03/03 rev.3 "Assessment, monitoring and reporting of conservation status – Preparing the 2001-2007 report under Article 17 of the Habitats Directive".

[33] Member States are free to choose their means and methods of gathering data and to adapt monitoring methods to regional differences; however, a certain – voluntary – harmonisation over the medium to long term should be sought.

[34] Regarding the definition of 'population', a group of spatially separated populations of the same species which interact at some level (meta-populations) might be used as a biologically meaningful reference unit. This approach needs to be adapted to the species in question, taking account of its biology/ecology.

(51) Surveillance of the conservation status of animal species should provide valuable information and contribute to effective implementation of the Directive. Such information is also necessary for appropriately applying derogations under Article 16: in order to determine whether any actions would be detrimental to maintaining that species at a favourable conservation status, national authorities must have sufficient information available to assess the conservation status of the species, and to predict the likely effects of any proposed derogation.

(52) In addition to the surveillance of conservation status, there is an explicit obligation under Article 12(4) to establish a system to monitor the incidental capture and killing of Annex IV(a) species and, in the light of the information gathered, to take further research or conservation measures if required. Findings under this system should be incorporated in the overall lessons drawn from the surveillance of conservation status.

*Summary: Good knowledge of a species (range/distribution, occurrence, biology, ecology, threats & sensitivity, conservation needs, etc.) and regular surveillance of its conservation status over time (as required in Article 11) are essential preconditions for any meaningful conservation strategy. Cooperation at EU level and transboundary cooperation might be essential for certain species. An EU framework for assessing conservation status was agreed by Member States in April 2005.*

### I.2.4.b) Appropriate and effective character of measures taken

(53) The Directive does not define in detail the concrete measures needed to fulfil the obligations arising from its various provisions and allows the Member States a certain margin of manoeuvre, or flexibility. The definition, adoption and implementation of such measures fall within the competence of national authorities. The Habitats Directive thus enables the Member States to implement its provisions in a **proportionate and appropriate** manner, an approach that underlies all the provisions of the Habitats Directive, including Articles 12 and 16. However, the discretionary power of Member States should respect some basic requirements.

(54) When it comes to interpreting provisions of a Directive, special attention must be given to the guiding principle laid down in Article 10 of the EC Treaty, which states that *"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."*

(55) Consequently, the maintenance or restoration of favourable conservation status has to be taken into consideration when establishing adequate measures for species protection and habitat conservation. Good scientific knowledge and surveillance of a species are preconditions for doing so. The circle is closed when the results of the surveillance of conservation status show that the measures chosen are actually appropriate and **effective** in the field.

(56) The measures taken by the Member States should adequately address the objective pursued, i.e. maintaining and restoring favourable conservation status, while also taking account of economic, social and cultural requirements and regional and local characteristics (Article 2(3)). Such measures will be proportionate where they enable the desired aim to be attained, are necessary for attainment of that aim and are appropriate in terms of the means used.

(57) In addition, it should be underlined that **a species-by-species approach** also needs to be adopted. The concrete targets to be achieved may differ significantly for each species, and can also evolve (e.g. due to better scientific knowledge). Member States should therefore always consider their implementation actions in the light of the intended objective, the species concerned and the circumstances of each case. Thus, a proportionate approach is not a static concept and becomes an important factor for the flexible implementation of species conservation. However, taking no measures at all on account of a species being in a good conservation status is not an option (see also chapter II.2.3).

(58) Flexibility and proportionality should thus not be misunderstood as concepts that reduce the obligations on Member States to act in an effective way, but need to be seen as providing room for authorities to adapt their way of implementation to the specific circumstances of each case (in conservation status terms, but also in social, economic and cultural terms). The implementation of a flexible and proportionate approach calls for the Member States to act within a clear framework of coordinated and effective measures, applied in a coherent[35] way with sufficient safeguards. According to the Court, *"Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned"*[36]. Thus, such approaches need to respect the overall objective of the Directive, namely to ensure biodiversity and to maintain or restore, at a favourable status, natural habitats and species of Community interest[37].

(59) The following paragraphs are intended to explain the link between conservation status, the use of different instruments and their appropriateness and effectiveness.

(60) In general terms, surveillance or an initial assessment of conservation status can conclude that the status of a species is either favourable or unfavourable (classified in different grades). Based on the best available information, the Member States should then define — in accordance with the provisions of the Directive — the specific conservation measures needed to maintain (a favourable) or restore (an unfavourable) conservation status for each species.

(61) At this stage, the question as to **what types of measures are obligatory** under the Directive arises depending on the annex in which a species is listed. Chapter II will deal in more detail with the concept of 'requisite measures to establish a system of strict protection' under Article 12. At this point, it will only be noted that certain measures, though important or appropriate for a species, might not be required under the provisions of the Directive depending on the annex in which a species is listed in. In relation to the species protection section, it is important to recognise that proactive habitat management measures (such as restoration of habitats/populations, improvement of habitats) are not an obligation under Article 12, even though they might well be under Article 6. For example, if proactive biotope restoration is needed for a butterfly species listed only in Annex IV(a) because its habitat has nearly disappeared and only a larger habitat would ensure long-term survival, such a measure would not be covered by Article 12. Such situations could be avoided or corrected in the medium to long term by revision of the annexes or the Directive itself.

---

[35] Coherence in this context means that flexibility and proportionality cannot be applied only when this seems convenient (for example only when granting derogations) but must at the same time be applied to the requisite measures for the effective protection of species under the strict protection system, so that overall implementation is in line with the objectives of the Directive.

[36] Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 112, and judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraph 66.

[37] If the Commission considers that such an approach does not comply with the Directive, it needs to prove that this is the case (see, for example, the judgment of 6 November 2003, Commission v UK, Case C-434/01, ECR p.13239, paragraph 21).

(62) Overall, the following main scenarios can be distinguished:

1. If the measures required for a specific species are obligatory under the Directive, there are two possible scenarios:

   - The Member State implements sufficient and verifiable measures to maintain or restore FCS, which is confirmed by the surveillance results; in that case, the measures and surveillance should be continued;

   - The Member State does not implement sufficient and verifiable measures to maintain or restore FCS. This means that it is not complying with its obligations, which normally constitutes an infringement of the Directive.

2. If the measures required for a species (or parts of it) are not obligatory under the Directive (e.g. active biotope restoration or reintroduction for a species exclusively listed in Annex IV), there are two possibilities:

   - The Member State implements voluntarily sufficient and verifiable measures to maintain or restore FCS, which is confirmed by the surveillance results; in that case, the measures and surveillance should be continued;

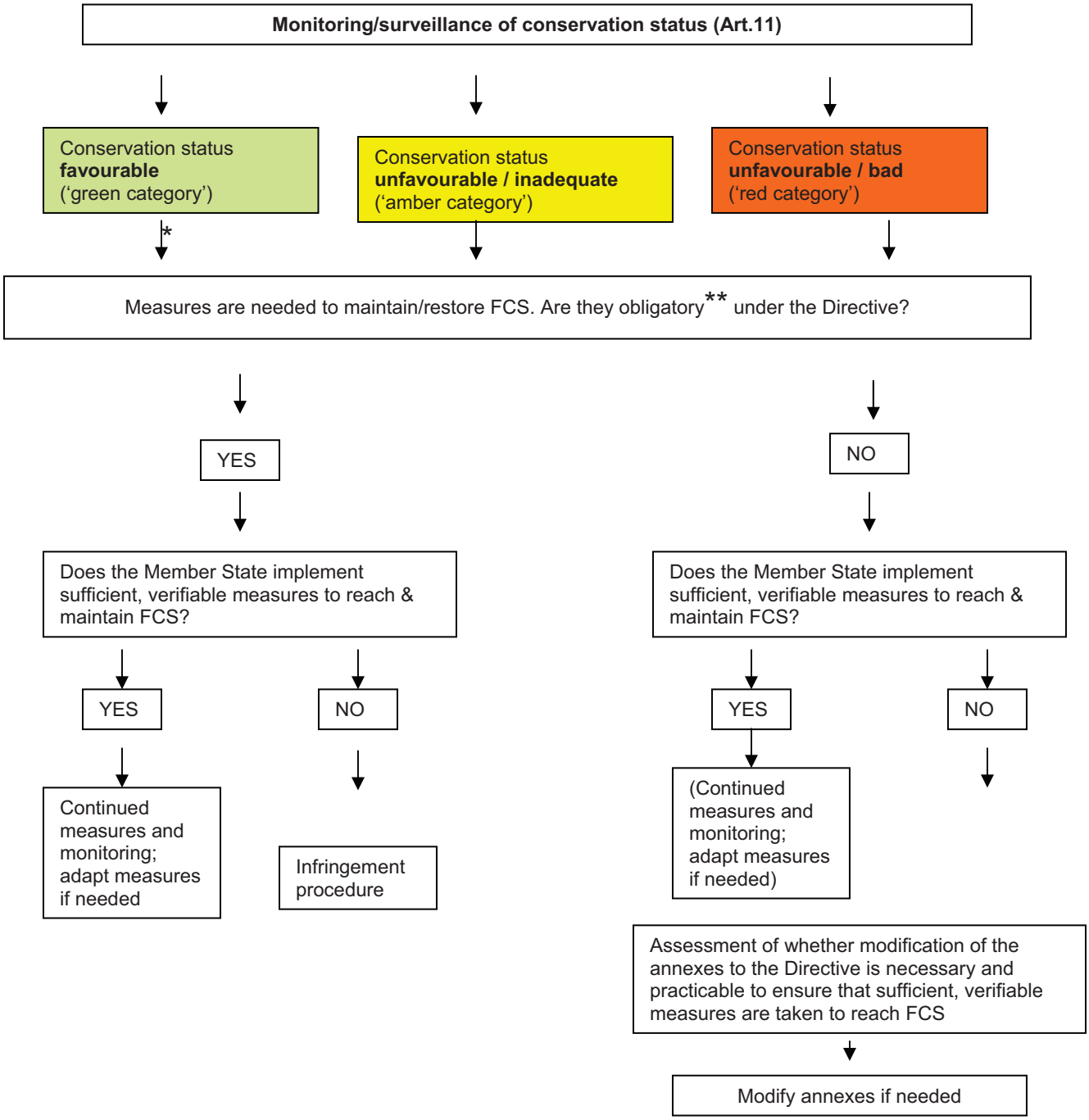
   - The Member State does not implement sufficient and verifiable measures to maintain or reach FCS. In such a case, the need for further action needs to be assessed, which might include modification of the annexes to the Directive if this is the appropriate way of ensuring FCS for a species. Modification of the annexes could involve adding a species listed only in Annex IV to Annex II or upgrading a species to priority status. If modification of the annexes is not likely to bring results, more far-reaching adaptations or additional instruments might be considered[38].

(63) This demonstrates the importance of designing appropriate and effective measures in combination with a surveillance system to monitor the conservation status of species.

*Summary: Measures taken by the Member States when implementing the provisions under the Directive should always be proportionate and appropriate to the objective pursued, i.e. maintaining and restoring favourable conservation status. The measures must be appropriate and effective on the ground. There might be some cases where appropriate measures are not obligatory under the Directive. Voluntary measures or adaptation of the Directive and its annexes may be envisaged in such cases.*

[38] Annexes could also be modified to remove a species as well, since surveillance could reveal a species to be widely abundant.

## APPROPRIATENESS AND EFFECTIVENESS OF MEASURES TAKEN




* Where monitoring shows that a species is in a favourable status with no need for measures to maintain this situation, and consequently no longer fulfils the criteria for Community interest, modification of the annexes (in this case, removal of the species) should be envisaged.

** This refers to the situation described in chapter 1.2.4.b.

# LECTURE 13

## Regional Airports: Groningen and Antwerp

23 March 2012

**LJN: AN9219, Raad van State , 200205524/1**

| | |
|---|---|
| Datum uitspraak: | 03-12-2003 |
| Datum publicatie: | 03-12-2003 |
| Rechtsgebied: | Bestuursrecht overig |
| Soort procedure: | Eerste aanleg - meervoudig |
| Inhoudsindicatie: | Bij besluit van 15 mei 2001 heeft verweerder sub 1, in overeenstemming met verweerder sub 2, met toepassing van artikel 27 van de Luchtvaartwet (hierna: Lvw) gelezen in samenhang met artikel 24 van de Lvw, het besluit van 1 oktober 1959, no. TW/14962, waarbij het luchtvaartterrein Eelde is aangewezen, gewijzigd (hierna: het A-besluit). Bij besluit van gelijke datum, kenmerk M175, heeft verweerder sub 2, in overeenstemming met verweerder sub 1, toepassing gegeven aan artikel 26 van de Lvw in samenhang met artikel 37 van de Wet op de Ruimtelijke Ordening (hierna: WRO) voor het luchtvaartterrein Eelde (hierna: het RO-besluit). |

---

**Uitspraak**

200205524/1.
Datum uitspraak: 3 december 2003

AFDELING
BESTUURSRECHTSPRAAK

Uitspraak in het geding tussen:

1. het college van burgemeester en wethouders van Tynaarlo,
2. [appellant sub 2], wonend te [woonplaats],
3. de Vereniging Omwonenden Luchthaven Eelde, gevestigd te Haren, en andere (hierna: VOLE en andere)
4. [appellant sub 4], wonend te [woonplaats],
5. IVN, Vereniging voor Natuur- en Milieueducatie, afdeling Eelde/Paterswolde, gevestigd te Paterswolde, en afdeling Vries, gevestigd te Vries (hierna: IVN),
6. [appellante sub 6], wonend te [woonplaats],
7. [appellant sub 7], wonend te [woonplaats],
8. de Milieufederatie Drenthe, gevestigd te Assen,
9. de gemeenteraad van Haren,
10. [appellant sub 10], wonend te [woonplaats],

appellanten,

en

1. de Staatssecretaris van Verkeer en Waterstaat,
2. de Staatssecretaris van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer,

verweerders.

1. Procesverloop

Bij besluit van 15 mei 2001 heeft verweerder sub 1, in overeenstemming met verweerder sub 2, met toepassing van artikel 27 van de Luchtvaartwet (hierna: Lvw) gelezen in samenhang met artikel 24 van de Lvw, het besluit van 1 oktober 1959, no. TW/14962, waarbij het luchtvaartterrein Eelde is aangewezen, gewijzigd (hierna: het A-besluit).
Bij besluit van gelijke datum, kenmerk M175, heeft verweerder sub 2, in overeenstemming met verweerder sub 1, toepassing gegeven aan artikel 26 van de Lvw in samenhang met artikel 37 van de Wet op de Ruimtelijke Ordening (hierna: WRO) voor het luchtvaartterrein Eelde (hierna: het RO-besluit).

Tegen deze besluiten zijn bezwaren als bedoeld in artikel 7:1 van de Algemene wet bestuursrecht (hierna: Awb) ingediend.

Bij besluit van 26 augustus 2002, no. DGL/02.421463, hebben verweerders beslist op deze bezwaren. Verweerders hebben het A-besluit deels gewijzigd en het RO-besluit ongewijzigd gehandhaafd.

Tegen de beslissing op bezwaar hebben appellanten beroep ingesteld.

Bij brief van 24 januari 2003 hebben verweerders een verweerschrift ingediend.

Na afloop van het vooronderzoek zijn nadere stukken ontvangen van [appellant sub 2], IVN, [appellant sub 6] en [appellant sub 10]. Deze zijn aan de andere partijen toegezonden.

De Afdeling heeft de zaak ter zitting behandeld op 11 september 2003, waar [appellant sub 2] in persoon, [appellant sub 6] in persoon, [appellant sub 7], vertegenwoordigd door [gemachtigde], VOLE en andere, vertegenwoordigd door mr. A.H.J. van den Biesen, advocaat te Amsterdam, [appellant sub 4] in persoon, de Milieufederatie Drenthe, vertegenwoordigd door [gemachtigde], IVN, vertegenwoordigd door [gemachtigde], [appellant sub 10] in persoon, de gemeenteraad van Haren, vertegenwoordigd door mr. drs. A.H. Keuning, ambtenaar van de gemeente, en verweerders, vertegenwoordigd door mr. I.W. Neleman, advocaat te Den Haag, en bijgestaan door mr. O.M. van Dijk, ir. J.W. Pulles, drs. ing. J.W. Nollet en A.J. Koppert, ambtenaren ten departemente, zijn verschenen. Voorts zijn namens Groningen Airport Eelde [gemachtigden], verschenen. Het college van burgemeester en wethouders van Tynaarlo heeft zich niet doen vertegenwoordigen.

2. Overwegingen

2.1. De Milieufederatie Drenthe heeft haar bezwaar inhoudende dat in de aanwijzing ten onrechte niet een monitoringsprogramma is voorgeschreven ter zitting ingetrokken.

ontvankelijkheid

2.2. Verweerders betogen dat het aanvullende beroepschrift van VOLE en andere van 31 januari 2003 niet-ontvankelijk is aangezien het buiten de beroepstermijn is ingediend en andere beroepsgronden bevat dan vermeld in het beroepschrift.

2.2.1. Ingevolge artikel 6:5, eerste lid, onder d, van de Awb bevat het beroepschrift de gronden van het beroep.

In artikel 6:6 van die wet is onder meer bepaald dat het beroep niet ontvankelijk kan worden verklaard indien niet is voldaan aan artikel 6:5 of aan enig ander bij de wet gesteld vereiste voor het in behandeling nemen van het beroep, mits de indiener de gelegenheid heeft gehad het verzuim te herstellen binnen een hem daartoe gestelde termijn.

In artikel 8:58, eerste lid, van de Awb is bepaald dat partijen tot tien dagen voor de zitting nadere stukken kunnen indienen.

In het beroepschrift hebben appellanten onder meer verwezen naar de door hen ingediende bedenkingen. Derhalve hadden zij in beginsel reeds voldaan aan het bepaalde in voormeld artikel 6:5, eerste lid, onder d, van de Awb. Het aanvullende beroepschrift betreft voorts een nadere onderbouwing van het beroepschrift. Het betoog van verweerders treft gelet op het voorgaande geen doel.

inleiding

2.3. Het A-besluit voorziet in een wijziging van het aanwijzingsbesluit ten aanzien van het luchtvaartterrein Eelde van 1 oktober 1959 (Stcrt. 1959, 198). Bij dit besluit is het terrein aangewezen als luchtvaartterrein met kadastrale gegevens ten behoeve van het openbaar luchtverkeer met burgerlijke vliegtuigen en zweefvliegtuigen, en oefen- en proefvluchten met burgerlijke vliegtuigen en zweefvliegtuigen. Het voorliggende A-besluit is genomen in vervolg op het verzoek van de exploitant om een baanverlenging van baan 23-05 van 1.800 naar 2.500 meter. Het A-besluit heeft onder meer betrekking op:

- de ligging en lengte van de baan 23-05 alsmede van de baan 19-01;

- het gebruik van het luchtvaartterrein in de situatie met de verlengde baan 23-05;

- de vaststelling van een Ke-zone met een grenswaarde van 35 Ke en met de geluidscontouren behorende bij de waarden 40, 45, 50, 55 en 65 Ke;

- de vaststelling van een Bkl-zone met een grenswaarde van 47 bkl en met de geluidscontour van 57 bkl.

de totstandkoming van het A-besluit en het bestreden besluit

2.4. VOLE en andere stellen dat verweerders niet tot het A-besluit hebben kunnen komen gezien het lange tijdsverloop tussen het verschijnen van diverse aan het A-besluit ten grondslag liggende adviezen, waaronder het advies van de Commissie zoals bedoeld in artikel 21 van de Lvw (hierna: de Commissie 21), en de aanwijzing.

2.4.1. De Afdeling stelt vast dat het A-besluit niet binnen de in artikel 24, eerste lid, van de Lvw gestelde termijn van zes maanden is genomen. Het verlopen van deze termijn van orde heeft echter niet tot gevolg dat verweerders niet meer bevoegd waren om te beslissen omtrent de aanwijzing.

2.5. Een aantal appellanten meent dat er sprake is geweest van belangenverstrengeling. Zij stellen in dit verband onder meer dat de samenstelling van het bestuurlijk overleg dan wel van de Commissie 21 zodanig was dat een aantal deelnemers daaraan dan wel leden daarvan bestuursorganen vertegenwoordigden die tevens aandeelhouder van N.V. Groningen Airport Eelde zijn. Appellanten menen in dit verband dat het overleg zoals bedoeld in artikel 19 van de Lvw en het advies van de Commissie 21 niet als onafhankelijk kunnen worden beschouwd omdat in overwegende mate het aandeelhoudersbelang was vertegenwoordigd. [appellant sub 4] stelt meer in het algemeen dat er sprake is van gebrek aan transparantie en openheid in de periode voorafgaand aan het A-besluit van de zijde van de aandeelhouders van N.V. Groningen Airport Eelde.

2.5.1. In artikel 19 van de Lvw is beschreven welke bestuursorganen bij het bestuurlijk overleg dienen te worden betrokken.

In artikel 21, derde lid, van de Lvw is beschreven uit welke leden de Commissie 21 dient te bestaan. De samenstelling van de deelnemers aan het bestuurlijk overleg en de Commissie 21 volgt derhalve rechtstreeks uit de wet.

Niet is gebleken dat de samenstelling van het bestuurlijk overleg en van de commissie niet overeenkomstig artikel 19 respectievelijk artikel 21 van de Lvw heeft plaatsgevonden.

Voorts is niet gebleken dat de leden van de commissie niet het standpunt van degene die zij worden geacht te vertegenwoordigen hebben verwoord.

Dat bij het bestuurlijk overleg en de Commissie 21 bestuursorganen betrokken zijn geweest die aandeelhouder zijn van N.V. Groningen Airport Eelde doet aan het voorgaande niet af. Het hebben van een zakelijk belang bij een project van de bij het overleg of de Commissie 21 betrokken bestuursorganen is in beginsel niet ongeoorloofd en behoeft daarnaast niet noodzakelijkerwijs in te houden dat door deze bestuursorganen geen rekening is gehouden met andere belangen.

Voorts is van belang dat verweerders bij hun besluitvorming niet zijn gebonden aan de uitkomsten van het overleg dan wel aan de advisering door de Commissie 21.

Appellanten hebben niet aannemelijk gemaakt dat het zijn van aandeelhouder van een aantal deelnemers aan het bestuurlijk overleg dan wel van de vertegenwoordigde bestuursorganen in de Commissie 21 voor verweerders in dit geval uit oogpunt van zorgvuldigheid aanleiding had dienen te zijn de uitkomsten hiervan buiten beschouwing te laten. Hetgeen [appellant sub 4] heeft aangevoerd ten aanzien van transparantie en openheid doet hier niet aan af.

2.6. [appellant sub 2] maakt bezwaar tegen de gebundelde behandeling en de gewijzigde bewoordingen van zijn bezwaren. In dit verband merkt hij op dat het op deze wijze niet zeker is of alle bezwaren zijn behandeld.

2.6.1. Mede in aanmerking genomen het grote aantal ingediende bezwaarschriften, bestaat geen grond voor het oordeel dat verweerders niet tot het bijeenbrengen en rubriceren van de voornaamste en herhaaldelijk terugkerende bezwaren in het bij de beslissingen op bezwaar gevoegde witte boekje hadden mogen overgaan. Appellant heeft niet aannemelijk gemaakt dat verweerders dan wel de Commissie 21 als gevolg van de gebundelde behandeling van de bezwaren relevante bezwaren materieel buiten beschouwing hebben gelaten.

2.7. [appellant sub 2] heeft voorts een aantal bezwaren omtrent de gang van zaken ten aanzien van het milieueffectrapport (hierna: MER). Hij heeft bezwaar tegen de handelwijze van de Commissie voor de milieueffectrapportage (hierna: Commissie m.e.r.), onder andere omdat deze het nut en de noodzaak van de baanverlenging niet heeft beschouwd. Daarnaast meent hij dat onderdelen van het MER niet voldoen aan de

richtlijnen als bedoeld in artikel 7.15, eerste lid, van de Wet milieubeheer, dat de redelijkerwijs in beschouwing te nemen alternatieven niet in aanmerking zijn genomen en dat ten tijde van het bestuurlijk overleg als bedoeld in artikel 19 van de Lvw het belevingsonderzoek, opgesteld om een gebrek in het MER te herstellen, niet bekend was bij de deelnemers.

2.7.1. De Afdeling ziet in hetgeen appellant heeft aangevoerd geen grond voor het oordeel dat de handelwijze van de Commissie m.e.r. onzorgvuldig is geweest. Zij overweegt hiertoe dat de Commissie m.e.r. dient te beoordelen of het MER voldoet aan de eisen die daaraan gesteld worden. In dit verband dient de Commissie m.e.r. met name te bezien of het MER voldoende informatie bevat om milieueffecten een volwaardige rol in de besluitvorming te kunnen laten spelen. Een beoordeling van het nut en de noodzaak van de activiteit valt in zoverre buiten haar beoordelingskader.

In het MER zijn drie alternatieven onderzocht alsmede een aantal varianten binnen die alternatieven. Uit het toetsingsadvies van de Commissie m.e.r. van 18 augustus 1997 blijkt niet dat zij van mening is dat in het MER onvoldoende alternatieven zijn opgenomen dan wel locatiealternatieven of andere vervoerswijzen als alternatieven in het MER dienden te worden opgenomen. Gelet hierop ziet de Afdeling geen grond voor het oordeel dat het MER onvoldoende informatie bevat over de alternatieven die redelijkerwijs in beschouwing dienden te worden genomen.

De Commissie m.e.r. heeft het MER blijkens haar toetsingsadvies op andere punten in strijd met de richtlijnen voor het MER geacht. Gelet op hetgeen zij in dit advies hieromtrent heeft vermeld, moet worden aangenomen dat de gebreken in het MER niet van dien aard zijn dat hier niet aan voorbij kon worden gegaan dan wel dat deze nadien niet konden worden hersteld. Hiertoe overweegt de Afdeling onder andere dat de Commissie m.e.r. wat betreft de invulling van het meest milieuvriendelijke alternatief een tekortkoming heeft aangegeven die van essentieel belang is voor de besluitvorming. De Commissie m.e.r. beveelt hieromtrent aan een belevingsonderzoek uit te laten voeren waarna het bevoegd gezag op grond van artikel 7.42 Wet milieubeheer vervolgens bij het beschikbaar komen van de resultaten van het belevingsonderzoek na dient te gaan of die resultaten aanleiding geven tot bijstelling van de voorschriften voor het gebruik van het luchtvaartterrein. Verweerders hebben dit belevingsonderzoek vóór het nemen van het A-besluit uit laten voeren.

Ten tijde van het bestuurlijk overleg op 20 februari 1997 was het belevingsonderzoek niet een bij de deelnemers bekend stuk. Dit onderzoek is eerst medio oktober 1999 toegestuurd aan alle deelnemers. Zij zijn in de gelegenheid gesteld hierop nader te reageren. Dit heeft niet geleid tot een ander standpunt hunnerzijds. Mede gelet daarop bestaat geen grond voor het oordeel dat het ontbreken van de later alsnog verschafte gegevens en de daartoe gevolgde procedure zou dienen te leiden tot vernietiging van het bestreden besluit.

2.8. Voorzover de gemeenteraad van Haren stelt dat in het MER ten onrechte niet is uitgegaan van een 47 bkl-contour overweegt de Afdeling dat ter zitting onweersproken is gesteld dat in het MER is uitgegaan van een 47 bkl-zone. Dit betoog van appellant mist derhalve feitelijke grondslag.

strijd met planologische kernbeslissingen

2.9. Een aantal appellanten stelt dat het aanwijzingsbesluit ten onrechte is gebaseerd op het verouderde Structuurschema Burgerluchtvaartterreinen (hierna: SBL). De motivering uit het SBL is niet langer de onderbouwing van het huidige beleid aangezien het berust op feiten en conclusies die gedateerd zijn, aldus appellanten. In dit verband wordt gewezen op het in ontwikkeling zijnde Structuurschema Regionale en Kleine Luchtvaart (hierna: SRKL).

2.9.1. In artikel 27, eerste lid, van de Lvw is, voorzover van belang, bepaald dat de Minister van Verkeer en Waterstaat in overeenstemming met de Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, een aanwijzing te allen tijde kan wijzigen. Ingevolge het bepaalde in het tweede lid van dit artikel moet de wijziging overeenstemmen met een van kracht zijnd plan als bedoeld in artikel 2a van de WRO.

2.9.2. Het SBL is het hiervoor bedoelde plan en bevat het beleid ten aanzien van burgerluchtvaartterreinen. De Tweede Kamer der Staten-Generaal heeft op 27 oktober 1987 en de Eerste Kamer der Staten-Generaal heeft op 6 september 1988 ingestemd met het SBL.

Bij de Wet rechtskracht diverse planologische kernbeslissingen van 17 december 1998 (Stb. 721) is aan het SBL met terugwerkende kracht rechtskracht verleend. Het SBL is ingevolge deze wet tot 31 december 2003 een van kracht zijnd plan, als bedoeld in de WRO en de Lvw.

Het SRKL kan niet als een zodanig plan gelden. Hiertoe overweegt de Afdeling dat het SRKL ten tijde van het nemen van het bestreden besluit weliswaar in voorbereiding was ter vervanging van het SBL, doch rechtskracht ontbeerde. Overigens blijkt uit de stukken dat de voorbereiding van het SRKL inmiddels is stopgezet.

Gelet op het vorenstaande hebben verweerders zich terecht op het SBL gebaseerd. De omstandigheid dat het SBL dateert uit 1988 doet daar niet aan af.

Deze beroepsgrond treft derhalve geen doel.

de geluidszonering

2.10. Een aantal appellanten heeft bezwaar tegen het gebruik van de Ke-methode bij de geluidszonering. Zij stellen dat ten onrechte gebruik is gemaakt van de zogeheten afkap-regeling in de Ke-berekening nu hierdoor niet een deugdelijk beeld wordt gegeven van de hinderbeleving. In dit verband wordt betoogd dat dit ruimschoots voor de primaire beslissing al bekend was. VOLE en andere stellen daarnaast dat in de Ke-methode ten onrechte niet wordt gemeten, maar slechts wordt berekend.

2.10.1. Verweerders erkennen dat een berekeningsmethodiek waarin geen gebruik wordt gemaakt van de 65 dB (A) afkap beter aansluit bij de in werkelijkheid ervaren geluidsbelasting. Zij stellen dat dit echter nog niet wil zeggen dat het gebruik van de Ke-methodiek en de daarin besloten liggende afkap in het kader van het A-besluit onaanvaardbaar is. In dit verband wijzen zij erop dat in de aanloop naar het vaststellen van het A-besluit gebruik is gemaakt van de Ke-berekeningen met de 65 dB(A) afkap, zoals in het SBL, het MER en de berekeningen die in het kader van het ontwerp A-besluit van 1997 zijn uitgevoerd en dat niet kan worden volgehouden dat ten tijde van het ontwerp A-besluit evident was dat het gebruik van de afkap de validiteit van het rekenmodel zou gaan aantasten. In de toekomst zal weliswaar worden overgestapt op een nieuwe geluidsdosismaat, doch deze is thans nog niet voorhanden, aldus verweerders.

2.10.2. Ingevolge artikel 25, eerste lid, aanhef en onder a, van de Lvw, voorzover thans van belang, worden bij algemene maatregel van bestuur uniforme grenswaarden vastgesteld voor de maximaal toegelaten geluidsbelasting door landende en opstijgende luchtvaartuigen voor luchtvaartuigen met een toegelaten totaalmassa van tenminste 6.000 kg, dan wel minder dan 6.000 maar meer dan 390 kg, voorzover dit hefschroefvliegtuigen betreft, dan wel deze luchtvaartuigen gebruik maken van dezelfde aan- en uitvliegroutes als de luchtvaartuigen van ten minste 6.000 kg, dan wel de vliegpatronen van de luchtvaartuigen overeenkomen met die van luchtvaartuigen van ten minste 6.000 kg.

Ter uitvoering van deze bepaling is het Besluit geluidsbelasting grote luchtvaart (hierna: BGGL) vastgesteld.

Ingevolge artikel 1 van het BGGL wordt de geluidsbelasting door landende en opstijgende luchtvaartuigen op een bepaalde plaats vastgesteld in Kosteneenheden (Ke). De berekeningsmethode van de Ke is evenzeer als het gebruik van de norm vastgelegd in het BGGL. De berekeningsmethode wordt voorts nader uitgewerkt in de krachtens artikel 25g, eerste lid, van de Lvw vastgestelde Regeling berekening geluidsbelasting in Kosteneenheden (hierna: Regeling Ke). De beroepsgronden betreffende de toegepaste berekeningsmethode kunnen doel treffen voorzover deze in strijd is met regelgeving van hogere orde. Hiervan kan sprake zijn, indien de resultaten van de berekeningen niet overeenkomen met het in artikel 25, eerste lid, van de Lvw bepaalde dat de geluidsbelasting, veroorzaakt door landende en stijgende luchtvaartuigen, dient te worden vastgesteld.

Uit de keuze voor de berekening van de geluidsbelasting door middel van de Ke-berekeningsmethode vloeit voort dat de veroorzaakte geluidsbelasting ter plaatse via een bepaald model en daarbij behorende formule wordt berekend. De Ke drukt de beoordeling van ten gevolge van vliegtuiggeluid door mensen ervaren hinder uit. Deze kan niet anders dan met behulp van modellen worden berekend.

De met deze modellen berekende geluidszonering dient hoofdzakelijk om het gebruik van het luchtvaartterrein te reguleren. Door het vaststellen van geluidszones wordt een grens gesteld aan de door het gebruik van het luchtvaartterrein te veroorzaken geluidsbelasting en daardoor tevens aan het gebruik van het betrokken luchtvaartterrein. Doel van de in de desbetreffende berekeningsvoorschriften opgenomen modellen is dan ook op reproduceerbare wijze de geluidsbelasting te kunnen bepalen.

Naar hun aard zijn modellen niet meer dan een benadering van de werkelijkheid. Indien de berekeningen op basis van een model evenwel te zeer afwijken van de werkelijkheid, tast dat de validiteit van het model aan. Indien een model niet voldoende de werkelijke geluidsbelasting door landende en stijgende vliegtuigen benadert, is het enkele gebruik ervan niet toereikend om aan het bepaalde bij artikel 25, eerste lid, van de Lvw te voldoen.

Het bovenstaande brengt met zich dat de hieronder te bespreken beroepsgronden inzake de berekeningswijze van de Ke bezien moeten worden in het licht van de vraag of verweerders zich in redelijkheid op het standpunt hebben kunnen stellen dat het gebruikte model in voldoende mate de werkelijke geluidsbelasting ten gevolge van landende en stijgende vliegtuigen benadert.

2.10.3. Ingevolge artikel 2, eerste lid, van het BGGL is de grenswaarde voor de maximaal toelaatbare geluidsbelasting als bedoeld in artikel 25, eerste lid, aanhef en onder a, van de Lvw, voor de in het tweede lid genoemde luchtvaartterreinen 35 Ke. Binnen de 35 Ke-geluidszone is blijkens de Nota van Toelichting bij het BGGL (Stb. 648) sprake van ernstige hinder voor 25 procent van de bevolking.

In de tweede helft van de jaren ’70 is een berekeningsvoorschrift opgesteld waarbij de 35 Ke-geluidszone wordt berekend met gebruikmaking van de zogeheten 65 dB(A) afkap. Deze afkap houdt in dat indien de geluidsbelasting in een netwerkpunt op een bepaald moment 65 dB(A) of minder bedraagt, deze geluidshoeveelheid niet wordt meegerekend bij het bepalen van de hoeveelheid Ke ter plaatse. De 65 dB(A) afkap is bij beschikking van 12 januari 1984 in de berekeningsvoorschriften van de Regeling Ke opgenomen. Uit de toelichting op de uit 1996 stammende regeling Ke blijkt dat de aanvankelijke reden om de 65 dB(A) afkap te hanteren was dat de geluidsgegevens van vliegtuigen in het algemeen niet werden gegeven beneden de 65 dB (A), waardoor bij het toch in rekening willen brengen van dergelijke lage geluidsniveaus extrapolatiefouten zouden ontstaan. Voorts waren er vanuit het oogpunt van hinderbeleving geen dringende redenen om bij de berekening van de geluidsbelasting in Ke rekening te houden met geluidsniveaus lager dan 65 dB(A). Het berekeningsvoorschrift was destijds vooral opgesteld om op efficiënte wijze zoneringscontouren van 35 Ke en hoger te berekenen.

Uit de genoemde toelichting blijkt dat de drempelwaarde sindsdien een steeds grotere invloed heeft verkregen op de geluidsbelasting in Ke. Deze toename kan worden verklaard doordat in tegenstelling tot voorheen in de besluitvorming met betrekking tot civiele luchtvaartterreinen ook rekening wordt gehouden met een geluidsbelasting lager dan 35 Ke en bovendien de geluidsniveaus van civiele vliegtuigen gemiddeld lager zijn geworden dan in de tweede helft van de jaren ’70. Daarnaast zijn de methoden voor het uitvoeren van geluidsmetingen en de methoden om uit dergelijke metingen ook lagere geluidsniveaus te bepalen verbeterd.

Bij de aanpassing van de berekeningsvoorschriften voor de geluidsbelasting in 1996 is desondanks de drempelwaarde van 65 dB(A) gehandhaafd, mede in afwachting van onderzoek in het kader van het Evaluatie-programma rond Schiphol inzake de invloed van de 65 dB(A) drempelwaarde op de hinderbeleving.

2.10.4. Zoals de Afdeling eerder in haar uitspraak van 28 juli 1998, no. E01.97.0309 (NJB 1998, p 1357, nr 33), omtrent het voorgaande heeft overwogen beïnvloedt het gebruik van de 65 dB(A) afkap de uitkomst van de Ke-berekeningen steeds meer. De Afdeling heeft in die uitspraak dan ook vastgesteld dat, gelet op de steeds afnemende geluidsproductie door vliegtuigen, de validiteit van het gebruikte model steeds verder onder druk komt te staan en dat er mitsdien een moment zal komen dat door het gebruik van een dergelijke afkap het model niet meer valide is en in die zin in strijd komt met artikel 25, eerste lid, van de Lvw.

Tot slot heeft de Afdeling overwogen dat, hoewel zij aanknopingspunten had voor de veronderstelling dat het gebruik van de 65 dB(A) afkap de validiteit van het model is gaan aantasten, verweerder gelet op de omstandigheden van het geval waaronder met name de voorbereidende besluitvorming, de 65 dB(A) afkap nog heeft mogen toepassen.

2.10.5. De Afdeling stelt op grond van het voorgaande en het verhandelde ter zitting vast dat verweerders zich sedert het midden van de jaren negentig ervan bewust zijn dat het gebruik van de 65 dB(A) afkap de uitkomst van de Ke-berekeningen steeds meer beïnvloedt.

Voor de luchthaven Schiphol wordt de Ke als norm voor het bepalen van de geluidsbelasting van vliegverkeer inmiddels niet meer gebruikt. Voor de berekening van de geluidsbelasting van het vliegverkeer van Schiphol is in een wijziging van de Wet luchtvaart de Lden en Lnight geïntroduceerd. In de Memorie van Toelichting op de wijziging van de Wet luchtvaart (TK 2000-2001, 27 603, nr. 3, blz. 37) wordt ten aanzien van deze nieuwe normen vermeld:

"Daarmee vervallen de voor de luchthaven Schiphol gehanteerde normen voor geluidsbelasting in Kosteneenheden (voor de etmaalperiode) en de LAeq (voor de nachtperiode). Behalve dat hiermee wordt aangesloten bij de ontwikkelingen in Europees verband vervallen ook enkele nadelen die aan de Ke-methodiek kleven, met name dat vliegtuiggeluid van minder dan 65 dB(A) niet in de berekeningen werd meegenomen (de veel bekritiseerde «afkapwaarde»). Door het vervallen van deze afkapwaarde wordt beter aangesloten bij de

werkelijk ondervonden geluidshinder dan bij de Ke-methodiek het geval was. Immers al het vliegtuiggeluid telt nu mee in de geluidsbelasting. Bovendien is het nieuwe stelsel ook geschikt voor een toekomstige overgang van het berekenen van geluidsbelasting naar meten of een combinatie van meten en berekenen".

In het verweerschrift hebben verweerders zich eveneens op het standpunt gesteld dat een berekeningsmethodiek waarin geen gebruik wordt gemaakt van de 65 dB(A) afkap beter aansluit bij de in werkelijkheid ervaren geluidsbelasting. Het is de bedoeling dat de Lden ook voor de kleine en regionale luchthavens gaat gelden. Een wetsvoorstel hiervoor is sinds begin 2002 in voorbereiding. Voorts is ter zitting gebleken dat de operationaliteit van de Lden voor de kleine en regionale luchthavens niet meer ter discussie staat en thans zover is ontwikkeld dat deze snel kan worden ingevoerd en slechts het nieuwe wettelijke stelsel afgewacht moet worden.

Gelet op het voorgaande en gelet op hetgeen verweerders overigens naar voren hebben gebracht is de Afdeling van oordeel dat verweerders onvoldoende aannemelijk hebben gemaakt dat zij ten tijde van het A-besluit en het bestreden besluit niet over zodanig sterke aanwijzingen beschikten dat het gebruik van de 65 dB(A) afkap de validiteit van het model in zodanig ernstige mate is gaan aantasten dat het model niet voldoende de werkelijke geluidsbelasting ten gevolge van landende en stijgende vliegtuigen benadert. Tevens konden verweerders niet langer aannemen dat het aantal ernstig gehinderden binnen de 35 Ke-zone overeenkomt met 25 procent van de bevolking, hetgeen het uitgangspunt is geweest bij de oorspronkelijke normering.

Gezien het vorenstaande is de Afdeling van oordeel dat verweerders het rekenmodel wegens het in strijd zijn gekomen met artikel 25, eerste lid, van de Lvw, in dit geval niet meer als uitgangspunt voor het bepalen van de geluidsbelasting hadden mogen nemen.

De beroepen zijn (in zoverre) gegrond.

2.10.6. Het voorgaande betekent tevens dat het bestreden besluit is genomen zonder dat een betrouwbaar beeld bestaat van de geluidsbelasting die veroorzaakt wordt door de in het A-besluit mogelijk gemaakte baanverlenging en het daarmee samenhangende toegestane gebruik. Gezien de nauwe samenhang tussen de baanverlenging in het A-besluit en het daarmee samenhangende toegestane gebruik van het luchtvaartterrein en de daardoor ervaren geluidsbelasting in de omgeving van het luchtvaartterrein dient het bestreden besluit te worden vernietigd voorzover daarbij het A-besluit wat betreft de Ke-zone en de baan 23-05 voorzover deze langer is dan 1.800 meter, met het daarbij behorende codenummer en de codeletter, is gehandhaafd. De overige bezwaren van appellanten die samenhangen met de – berekening van de – geluidsbelasting en de baanverlenging, zoals bijvoorbeeld de invoergegevens, tolerantiegebieden, de handhaving van de geluidszones, nut en noodzaak van de baanverlenging en de economische onderbouwing daarvan, behoeven gezien het voorgaande thans geen bespreking. De overige beroepen gericht tegen de baanverlenging zijn gezien het voorgaande eveneens gegrond.

2.10.7. De Afdeling stelt voorts vast dat de baan 23-05 met een lengte van 2.500 meter in het A-besluit een intensivering van het gebruik mogelijk maakt zonder dat daarbij, zoals overwogen, de werkelijke geluidsbelasting voor de omgeving bekend is. In verband hiermee en in aanmerking genomen de onomkeerbare gevolgen die de baanverlenging met zich kan brengen ziet de Afdeling aanleiding om met toepassing van artikel 8:72, vijfde lid, van de Awb het A-besluit te schorsen wat betreft de baan 23-05 voorzover deze langer is dan 1.800 meter tot zes weken nadat opnieuw op de bezwaren is beslist. Gelet op de in geding zijnde belangen van de omwonenden van het luchtvaartterrein bij het bestaan van een Ke-zonering ziet de Afdeling geen aanleiding om het A-besluit wat betreft de Ke-zone te schorsen.

Ten overvloede overweegt de Afdeling in verband met de nieuw te nemen beslissing op bezwaar dat, nu in het MER is uitgegaan van de 65 dB(A) afkap, aangenomen kan worden dat dit MER niet zonder meer aan de te nemen beslissing op bezwaar ten grondslag kan worden gelegd.

Daarnaast is nader onderzoek nodig geworden met betrekking tot de in de omgeving liggende gebieden die op basis van richtlijn 92/43/EEG van de Raad van de Europese Gemeenschappen van 21 mei 1992 inzake de instandhouding van de natuurlijke habitats en de wilde flora en fauna (Pb L 206) alsmede richtlijn 79/409/EEG van de Raad van de Europese Gemeenschappen van 2 april 1979 inzake het behoud van de vogelstand (Pb L 103) zijn aangewezen.

de bkl-zone

2.11. VOLE en andere stellen dat de berekening van de bkl-zone ten onrechte is gebaseerd op de oude Appendices van het ‘Voorschrift voor de berekening van de geluidsbelasting ten gevolge van de kleine

luchtvaart' nu deze bij besluit 'Wijziging Regeling geluidsbelastingberekening kleine vliegtuigen' van 23 maart 2001 (Stcrt 2001,61) zijn gewijzigd. Verweerders hebben hier ten onrechte geen consequenties aan verbonden, aldus appellanten.

2.11.1. Verweerders stellen dat de bkl-zone is berekend aan de hand van de oude Appendices en dat deze zone anders zou liggen indien de gewijzigde Appendices gehanteerd zouden worden. Zij achten een aanpassing echter niet nodig in verband met de beperkte omvang van het verschil. Hiertoe verwijzen zij naar de toelichting bij het voornoemde besluit.

2.11.2. Ter zitting hebben verweerders desgevraagd bevestigd dat zij ten onrechte geen rekening hebben gehouden met de gewijzigde Appendices. De Afdeling is van oordeel dat de mogelijk beperkte omvang van het verschil niet met zich brengt dat verweerders voorbij mochten gaan aan het besluit 'Wijziging Regeling geluidsbelastingberekening kleine vliegtuigen'. Uitgangspunt is dat de beslissing op bezwaar wordt genomen met inachtneming van de feiten en omstandigheden ten tijde van het nemen van de beslissing op bezwaar en de te dien tijde geldende rechts- en beleidsregels.

Gezien het voorgaande is het bestreden besluit voorzover daarin de bkl-zone van het A-besluit ongewijzigd is gehandhaafd niet genomen overeenkomstig de bij de voorbereiding van een besluit in acht te nemen zorgvuldigheid.

Verweerders hebben in zoverre gehandeld in strijd met het bepaalde in artikel 3:2 van de Awb. Het beroep van VOLE en andere is op dit punt gegrond en het bestreden besluit dient te worden vernietigd voorzover daarbij de bkl-zone is gehandhaafd.

voorschriften in het A-besluit

2.12. VOLE en andere menen dat de met de exploitant gemaakte afspraken in 1969-1970 ten onrechte niet zijn meegenomen in de gebruiksbeperkingen in het kader van het A-besluit.

2.12.1. De Afdeling overweegt dat deze afspraken niet zijn gemaakt in het kader van het voorliggende A-besluit. Appellanten hebben niet aannemelijk gemaakt dat deze niettemin in het A-besluit dienden te worden opgenomen.

Deze beroepsgrond treft derhalve geen doel.

2.13. Een aantal appellanten stelt dat het luchtvaartterrein 's nachts gedurende een periode van acht uur gesloten dient te zijn. Zij pleiten voor een nachtsluitingstijd tot 07.00 uur in plaats van tot 06.30 uur zoals thans in het A-besluit is opgenomen. VOLE en andere wijzen in dit verband op de Richtlijn 2002/49/EG van het Europees parlement en de raad inzake de evaluatie en beheersing van het omgevingslawaai van 25 juni 2002. Daarnaast heeft een aantal appellanten bezwaar tegen de weekendsluitingstijden vanaf 23.00 uur.

2.13.1. Verweerders hebben bij het vaststellen van de openings- en sluitingstijden een afweging gemaakt tussen de belangen van de omgeving bij een ruime sluitingstijd en de belangen van de luchthaven bij een rendabele exploitatie van de luchthaven. Gelet op de beperkingen die reeds aan het gebruik van de luchthaven zijn gesteld hebben verweerders gekozen voor de openings- en sluitingstijden zoals opgenomen in artikel 8, eerste lid, van het A-besluit, aldus verweerders. Indien de openings- en sluitingstijden worden aangescherpt komt volgens hen het benutten van het vervoerspotentieel op de middellange afstand onder druk te staan.

2.13.2. Appellanten hebben niet aannemelijk gemaakt dat verweerders niet in redelijkheid de weekendsluitingstijd op 23.00 uur hebben kunnen vaststellen. De Afdeling is evenwel van oordeel dat verweerders het belang van de omgeving bij een langere nachtsluitingstijd in de ochtend onvoldoende zorgvuldig hebben afgewogen tegen de belangen van de luchthaven bij een rendabele exploitatie van de luchthaven. Verweerders hebben weliswaar de belangen van de omgeving enerzijds en het belang van de luchthaven anderzijds tegenover elkaar gezet, maar de Afdeling acht, in aanmerking nemend de grote betekenis die kan worden toegekend aan nachtrust, onvoldoende gemotiveerd om welke reden het belang van de luchthaven in dit geval zwaarder moet wegen. De Afdeling neemt hierbij in aanmerking dat momenteel geen vliegbewegingen plaatsvinden voor 07.00 uur. Evenmin hebben verweerders ter zitting aannemelijk kunnen maken dat dit zich in de nabije toekomst wel zal voordoen en in hoeverre dit een rendabele exploitatie van de luchthaven dient.

Gelet op het voorgaande is de Afdeling van oordeel dat verweerders in zoverre hebben gehandeld in strijd met

het bepaalde in artikel 3:2 en 7:12, eerste lid, van de Awb. Het beroep van VOLE en andere is op dit punt gegrond en het bestreden besluit dient te worden vernietigd voorzover daarbij de openingstijd vanaf 06.30 uur in artikel 8, eerste lid, onder a, van het A-besluit ongewijzigd is gehandhaafd.

2.14. VOLE en andere stellen dat in het A-besluit in strijd met door verweerders gedane toezeggingen geen beperkingen zijn opgenomen ten aanzien van lawaaiig klein circuitverkeer. Hiertoe verwijzen zij naar het stuk Tweede Kamer, jaargang 1999-2000, 26893, nr. 3, vraag 7.

2.14.1. In artikel 9, eerste lid, van het A-besluit is bepaald dat het uitvoeren van circuitvluchten als onderdeel van proef-, les- dan wel oefenvluchten, met vliegtuigen met schroefaandrijving met een maximaal toegelaten totaal massa van minder dan 6.000 kg plaatsvindt van maandag tot en met zaterdag van 08.00 uur tot 22.00 uur.

De Afdeling overweegt dat uit het door appellanten genoemde stuk en ook overigens niet blijkt dat verweerders toezeggingen inzake verdergaande beperkingen hebben gedaan.

Deze beroepsgrond treft derhalve geen doel.

2.15. Een aantal appellanten stelt dat circuitvluchten met middelzware en zware toestellen verboden dienen te worden in verband met de relatief grote geluidhinder die zij veroorzaken in de regio. Zij achten de beperking tot 43 vluchten per jaar niet voldoende.

2.15.1. Verweerders stellen dat het uitvoeren van circuitvluchten als onderdeel van proefvluchten van belang is met het oog op onderhoud in verband met de luchtwaardigheid van toestellen. Daarnaast zijn dergelijke vluchten van essentieel belang voor enkele op het luchtvaartterrein gevestigde onderhoudsbedrijven en hebben zij in dat kader ook een economische betekenis. Verweerders achten het voor de exploitatiemogelijkheden van deze bedrijven nodig dat de mogelijkheid tot het uitvoeren van proefvluchten behouden blijft. Om de hinder aanvaardbaar te maken, hebben verweerders in artikel 9, vierde lid, van het A-besluit, na vernummering van het derde lid, een beperking opgelegd tot maximaal 43 circuitvluchten als onderdeel van proefvluchten, met luchtvaartuigen met een maximaal toegelaten totaalmassa van 6.000 kg of meer, overeenkomstig het aantal van dergelijke vluchten in 1999.

2.15.2. De Afdeling ziet geen grond voor het oordeel dat verweerders zich niet in redelijkheid op voornoemd standpunt hebben kunnen stellen. Appellanten hebben niet aannemelijk gemaakt dat de geluidhinder van deze circuitvluchten zodanig zal zijn dat verweerders niet in redelijkheid meer gewicht hebben kunnen toekennen aan het belang bij de mogelijkheid tot het gebruik ten behoeve van circuitvluchten dan aan het belang van omwonenden.

Deze beroepsgrond treft derhalve geen doel.

2.16. VOLE en andere maken bezwaar tegen het feit dat reclamevluchten op en rondvluchten boven het luchtvaartterrein blijven toegestaan.

2.16.1. Verweerders hebben een beperking van dit soort vluchten niet nodig geacht. Zij stellen dat reclamevluchten gebonden zijn aan de Regeling reclamesleepvliegen die is vastgesteld ter beperking van de geluidhinder door reclamesleepvliegtuigen. Daarnaast heeft de Staat een convenant gesloten met de Vereniging van Nederlandse Luchtvaart Ondernemingen, die alle reclamesleepvliegbedrijven in Nederland vertegenwoordigt. In dit convenant zijn maatregelen opgenomen om de hinder aanzienlijk te beperken.

2.16.2. De Afdeling is van oordeel dat verweerders er in redelijkheid vanuit hebben kunnen gaan dat voornoemde regeling en het convenant voldoende waarborg bieden ter beperking van de overlast van reclamevluchten op en rondvluchten boven het luchtvaartterrein. Appellanten hebben niet aannemelijk gemaakt dat in het A-besluit desondanks een regeling ter zake opgenomen dient te worden.

Deze beroepsgrond treft derhalve geen doel.

2.17. VOLE en andere stellen dat in het A-besluit het maximum aantal toegestane vluchten opgenomen dient te worden. Daarnaast stellen zij dat ten onrechte geen grens is gesteld aan de grootte van de vliegtuigen die gebruik mogen maken van het luchtvaartterrein. De baancode achten appellanten niet voldoende. Zij menen dat het in strijd is met de rechtszekerheid als niet duidelijk is welke soort vliegtuigen gebruik mag maken van het vliegveld.

2.17.1. Verweerders merken op dat appellanten terecht het standpunt hebben ingenomen dat de Lvw in de mogelijkheid voorziet naast het vaststellen van een geluidszone tevens het maximum aantal toegestane vluchten in het A-besluit te regelen. Zij zien evenwel geen bijzondere omstandigheden die in dit geval aanleiding geven tot het opnemen hiervan. Verder hebben verweerders in artikel 5, derde lid, van het A-besluit de start- en landingsbanen op grond van hun kenmerken (lengte en breedte) een code gegeven die internationaal gebruikelijk is. Het codecijfer is gerelateerd aan de vliegtuigprestatiekarakteristieken en de codeletter is gerelateerd aan de vliegtuigafmetingen. Een combinatie van deze codes geeft de gebruiksmogelijkheden van de baan aan. Naast de beschikbare baanlengte en –breedte geeft de baancode ook de eigenschappen van het “meest kritische vliegtuig” aan waarvoor de betreffende baan is bedoeld, aldus verweerders.

2.17.2. Zoals de Afdeling heeft overwogen in haar uitspraak van 16 oktober 2002, nummer 200103329/1 (www.raadvanstate.nl), worden ingevolge artikel 24, derde lid, van de Lvw in de aanwijzing van het luchtvaartterrein in ieder geval voorschriften gesteld om te voorkomen dat buiten de geluidszones, bedoeld in artikel 25a, een hogere geluidsbelasting dan de vastgestelde grenswaarde optreedt. Deze kunnen beperkingen inhouden ten aanzien van het gebruik van het luchtvaartterrein. De Lvw verzet zich niet tegen het in het aanwijzingsbesluit opnemen van voorschriften inzake een maximum aantal vliegbewegingen. De Afdeling is van oordeel dat de Lvw zich evenmin verzet tegen het in het aanwijzingsbesluit opnemen van een voorschrift ter beperking van de grootte van de toegestane vliegtuigen.

2.17.3. Anders dan verweerders stellen verschaft de baancode evenwel slechts een feitelijke weergave van de baan en houdt zij geen norm in ten aanzien van het toegestane gebruik. De Afdeling is niettemin van oordeel dat verweerders in redelijkheid geen nadere bepalingen behoefden op te nemen waarin de grootte van de toegestane vliegtuigen is opgenomen aangezien uit de baanlengte in voldoende mate valt af te leiden welk soort vliegtuig gebruik kan maken van de baan. Appellanten hebben niet aannemelijk gemaakt dat het niet opnemen van een dergelijk voorschrift in het onderhavige geval leidt tot rechtsonzekerheid of anderszins ten onrechte is nagelaten.

In hetgeen appellanten hebben aangevoerd ten aanzien van het opnemen van een voorschrift met een maximum aantal toegestane vluchten ziet de Afdeling evenmin grond voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat hiervoor geen aanleiding bestaat.

Deze beroepsgrond treft derhalve geen doel.

2.18. Een aantal appellanten stelt dat ten onrechte de extensieregeling is opgenomen in artikel 8, vierde en vijfde lid, van het A-besluit.

2.18.1. Verweerders hebben een extensieregeling opgenomen onder andere ter voorkoming van ernstige verstoringen van de dienstregeling en groot passagiersongemak. Daarnaast behoudt de luchthaven de benodigde flexibiliteit. De regeling is naar het oordeel van verweerders het verantwoorde resultaat van een weging tussen de belangen van de luchthaven en haar gebruikers en de belangen van de omgeving. De extensieregeling heeft alleen betrekking op starts en landingen tussen 23.00 en 24.00 uur.

Er mag van de regeling gebruik worden gemaakt in een aantal limitatief omschreven gevallen. Blijkens het stuk Tweede Kamer, vergaderjaar 2000-2001, 26 893, nr. 21, gaat het bij onverwacht vertragende omstandigheden om gevallen waarin zich gedurende de vlucht vertraging openbaart, onder andere als gevolg van congestie in het luchtruim. Voorts kan hierbij worden gedacht aan meteorologische omstandigheden. Onder meteorologische omstandigheden wordt onder meer verstaan de klimatologische situatie waarin de meteolimieten van het toestel worden overschreden. Daarnaast moet worden gedacht aan weersomstandigheden zoals (onweers-)buien in het aan- en uitvlieggebied en aan slechte zichtomstandigheden. Verweerders betogen dat stringent toezicht wordt gehouden op de naleving van de bepaling en dat alleen binnen de randvoorwaarden gebruik kan worden gemaakt van de extensieregeling.

2.18.2. De Afdeling overweegt dat, nu in de extensieregeling opgenomen in artikel 8, vierde en vijfde lid, van het A-besluit voldoende duidelijk is omschreven in welke gevallen van de regeling gebruik kan worden gemaakt, geen grond bestaat voor het oordeel dat deze regeling in strijd is met de rechtszekerheid. Ook overigens bestaat, mede gelet op het verwachte beperkte gebruik van de extensieregeling in de praktijk, geen aanleiding voor het oordeel dat verweerders niet in redelijkheid hebben kunnen overgaan tot het opnemen van het voorschrift in het A-besluit.

Deze beroepsgrond treft derhalve geen doel.

2.19. De Milieufederatie Drenthe stelt dat, in verband met het belang van de recreatie, op zon- en feestdagen

geen circuitvluchten met toestellen van minder dan 6.000 kg en het uitvoeren van vluchten ten behoeve van valschermspringen mogen worden toegestaan. VOLE en andere stellen dat de regeling in het A-besluit ten aanzien van paravluchten niet beperkend genoeg is en zij menen dat deze vluchten in het geheel moeten worden verboden. [appellant sub 2] ziet niet in waarom vluchten ten behoeve van valschermspringen op Eelde op zon- en feestdagen een uur vroeger mogen beginnen dan op vliegveld Teuge.

2.19.1. De Afdeling stelt voorop dat per luchtvaartterrein voorschriften kunnen worden opgenomen in een aanwijzingsbesluit die het gebruik van dat luchtvaartterrein regelen. Deze komen tot stand na een afweging tussen de betrokken belangen en kunnen per luchtvaartterrein verschillen. De voorschriften in het voorliggende A-besluit behoeven derhalve niet zonder meer gelijkluidend te zijn aan de voorschriften in het aanwijzingsbesluit van vliegveld Teuge.

De Afdeling ziet in hetgeen appellanten hebben aangevoerd geen aanleiding voor het oordeel dat verweerders niet in redelijkheid het standpunt hebben kunnen innemen dat geen grond bestaat voor het opnemen van verdergaande beperkingen ten aanzien van circuitvluchten en vluchten ten behoeve van valschermspringen dan in het A-besluit zijn opgenomen. Niet is gebleken dat in dit verband onvoldoende gewicht is toegekend aan de belangen van recreanten en omwonenden.

Deze beroepsgrond treft derhalve geen doel.

RO-besluit

2.20. Bij de beslissing op bezwaar inzake het RO-besluit hebben verweerders de bezwaren tegen het RO-besluit ongegrond verklaard. Verweerder sub 2 heeft erop gewezen dat hij ingevolge artikel 26 van de Lvw verplicht is om in overeenstemming met verweerder sub 1 ten aanzien van gronden gelegen binnen de bij het A-besluit gegeven geluidszone aanwijzingen te geven als bedoeld in artikel 37 van de WRO.

2.20.1. Gelet op de (gedeeltelijke) vernietiging van de beslissing op bezwaar inzake het A-besluit zou de beslissing op bezwaar inzake het RO-besluit niet op de wijze zijn genomen zoals zij thans luidt. Derhalve zijn de beroepen hiertegen gegrond en dient deze beslissing eveneens wegens strijd met artikel 7:12, eerste lid, van de Awb te worden vernietigd.

Proceskosten

2.21. Verweerders dienen ten aanzien van de beroepen van [appellant sub 2], VOLE en andere, [appellante sub 6] en [appellant sub 10] op na te melden wijze in de proceskosten te worden veroordeeld. Ten aanzien van de overige beroepen is niet gebleken van proceskosten die voor vergoeding in aanmerking komen.

3. Beslissing

De Afdeling bestuursrechtspraak van de Raad van State

Recht doende in naam der Koningin:

I. verklaart de beroepen tegen de beslissing op bezwaar inzake het A-besluit gedeeltelijk gegrond;

II. verklaart de beroepen tegen de beslissing op bezwaar inzake het RO-besluit gegrond;

III. vernietigt de beslissing op bezwaar inzake het A-besluit voorzover het betreft de Ke-zone, de baan 23-05, voorzover deze langer is dan 1.800 meter, met het daarbij behorende codenummer en de codeletter, de bkl-zone en de openingstijd vanaf 06.30 uur in artikel 8, eerste lid, onder a, van het A-besluit, en de beslissing op bezwaar inzake het RO-besluit geheel;

IV. schorst het besluit van verweerder sub 1 van 15 mei 2001 voorzover het de baan 23-05, voorzover langer dan 1.800 meter, betreft, tot zes weken nadat verweerders opnieuw hebben beslist op de bezwaren;

V. verklaart de beroepen voor het overige ongegrond;

VI. veroordeelt verweerders in de door appellanten in verband met de behandeling van het beroep gemaakte proceskosten tot een bedrag van
€ 864,08; het bedrag dient door de Staat der Nederlanden als volgt te worden betaald aan:

1. [appellant sub 2] een bedrag van € 54,47;

2. VOLE en andere een bedrag van € 699,57, waarvan een bedrag van
€ 644,00 is toe te rekenen aan door een derde beroepsmatig verleende rechtsbijstand;

3. [appellante sub 6] een bedrag van € 54,47;

4. [appellant sub 10] een bedrag van € 55,57;

VII. gelast dat de Staat der Nederlanden aan [appellanten sub 2, sub 4, sub 6, sub 7 en sub 10] ieder afzonderlijk het door hen voor de behandeling van het beroep betaalde griffierecht (€ 109,00) vergoedt en voorts aan het college van burgemeester en wethouders van Tynaarlo, VOLE en andere, IVN, de Milieufederatie Drenthe en de gemeenteraad van Haren ieder afzonderlijk het door hen voor de behandeling van het beroep betaalde griffierecht (€ 218,00) vergoedt.

Aldus vastgesteld door mr. J.C.K.W. Bartel, Voorzitter, en mr. R. Cleton en mr. H.Ph.J.A.M. Hennekens, Leden, in tegenwoordigheid van mr. S. Langeveld, ambtenaar van Staat.

w.g. Bartel w.g. Langeveld
Voorzitter ambtenaar van Staat

Uitgesproken in het openbaar op 3 december 2003

317-409.

---

**AB 2008, 371**

**Raad van State Afdeling bestuursrechtspraak (Meervoudige kamer)**, **11 juni 2008, nr 200603116/1, LJN: BD3598,**
Mrs. P.J.J. van Buuren, M. Oosting, H.Ph.J.A.M. Hennekens
**Wetingang:** EG-Verdrag art. 88

## Essentie

Vernietiging bestreden besluit omtrent verlenging start- en landingsbaan *vliegveld* Eelde vanwege schending van art. 88, derde lid, EG-Verdrag. Toepassing staatssteunrecht in het kader van planologische besluitvorming.

## Samenvatting

De conclusie is dat de bijdrage van € 18,6 mln moet worden aangemerkt als staatssteun als bedoeld in art. 87 van het EG-Verdrag en dat verweerders ten tijde van het nemen van het bestreden besluit aan de Mededeling uit 1994 niet het gerechtvaardigd vertrouwen mochten ontlenen dat de Commissie een bijdrage van het Rijk ter bekostiging van de verlenging van de start- en landingsbaan van GAE niet zou aanmerken als steunverlening, althans niet als steunverlening die aanmelding behoefde. Naar het oordeel van de Afdeling hadden verweerders daarom de voorgenomen verlening van staatssteun moeten aanmelden, dan wel de Commissie moeten benaderen teneinde zekerheid te verkrijgen dat aanmelding volgens de Commissie niet nodig is. Door dit na te laten, is in strijd gehandeld met de op Nederland als lidstaat rustende verplichting voortvloeiend uit art. 88, derde lid, van het EG-Verdrag. De beroepen (…) zijn in zoverre gegrond. Voor het overige zijn de beroepen (…) ongegrond.

**Partijen**

1. De gemeenteraad van Haren,
2. De Milieufederatie Drenthe, Assen,
3. Appellant sub 3,
4. Appellant sub 4,
5. Appellante sub 5,
6. Appellant sub 6,
7. Appellant sub 7,
8. Appellant sub 8,
9. De vereniging ‘Vereniging Omwonenden Luchthaven Eelde’, te Haren, ‘Stichting Rondom *Vliegveld* Eelde’, te Vries, appellant sub 9A en 162 anderen,
10. Appellanten sub 10,
11. Appellanten sub 11,
12. De verenigingen met volledige rechtsbevoegdheid ‘IVN, Vereniging voor Natuur- en Milieueducatie, Afdeling Eelde-Paterswolde’ en ‘IVN, Vereniging voor Natuur- en Milieueducatie, Afdeling Vries’, te Paterswolde respectievelijk Vries, beide gemeente Tynaarlo,

tegen

1. De Staatssecretaris van Verkeer en Waterstaat,
2. De Staatssecretaris van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, tezamen: verweerders.

**1. Procesverloop**

Bij besluit van 15 mei 2001 heeft de minister van Verkeer en Waterstaat, in overeenstemming met de minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, op grond van artikel 27, in samenhang met artikel 24 van de Luchtvaartwet (hierna: de Lvw), het besluit van 1 oktober 1959, no. TW/14962, waarbij het luchtvaartterrein Eelde is aangewezen, gewijzigd (hierna: het A-besluit). Bij besluit van gelijke datum, kenmerk M175, heeft de minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, in overeenstemming met de minister van Verkeer en Waterstaat, toepassing gegeven aan artikel 26 van de Lvw in samenhang met artikel 37 van de Wet op de Ruimtelijke Ordening (hierna: de WRO) voor het luchtvaartterrein Eelde (hierna: het RO-besluit).
Tegen deze besluiten zijn bezwaren als bedoeld in artikel 7:1 van de Algemene wet bestuursrecht (hierna: de Awb) ingediend.
Bij besluit van 26 augustus 2002, no. DGL/02.421463, hebben verweerders beslist op deze bezwaren. Verweerders hebben het A-besluit deels gewijzigd en het RO-besluit ongewijzigd gehandhaafd.
Bij uitspraak van 3 december 2003, zaaknr. 200205524/1, heeft de Afdeling de tegen de beslissing op bezwaar inzake het A-besluit ingestelde beroepen gedeeltelijk en de tegen de beslissing op bezwaar inzake het RO-besluit ingestelde beroepen geheel gegrond verklaard. De Afdeling heeft daarbij de beslissing op bezwaar inzake het A-besluit gedeeltelijk vernietigd en heeft de beslissing op bezwaar inzake het RO-besluit geheel vernietigd. Ook is het besluit van de minister van Verkeer en Waterstaat van 15 mei 2001 geschorst voor zover het de baan 23-05, voor zover langer dan 1.800 meter, betreft, tot zes weken nadat verweerders opnieuw hebben beslist op de bezwaren. Voor het overige zijn de beroepen ongegrond verklaard.
Bij besluit van 14 maart 2006, no. HDJZ/LUV/2006-226 (hierna: het bestreden besluit), hebben verweerders opnieuw beslist op de bezwaren.

Verweerders hebben daarbij het A-besluit en het RO-besluit deels gewijzigd en voor het overige ongewijzigd gehandhaafd.
Tegen dit besluit hebben de gemeenteraad van Haren bij brief van 3 mei 2006, de Milieufederatie Drenthe (hierna: de Milieufederatie) bij brief van 2 mei 2006, appellant sub 3 bij brief van 2 mei 2006, appellant sub 4 bij brief van 26 april 2006, appellante sub 5 bij brief van 3 mei 2006, appellant sub 6 bij brief van 4 mei 2006, appellant sub 7 bij brief van 1 mei 2006, appellant sub 8 bij brief van 1 mei 2006, de vereniging 'Vereniging Omwonenden Luchthaven Eelde', de stichting 'Stichting Rondom *Vliegveld* Eelde', appellant sub 9A en 162 anderen, (hierna: VOLE en andere) bij brief van 2 mei 2006, appellanten sub 10 (hierna in enkelvoud: appellant sub 10) bij brief van 2 mei 2006, appellanten sub 11 (hierna in enkelvoud: appellant sub 11) bij brief van 2 mei 2006, en de verenigingen 'IVN, Vereniging voor Natuur- en Milieueducatie, Afdeling Eelde-Paterswolde' en 'IVN, Vereniging voor Natuur- en Milieueducatie, Afdeling Vries' (hierna in enkelvoud: IVN) bij brief van 1 mei 2006, beroep ingesteld. Appellant sub 3 heeft zijn beroep aangevuld bij brief van 6 juni 2006. Appellante sub 5 heeft haar beroep aangevuld bij brief van 5 juni 2006. Appellant sub 6 heeft zijn beroep aangevuld bij brief van 6 juni 2006. Appellant sub 7 heeft zijn beroep aangevuld bij brief van 23 juni 2006. VOLE en andere hebben hun beroep aangevuld bij brief van 6 juni 2006. Appellant sub 10 heeft zijn beroep aangevuld bij brief van 5 juni 2006.
Verweerders hebben een verweerschrift ingediend.
De Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening heeft een deskundigenbericht uitgebracht, gedateerd 4 december 2006. Partijen zijn in de gelegenheid gesteld daarop te reageren.
Voor afloop van het vooronderzoek zijn nadere stukken ontvangen van appellant sub 7. Deze zijn aan de andere partijen toegezonden.
Na afloop van het vooronderzoek zijn nadere stukken ontvangen van de Milieufederatie, appellante sub 5, VOLE en andere, appellant sub 10, IVN en van verweerders. Deze stukken zijn aan de andere partijen toegezonden.
De Afdeling heeft de zaak ter zitting behandeld op 8 mei 2007, waar de Milieufederatie, vertegenwoordigd door drs. C. Teulen, medewerker van de Milieufederatie, appellant sub 3, in persoon, appellant sub 4, in persoon, appellante sub 5, in persoon, appellant sub 6, in persoon, appellant sub 7, in persoon, appellant sub 8, in persoon, VOLE en andere, vertegenwoordigd door mr. A.H.J. van den Biesen, advocaat te Amsterdam, appellant sub 10, in persoon, appellant sub 11, in persoon, en IVN, vertegenwoordigd door appellante sub 5, gemachtigde, en verweerders, vertegenwoordigd door mr. I.W. Neleman, mr. M. Rus en mr. R.J.M. van den Tweel, allen advocaat te Den Haag, ir. W.W. Haverdings, medewerker van ADECS Airinfra B.V., A. van Veen, medewerker van het Nationaal Lucht- en Ruimtevaartlaboratorium, en R. Lensink, medewerker van Bureau Waardenburg, zijn verschenen. Voorts is daar gehoord de naamloze vennootschap '*Groningen* Airport Eelde N.V.' (verder: GAE N.V.), vertegenwoordigd door mr. Q.J. Tjeenk Willink, advocaat te Amsterdam, en vergezeld door haar directeur.
Bij brief van 9 juli 2007 heeft de Afdeling aan partijen medegedeeld dat zij het onderzoek heeft heropend, teneinde over het onderwerp staatssteun vragen te stellen aan de Europese Commissie (hierna: de Commissie). Bij brief van 30 juli 2007 heeft de Afdeling vragen gesteld aan de Commissie. Bij brief van 23 november 2007 heeft de Commissie op deze vragen gereageerd. De vragen aan en antwoorden van de Commissie zijn aangehecht (niet opgenomen, *red*.).
Bij brief van 3 december 2007 heeft de Afdeling partijen gelegenheid geboden zich hierover nader uit te laten. Appellante sub 5, appellant sub 6, appellant sub 7, VOLE en andere, appellant sub 10, IVN, verweerders en GAE N.V. hebben van deze mogelijkheid gebruik gemaakt.
De Afdeling heeft de zaak op een nadere zitting behandeld op 28 februari 2008, waar appellant sub 4, appellante sub 5, appellant sub 6, allen in persoon, VOLE en andere, vertegenwoordigd door ir. I.G.J. van Lotringen, IVN, vertegenwoordigd door appellante sub 5, gemachtigde, appellant sub 7, in persoon, en verweerders, vertegenwoordigd door mr. B.J. Drijber, advocaat te Den Haag, zijn verschenen. Voorts is daar gehoord GAE N.V., vertegenwoordigd door mr. T. Ottervanger, advocaat te Amsterdam, en vergezeld door haar adjunct-directeur.

**2. Overwegingen**

**Ontvankelijkheid**

**2.1**

Ingevolge artikel 6:13 van de Awb, voor zover thans van belang, kan geen beroep worden ingesteld tegen een op bezwaar genomen besluit door een belanghebbende aan wie redelijkerwijs kan worden verweten geen bezwaar te hebben gemaakt tegen het oorspronkelijke besluit.
Appellant sub 8 heeft tegen het A-besluit en het RO-besluit van 15 mei 2001 geen bezwaar gemaakt. Er zijn geen omstandigheden gesteld die tot het oordeel kunnen leiden dat dit hem redelijkerwijs niet verweten kan worden. Gelet op het vorenstaande is het beroep van appellant sub 8 niet-ontvankelijk.

**Het A-besluit**

**2.2**

Het A-besluit voorziet in een wijziging van het Aanwijzingsbesluit met betrekking tot het luchtvaartterrein Eelde van 1 oktober 1959 (*Stcrt.* 1959, 198). Bij dit besluit is het terrein aangewezen als luchtvaartterrein met kadastrale gegevens ten behoeve van het openbaar luchtverkeer met burgerlijke vliegtuigen en zweefvliegtuigen, en oefen- en proefvluchten met burgerlijke vliegtuigen en zweefvliegtuigen.
Het voorliggende A-besluit is genomen in vervolg op het verzoek van de exploitant van de luchthaven om een baanverlenging van baan 23-05 van 1.800 naar 2.500 meter. Het A-besluit heeft onder meer betrekking op:
— de ligging en lengte van de baan 23-05 alsmede van de baan 19-01;
— het gebruik van het luchtvaartterrein in de situatie met de verlengde baan 23-05;

— de vaststelling van een Ke-zone met een grenswaarde van 35 Ke en de geluidscontouren behorende bij de waarden 40, 45, 50, 55 en 65 Ke;

— de vaststelling van een Bkl-zone met een grenswaarde van 47 Bkl en de geluidscontour van 57 Bkl.

**Procedurele aspecten**

**2.3**

Appellante sub 5 en VOLE en andere stellen dat het bestreden besluit van verweerders van 14 maart 2006 ten onrechte is aangemerkt als een beslissing op bezwaar. Volgens hen dient voornoemd besluit te worden aangemerkt als een nieuw primair besluit, waartegen opnieuw bezwaar moet kunnen worden gemaakt. In dat verband betogen VOLE en andere dat in het kader van het bestreden besluit ten onrechte niet de mogelijkheid is geboden om bezwaar te maken tegen de aanvullende milieu-informatie.

**2.3.1**

Het betoog van appellante sub 5 en VOLE en andere dat het bestreden besluit van verweerders van 14 maart 2006 dient te worden aangemerkt als een primair besluit, faalt. De systematiek en uitgangspunten ter zake van het beslissen op een bezwaarschrift brengen mee dat een primair besluit op grondslag van de ontvankelijke bezwaren in volle omvang wordt heroverwogen. De door appellanten gestelde omstandigheden dat bij de beslissing op bezwaar deels een andere motivering aan het A-besluit ten grondslag is gelegd en dat andere uitgangspunten zijn gehanteerd met betrekking tot bijvoorbeeld de vlootmix, raken niet de essentie van het A-besluit nu de baanverlenging, gebruiksbeperkingen en de omvang van de geluidruimte zoals die in de beslissing op bezwaar zijn opgenomen, gelijk zijn aan het A-besluit. Onder deze omstandigheden is geen sprake van een beslissing op bezwaar die niet langer als het resultaat van de heroverweging is te beschouwen.

**2.4**

Volgens appellante sub 5 en VOLE en andere is, na de uitspraak van de Afdeling van 3 december 2003, ten onrechte aan anderen dan de belanghebbenden die bezwaar hebben gemaakt tegen het besluit van 15 mei 2001 niet de mogelijkheid geboden een bezwaarschrift in te dienen.

**2.4.1**

Ingevolge artikel 8:72, tweede lid, van de Awb brengt vernietiging van een besluit of een gedeelte van een besluit vernietiging van de rechtsgevolgen van dat besluit of van het vernietigde gedeelte daarvan mee. Nu de Afdeling in vorengenoemde uitspraak van 3 december 2003 de beslissing op bezwaar inzake het A-besluit en het RO-besluit integraal heeft vernietigd, waren verweerders gehouden om met inachtneming van deze uitspraak opnieuw op de reeds ingediende bezwaren te beslissen. Gelet hierop bestaat geen aanleiding voor het oordeel dat door verweerders ten onrechte niet aan anderen dan de oorspronkelijke bezwaarmakers de gelegenheid is geboden een bezwaarschrift in te dienen. Dat verweerders na de uitspraak van de Afdeling van 3 december 2003 in het kader van het nemen van een nieuwe beslissing op bezwaar nader onderzoek hebben gedaan naar onder meer de milieugevolgen van het A-besluit, maakt dit niet anders.

**2.5**

VOLE en andere stellen verder dat de berichtgeving omtrent de aan het bestreden besluit van verweerders van 14 maart 2006 ten grondslag liggende onderzoeken misleidend is geweest. Volgens hen is in die berichtgeving ten onrechte de indruk gewekt dat enkel belanghebbenden die eerder een bezwaarschrift hadden ingediend in beroep konden komen tegen de nieuwe beslissing op bezwaar.

**2.5.1**

Ingevolge artikel 6:13 van de Awb kan, voor zover hier van belang, geen beroep bij de administratieve rechter worden ingesteld door een belanghebbende aan wie redelijkerwijs kan worden verweten dat hij geen bezwaar heeft gemaakt. Uit artikel 6:13 van de Awb volgt dat, voor zover besluitonderdelen van de beslissing op bezwaar zijn gewijzigd ten opzichte van het A-besluit, het niet indienen van bezwaar geen beletsel voor een belanghebbende vormt om tegen deze besluitonderdelen in beroep te komen.

Appellanten betogen dat in de berichtgeving omtrent de nieuwe beslissing op bezwaar en de daaraan ten grondslag liggende onderzoeken de indruk is gewekt dat enkel belanghebbenden die eerder een bezwaarschrift hadden ingediend, in beroep konden komen tegen de nieuwe beslissing op bezwaar. Ter onderbouwing van deze stelling hebben VOLE en andere onder meer gewezen op een brief van 2 mei 2005. Niet in geschil is dat die brief was gericht en verzonden aan de belanghebbenden die reeds eerder een bezwaarschrift hadden ingediend. Nu die brief niet is gezonden naar anderen dan de oorspronkelijke bezwaarmakers, ziet de Afdeling in die brief reeds daarom geen aanleiding voor het oordeel dat potentieel belanghebbenden die eerder geen bezwaar hebben gemaakt door de brief zouden zijn misleid. Voorts ziet de Afdeling in hetgeen appellanten hebben aangevoerd geen aanleiding voor het oordeel dat de publicaties omtrent de nieuwe beslissing op bezwaar niet voldoen aan de wettelijke eisen die voor kennisgevingen gelden. Het door appellanten aangevoerde geeft geen grond voor het oordeel dat de kennisgevingen en de berichtgeving omtrent de beslissing van verweerders van 14 maart 2006 misleidend zijn geweest.

**Nut en noodzaak**

**2.6**

De Milieufederatie, appellant sub 6, IVN, appellant sub 4, appellante sub 5, appellant sub 7, de gemeenteraad van Haren, appellant sub 3 en VOLE en andere betwisten nut en noodzaak van de baanverlenging en de vroege openstelling van de luchthaven tussen 6:30 en 7:00 uur. Zij wijzen daarbij op verschillende onderzoeken waaruit volgens hen blijkt dat de gehanteerde prognoses te optimistisch zijn. In dat verband stellen zij voorts dat door verweerders ten onrechte geen eigen, onafhankelijk onderzoek naar de economische effecten van baanverlenging heeft plaatsgevonden.

**2.6.1**
Met het A-besluit wordt door verweerders beoogd de bereikbaarheid van de regio en de functionaliteit van het luchtvervoerssysteem te verbeteren, wat volgens verweerders positieve effecten voor de regionale economie meebrengt. De Afdeling acht deze doelstellingen niet onredelijk en acht aannemelijk dat met het verwezenlijken van dit streven een zwaarwegend belang is gemoeid. De Afdeling stelt voorop dat aan verweerders beleidsvrijheid toekomt bij de wijze waarop aan voornoemd streven vorm wordt gegeven.
**2.6.2**
Niet in geschil is dat de exploitatie van de luchthaven *Groningen* Airport Eelde (hierna: GAE) thans verliesgevend is. Volgens het in het kader van het A-besluit opgestelde milieueffectrapport uit 1995 (hierna: het MER 1995), het rapport 'Verwachte ontwikkelingen van het luchtverkeer op GAE', opgesteld door GAE N.V. en gedateerd januari 2005 (hierna: het ontwikkelingsrapport GAE) en een rapport van Buck Consultants International, 'Economische betekenis GAE N.V.', gedateerd januari 2005 (hierna: het rapport Buck) is capaciteitsvergroting van GAE noodzakelijk teneinde een kostendekkende exploitatie mogelijk te maken, om zodoende de continuïteit van de luchthaven te kunnen verzekeren. In de enkele door appellanten gestelde omstandigheid dat voornoemde rapporten zijn opgesteld door of in opdracht van GAE N.V. ziet de Afdeling geen aanleiding voor het oordeel dat deze rapporten reeds daarom niet aan het A-besluit of het bestreden besluit ten grondslag mochten worden gelegd.
**2.6.3**
Volgens het MER uit 1995 en de genoemde rapporten zijn de mogelijkheden tot capaciteitsvergroting beperkt door de huidige baanlengte en kan met de huidige capaciteit niet worden bereikt dat GAE kostendekkend wordt geëxploiteerd. Om die reden hebben verweerders in het kader van het A-besluit en het bestreden besluit verscheidene onderzoeken uitgevoerd naar de effecten van baanverlenging en vroege openstelling. Met baanverlenging wordt volgens deze onderzoeken mogelijk gemaakt dat met grotere of zwaarder beladen toestellen op GAE kan worden gevlogen. Daarmee, en met de vroege openstelling, biedt GAE volgens de rapporten groeimogelijkheden met betrekking tot lijnvluchten, vakantiecharters en vrachtvervoer. Door het verlengen van de baan kunnen volgens de rapporten onder meer low-cost vluchten op rendabele wijze worden uitgevoerd en wordt een toename van het aantal vakantiecharters verwacht. Voorts wordt volgens de rapporten met baanverlenging bereikt dat de luchttransportkosten per eenheid product afnemen omdat met grotere toestellen kan worden gevlogen, wat luchtvrachtvervoer vanaf GAE aantrekkelijker maakt. Volgens de rapporten wordt met een vroege openstelling van de luchthaven bereikt dat aansluiting kan worden geboden met vluchten vanaf Schiphol. Ook vergroot een vroege openstelling de kans dat vracht- en charterverkeer gebruik zal maken van de luchthaven, omdat deze diensten om bedrijfseconomische redenen de randen van de dag opzoeken, aldus de rapporten.
**2.6.4**
De door appellanten aangehaalde rapporten van prof. drs. J.G. de Wit, 'Luchthaven Eelde in de luchtvaartmarkt van morgen, een globale verkenning van een aantal rapporten inzake de luchthaven Eelde', gedateerd januari 2006, en 'Op de lange baan? Prognoses voor *Groningen* Airport Eelde nader gewogen', gedateerd april 2007, (hierna: de rapporten De Wit) hebben met name betrekking op de juistheid van de geprognosticeerde passagiersaantallen en het geprognosticeerde luchtvrachtverkeer. Ook in het rapport van appellant sub 8, 'Beter ten halve gekeerd over nut en noodzaak van baanverlenging op GAE', gedateerd mei 2006 (hierna: het rapport appellant sub 8) en in andere door appellanten aangehaalde rapporten wordt op deze prognoses ingegaan.
In de rapporten De Wit en appellant sub 8 wordt onder meer gewezen op recente infrastructurele en strategische ontwikkelingen, waarmee volgens deze rapporten in het onderzoek naar de effecten van baanverlenging geen of onvoldoende rekening is gehouden. De Afdeling overweegt dat niet is gebleken dat deze ontwikkelingen, in het bijzonder de Hogesnelheidslijn Amsterdam/Zuiderzeelijn, ten tijde van het nemen van het bestreden besluit zodanig concreet waren dat hiermee rekening had moeten worden gehouden.
Gelet op het deskundigenbericht, waarin de verschillende aannames van het MER uit 1995, het ontwikkelingsrapport GAE en het rapport Buck worden besproken, en gelet op de door appellanten ingebrachte rapporten, overweegt de Afdeling dat enige mate van onzekerheid bestaat over de exacte omvang van de effecten van baanverlenging en vroege openstelling. Op grond van deze rapporten kan naar het oordeel van de Afdeling niet met zekerheid worden gesteld dat de prognoses voor GAE zullen worden gehaald. Hieruit volgt echter niet dat geen behoefte bestaat aan baanverlenging en vroege openstelling. Mede gelet op het deskundigenbericht en het verhandelde ter zitting blijkt uit het MER 1995, het ontwikkelingsrapport GAE en het rapport Buck naar het oordeel van de Afdeling genoegzaam dat de huidige baanlengte hoe dan ook onvoldoende is om een rendabele exploitatie te kunnen voeren en dat de baanverlenging en vroege openstelling positieve effecten zullen hebben op de exploitatiemogelijkheden van GAE. Gelet hierop, mede in aanmerking genomen de beleidsvrijheid van verweerders, ziet de Afdeling in al hetgeen appellanten in de schriftelijke stukken en ter zitting hebben aangevoerd, geen aanleiding voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat het A-besluit bijdraagt aan het behoud en de versterking van het luchtvervoerssysteem, de bereikbaarheid van de regio en de regionale economie.
**Milieueffectrapportage**
**2.7**
Appellante sub 5, appellant sub 3 en VOLE en andere stellen dat ten onrechte geen actualisatie van alle in het MER uit 1995 beschreven alternatieven heeft plaatsgevonden.
**2.7.1**
Verweerders stellen zich op het standpunt dat uit de uitspraak van de Afdeling van 3 december 2003 volgt dat de onderzoeken naar de gevolgen van de alternatieven van het MER 1995 niet in het kader van de nieuwe beslissing op bezwaar behoefden te worden

geactualiseerd en dat er ook geen nieuwe vergelijking tussen de alternatieven behoefde plaats te vinden.

**2.7.2**

In haar uitspraak van 3 december 2003 heeft de Afdeling overwogen dat geen grond bestaat voor het oordeel dat het MER uit 1995 onvoldoende informatie bevat over de alternatieven die redelijkerwijs in beschouwing dienden te worden genomen.

**2.7.3**

Verweerders hebben in het kader van het nemen van een nieuwe beslissing op bezwaar verschillende onderzoeken uitgevoerd, waaronder het rapport 'Baanverlenging GAE, rapportage: Geluid, Emissies en Luchtkwaliteit', opgesteld door ADECS Airinfra en gedateerd april 2005 (hierna: het ADECS-rapport) en het rapport 'Effecten van de voorgenomen baanverlenging en uitbreiding van het gebruik van *vliegveld* Eelde in relatie tot de vigerende natuurwetgeving' van 11 april 2005 (hierna: het rapport Waardenburg). Verweerders hebben deze aanvullende informatie aan de Commissie voor de milieueffectrapportage (hierna: de Commissie m.e.r.) voorgelegd. In het toetsingsadvies van de Commissie m.e.r. van 1 juli 2005 staat dat de Commissie m.e.r. van oordeel is dat de essentiële informatie in de aanvullende milieu-informatie aanwezig is en dat daarmee goede en bruikbare informatie beschikbaar is gekomen om het milieubelang een volwaardige plaats te kunnen geven in de besluitvorming.

**2.7.4**

Gelet op het vorenstaande hebben verweerders zich terecht op het standpunt gesteld dat de onderzoeken naar de gevolgen van de alternatieven van het MER 1995 in het kader van het bestreden besluit niet behoefden te worden geactualiseerd. Gelet hierop hebben verweerders kunnen volstaan met een actualisatie van de onderzoeken naar de effecten van het voorkeursalternatief zoals in het A-besluit opgenomen.

**Geluidszones**

**2.8**

IVN, appellant sub 4, appellant sub 3 en VOLE en andere hebben bezwaar tegen de in het A-besluit en het bestreden besluit neergelegde geluidruimte voor GAE. Volgens hen is de te verwachten geluidbelasting binnen de geluidscontouren op onjuiste wijze berekend en zijn onjuiste invoergegevens gebruikt. De berekeningen zijn voorts te weinig inzichtelijk, aldus appellanten.

**2.8.1**

Ingevolge artikel 25, eerste lid, aanhef en onder a, van de Lvw, voor zover thans van belang, worden bij algemene maatregel van bestuur uniforme grenswaarden vastgesteld voor de maximaal toegelaten geluidbelasting door landende en opstijgende luchtvaartuigen voor luchtvaartuigen met een toegelaten totaalmassa van tenminste 6.000 kg, dan wel minder dan 6.000 maar meer dan 390 kg, voor zover dit hefschroefvliegtuigen betreft, dan wel deze luchtvaartuigen gebruik maken van dezelfde aan- en uitvliegroutes als de luchtvaartuigen van ten minste 6.000 kg, dan wel de vliegpatronen van de luchtvaartuigen overeenkomen met die van luchtvaartuigen van ten minste 6.000 kg.

Ter uitvoering van deze bepaling is het Besluit geluidsbelasting grote luchtvaart (hierna: het BGGL) vastgesteld. Ingevolge artikel 1 van het BGGL wordt de geluidbelasting op een bepaalde plaats door landende en opstijgende luchtvaartuigen vastgesteld in Kosteneenheden (hierna: Ke). De berekeningsmethode van de Ke en het gebruik van de norm zijn vastgelegd in het BGGL. De berekeningsmethode wordt voorts nader uitgewerkt in de krachtens artikel 25g, eerste lid, van de Lvw vastgestelde Regeling berekening geluidbelasting in Kosteneenheden (hierna: Regeling Ke). De beroepsgronden betreffende de toegepaste berekeningsmethode kunnen slechts doel treffen voor zover deze methode in strijd is met regelgeving van hogere orde. Hiervan kan sprake zijn, indien de resultaten van de berekeningen met de genoemde methode niet voldoende representatief zijn voor de geluidbelasting die wordt veroorzaakt door landende en stijgende luchtvaartuigen, zodat niet langer wordt voldaan aan het in artikel 25, eerste lid, van de Lvw bepaalde.

**2.8.2**

In het A-besluit is rond GAE een geluidszone vastgelegd met een grenswaarde van 35 Ke. In het kader van de onderzoeken die door verweerders aan het A-besluit en de beslissing op bezwaar van 26 augustus 2002 ten grondslag zijn gelegd, werd in het voor de geluidsberekeningen gebruikte rekenmodel gebruik gemaakt van de zogenoemde 65 dB(A)-afkap. In haar uitspraak van 3 december 2003 heeft de Afdeling ten aanzien van de gebruikte rekenmethode geoordeeld dat verweerders het rekenmodel wegens strijd met artikel 25, eerste lid, van de Lvw, in dit geval niet meer als uitgangspunt voor het bepalen van de geluidbelasting hadden mogen nemen. De Afdeling heeft daartoe overwogen dat het gebruik van de 65 dB(A)-afkap de validiteit van het rekenmodel aantast.

**2.8.3**

Naar aanleiding van de uitspraak van de Afdeling van 3 december 2003 zijn in het kader van het nemen van de nieuwe beslissing op bezwaar nieuwe geluidberekeningen uitgevoerd. De resultaten hiervan zijn neergelegd in het in overweging 2.7.3. genoemde ADECS-rapport.

**2.8.4**

De geluidsberekeningen in het ADECS-rapport zijn uitgevoerd met gebruikmaking van de Ke-methode. Vast staat dat geen gebruik is gemaakt van de 65 dB(A)-afkap. In het ADECS-rapport wordt geconcludeerd dat het door GAE geprognosticeerde aantal vliegbewegingen dat bij het A-besluit als uitgangspunt was genomen met gebruikmaking van de geactualiseerde invoergegevens en de Ke-methode zonder afkap, leidt tot grotere geluidszones dan in het A-besluit waren voorzien. Omdat dit door verweerders ongewenst wordt geacht, is het aantal ingevoerde toegestane vliegbewegingen zodanig aangepast dat de geluidszones dezelfde omvang hebben als de geluidszones die in het A-besluit zijn neergelegd.

**2.8.5**
Blijkens het ADECS-rapport en het deskundigenbericht is gebruik gemaakt van de standaard Ke-methode zoals vastgelegd in het BGGL. De gegevens die in de geluidsberekeningen zijn betrokken, zijn in het ADECS-rapport beschreven. Gelet hierop ziet de Afdeling geen aanleiding voor het oordeel dat de geluidsberekeningen onvoldoende inzichtelijk zijn.
**2.8.6**
Bij de geluidsberekeningen in het kader van het opstellen van het ADECS-rapport zijn geactualiseerde invoergegevens als uitgangspunt genomen. Onder meer is de zogenoemde vlootmix bijgesteld en is gebruik gemaakt van een woningbestand uit 2001, waar eerder gebruik was gemaakt van een woningbestand uit 1994. Bij het ADECS-rapport is een bijlage gevoegd die verscheidene tabellen bevat. Een aantal tabellen geeft de cumulatieve aantallen woningen of gehinderden weer, terwijl andere tabellen aantallen woningen weergeven voor de gronden tussen twee geluidscontouren, zogenoemde schillen. Het gemiddeld aantal inwoners per woning in een bepaalde schil, dat van belang is voor de schatting van het aantal ernstig gehinderden, kan worden afgeleid uit het aantal inwoners per schil gedeeld door het aantal woningen per schil. Uit de in de bijlage bij het ADECS-rapport opgenomen tabellen kunnen beide gegevens worden afgeleid, met dien verstande dat verweerders hebben aangegeven dat de tabel op pagina 57 het aantal inwoners weergeeft, en niet het cumulatieve geschatte aantal ernstig gehinderden zoals abusievelijk boven de tabel staat.
**2.8.7**
Appellant sub 3 heeft zijn betoog dat van een onjuist aantal ernstig gehinderden is uitgegaan, onder meer onderbouwd onder verwijzing naar door hem opgestelde tabellen. Door hem wordt, mede naar aanleiding van deze tabellen, geconcludeerd dat is uitgegaan van een onrealistisch laag gemiddeld aantal inwoners per woning. Volgens appellant komt dit doordat van een te laag aantal inwoners per schil is uitgegaan. De cijfers in zijn tabel waarin het aantal inwoners per schil is weergegeven voor de scenario's voor de jaren 2005 en 2015 en waarbij gebruik zou zijn gemaakt van het woningbestand uit 2001, verschillen sterk van de cijfers die uit het ADECS-rapport blijken. Nu onduidelijk is hoe hij tot deze cijfers is gekomen en gelet op de omstandigheid dat appellant sub 3 de berekeningen die tot deze cijfers hebben geleid niet inzichtelijk heeft gemaakt, ziet de Afdeling daarin geen aanleiding voor het oordeel dat in het ADECS-rapport onjuiste aantallen inwoners per schil als uitgangspunt zijn gehanteerd. Gelet hierop acht de Afdeling door appellant sub 3 niet aannemelijk gemaakt dat een onjuist aantal inwoners per woning in de geluidsberekeningen is betrokken.
**2.8.8**
Met betrekking tot de in het geluidsonderzoek gehanteerde rekenmethode overweegt de Afdeling het volgende. Uitgangspunt van de Ke-methode is dat de uitkomsten van berekeningen met die methode een prognose geven van het aantal ernstig gehinderden binnen de 35 Ke-zone op grond van de zogenoemde dosis-effectrelatie. Appellanten hebben in dat verband gewezen op het rapport ‘De kwaliteit van de leefomgeving rond GAE’, gedateerd september 1999 en opgesteld door TNO (hierna: het TNO-rapport), waarin de dosis-effectrelatie van GAE door middel van steekproeven is onderzocht. Het TNO-rapport is opgesteld in het kader van de voorbereiding van het A-besluit door verweerders. Uit het in het TNO-rapport beschreven onderzoek is gebleken dat het percentage ernstig gehinderden ten tijde van het uitvoeren van dat onderzoek feitelijk hoger was dan het percentage waar de Ke-methode van uitgaat. Volgens het TNO-rapport wordt de ernstige hinder met name veroorzaakt door oefenvluchten (stijgen, landen, circuitvluchten), het laag overvliegen en rondvluchten. Wat betreft de typen vliegtuigen wordt de meeste hinder ondervonden van kleine lesvliegtuigen en grote vliegtuigen met straal- of propelleraandrijving.
Blijkens de toelichting bij het A-besluit hebben verweerders in de uit het TNO-rapport blijkende feitelijke dosis-effectrelatie rond GAE aanleiding gezien in het A-besluit gebruiksvoorschriften op te nemen teneinde de ernstige hinder te beperken. Ingevolge artikel 9 van het A-besluit is het uitvoeren van circuitvluchten met zware toestellen verboden en is het uitvoeren van circuitvluchten met lichte toestellen aan beperkingen onderworpen. De Afdeling is, gelet op de conclusies van het TNO-rapport, van oordeel dat verweerders zich in redelijkheid op het standpunt hebben kunnen stellen dat een belangrijke oorzaak van de omstandigheid dat de dosis-effectrelatie volgens het TNO-rapport in de feitelijke situatie hoger ligt dan de dosis-effectrelatie waarvan bij de Ke-methode wordt uitgegaan hiermee is weggenomen, althans in grote mate is beperkt. Gelet hierop hebben verweerders er in redelijkheid van kunnen uitgaan dat de feitelijke dosis-effectrelatie na gebruikmaking van de mogelijkheden van het A-besluit niet zodanig afwijkt van de dosis-effectrelatie die ten grondslag ligt aan de Ke-methode, dat de Ke-berekeningen in zoverre niet als representatief kunnen worden beschouwd.
**2.8.9**
IVN, appellant sub 4, appellant sub 3 en VOLE en andere betogen voorts dat bij de berekening van de 35 Ke-zone de dosismaat Lday evening night (hierna: Lden) had moeten worden gebruikt en wijzen daarbij op de EU-richtlijn inzake de evaluatie en beheersing van omgevingslawaai.
**2.8.9.1**
Ingevolge artikel 5 van de Richtlijn 2002/49/EG van 25 juni 2002 inzake de evaluatie en beheersing van omgevingslawaai is het hanteren van Lden alleen voorgeschreven in het kader van strategische geluidbelastingkaarten. Dergelijke kaarten zijn thans niet aan de orde. Ingevolge het derde lid van dat artikel, kunnen lidstaten voor de geluidszonering bovendien andere geluidbelastingsindicatoren dan Lden hanteren. Gelet hierop dwingt deze richtlijn niet tot het hanteren van Lden in het kader van het A-besluit, nog daargelaten de vraag of de richtlijn rechtstreeks werkende bepalingen kent waarop appellanten een beroep kunnen doen.
Voor zover appellanten betogen dat uit berekeningen met de dosismaat Lden blijkt dat berekeningen met de Ke-methode geen representatief beeld geven van het aantal ernstig gehinderden, overweegt de Afdeling dat niet aannemelijk is gemaakt dat de berekeningsresultaten ten aanzien van het aantal ernstig gehinderden met de Lden-methode in dit geval zodanig afwijken van de

resultaten die met de Ke-methode zijn verkregen, dat naar aanleiding hiervan aan de representativiteit van de met het Ke-model verkregen resultaten moet worden getwijfeld. Daartoe wijst de Afdeling erop dat in het ADECS-rapport berekeningen met Lden zijn weergegeven, waarvan de resultaten niet of nauwelijks verschillen van de resultaten die zijn verkregen met de Ke-methode. Appellanten hebben niet aannemelijk gemaakt dat deze berekeningen onjuist zijn.

**2.8.10**

Gelet op het vorenstaande ziet de Afdeling in hetgeen IVN, appellant sub 4, appellant sub 3 en VOLE en andere hebben aangevoerd met betrekking tot de gehanteerde rekenmethode, geen aanleiding voor het oordeel dat daarmee in strijd is gehandeld met artikel 25, eerste lid, van de Lvw.

**2.9**

De Milieufederatie, appellante sub 5, appellant sub 7, appellant sub 3 en VOLE en andere voeren aan dat de vastgestelde geluidscontouren in strijd zijn met het streven het milieu minder te belasten, zoals onder meer in het Nationaal Milieubeleidsplan 3 en 4 is neergelegd.

**2.9.1**

Ingevolge artikel 4.3 van de Wet milieubeheer, in samenhang met de bij de Wet milieubeheer behorende bijlage, dient bij het nemen van een A-besluit rekening te worden gehouden met het geldende nationale milieubeleidsplan (hierna: het NMP). Ten aanzien van geluid is in het NMP4 onder meer neergelegd dat voor alle geluidbronnen op een locatie een grenswaarde van 70 dB(A) geldt. Voor vliegtuigen wordt in het NMP4 echter een uitzondering gemaakt, omdat de normen voor geluidbelasting van vliegtuigen worden geregeld in het kader van de luchtvaartwetgeving. Gelet hierop hebben verweerders zich in het bestreden besluit terecht op het standpunt gesteld dat het A-besluit in zoverre niet in strijd is met het NMP4. Uit de formulering en juridische status van het NMP3 en het NMP4, alsmede uit artikel 4.3 van de Wet milieubeheer volgt voorts dat met het opnemen van algemene beleidsdoelstellingen in het NMP 3 en het NMP4, zoals onder meer de verbetering van de leefomgeving, wordt beoogd te verzekeren dat het milieubelang in de belangenafweging omtrent een concreet besluit wordt betrokken. Uit de omstandigheid dat het A-besluit geluidbelasting voor de leefomgeving meebrengt, volgt derhalve niet reeds dat in strijd wordt gehandeld met het NMP3 en NMP4.

**2.10**

VOLE en andere betogen dat de maximale toegestane geluidbelasting regelmatig wordt overschreden en dat de handhavingsfrequentie te laag is.

**2.10.1**

Vast staat dat de afwikkeling van vliegverkeer binnen de grenzen van de in het A-besluit vastgestelde geluidszones dient plaats te vinden. Voor zover appellanten vrezen voor een overschrijding van de maximale toegestane geluidbelasting, overweegt de Afdeling dat dit aspect geen betrekking heeft op het A-besluit maar op de handhaving daarvan. Nu in de onderhavige procedure enkel het bestreden besluit ter beoordeling staat, kunnen handhavingsaspecten thans niet aan de orde komen.

**2.11**

VOLE en andere betogen dat het A-besluit onaanvaardbare geluidgevolgen meebrengt door cumulatie van geluid van verschillende bronnen. Volgens hen zijn ten onrechte geen cumulatiezones vastgelegd.

**2.11.1**

Verweerders hebben zich terecht op het standpunt gesteld dat uit de Lvw niet volgt dat ten aanzien van het geluid van GAE cumulatiezones moeten worden vastgesteld voor Ke-verkeer en het verkeer als bedoeld in het Besluit geluidsbelasting kleine luchtvaart (hierna: het Bkl). In het ADECS-rapport is de cumulatie van geluid onderzocht. Naast het Ke- en Bkl-verkeer zijn daarin het weg-, rail- en industriegeluid betrokken. In het ADECS-rapport is de cumulatie van geluid weergegeven door middel van contouren. Appellanten hebben, mede gelet op de in het ADECS-rapport weergegeven contouren, niet aannemelijk gemaakt dat de cumulatie van geluid tot zodanig ernstige hinder leidt dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat de gevolgen van het A-besluit uit een oogpunt van cumulatie van geluid aanvaardbaar zijn.

**2.12**

Volgens appellant sub 3 en VOLE en andere leidt de geluidbelasting die door GAE wordt veroorzaakt tot onaanvaardbare negatieve gevolgen voor kinderen, de gezondheid en slaap. Door verweerders is te weinig gewicht toegekend aan deze effecten van vliegverkeerlawaai, aldus appellanten.

**2.12.1**

Ter onderbouwing van hun betoog hebben appellanten gewezen op het rapport ‘Het effect van geluid van vlieg- en wegverkeer op cognitie, hinderbeleving en bloeddruk van basisschoolkinderen’ (rapportnr. 441520021), opgesteld door het RIVM in 2005. Blijkens dit rapport bestaat er een verband tussen de toename van geluidbelasting van vliegverkeer en de leesprestatie, complexere aandachtstaken en het lange termijngeheugen bij kinderen. In het rapport worden evenwel geen concrete geluidsnormen genoemd. Blijkens de stukken zijn in de omgeving van GAE twee basisscholen aanwezig. Uit het ADECS-rapport en het deskundigenbericht blijkt dat deze scholen buiten de 35 Ke-contour liggen. Verweerders hebben in dit kader berekend dat de geluidbelasting op de gevel van deze scholen bij gebruikmaking van de mogelijkheden van GAE 39 dB(A) respectievelijk 47 dB(A) bedraagt. Gesteld noch gebleken is dat deze constatering onjuist is.

Hetgeen appellanten hebben aangevoerd, geeft geen grond voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat het A-besluit geen onaanvaardbare geluidsgevolgen voor kinderen meebrengt. Verweerders hebben in

redelijkheid aansluiting kunnen zoeken bij de richtlijnen over geluid van de Wereld Gezondheid Organisatie (hierna: de WHO) uit het jaar 2000. Volgens die richtlijnen zijn voor kinderen negatieve effecten te verwachten bij een binnenwaarde van 35 dB(A) en hoger. Gelet op de door verweerders berekende geluidbelasting op de gevels van de scholen, ziet de Afdeling in hetgeen appellanten hebben aangevoerd, geen aanleiding voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat het geluidsniveau binnen de scholen aan de door de WHO gestelde richtlijnen kan voldoen.

**De openstelling van GAE vanaf 06.30 uur**

**2.13**

VOLE en andere stellen dat ten onrechte geen geluidszone in het A-besluit is opgenomen voor nachtelijk vliegverkeer. Appellanten pleiten voorts voor een nachtsluitingstijd voor GAE tot 07.00 uur in plaats van tot 06.30 uur.

**2.13.1**

Gelet op artikel 25, vierde lid, van de Lvw en gelet op de nachtelijke periode die in het A-besluit is neergelegd, waaruit volgt dat op GAE gedurende de nachtelijke periode geen structureel uitgevoerd vliegverkeer is toegestaan, hebben verweerders zich terecht op het standpunt gesteld dat voor GAE geen geluidszones behoeven te worden vastgesteld voor structureel uitgevoerd nachtelijk vliegverkeer.

**2.13.2**

Onder verwijzing naar overweging 2.6.4. acht de Afdeling voldoende aannemelijk gemaakt dat behoefte bestaat aan openstelling van GAE vanaf 06.30 uur. De Afdeling betrekt daarbij dat het niet onaannemelijk voorkomt dat met name luchtvrachtvervoerders gebruik zullen willen maken van de mogelijkheid vluchten in de zogenoemde randen van de dag uit te voeren. Mede gelet op de door appellanten genoemde rapporten van de Gezondheidsraad ‘Over de invloed van geluid op de slaap en de gezondheid’, gedateerd 22 juli 2004 en TNO/RIVM, ‘Slaapverstoring door vliegtuiggeluid’, uit november 2002, staat tegenover de behoefte aan vroege openstelling dat niet kan worden uitgesloten dat deze vroege openstelling negatieve gevolgen heeft voor de slaapkwaliteit van omwonenden. Hetgeen appellanten hebben aangevoerd, geeft naar het oordeel van de Afdeling echter geen grond voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat de ten gevolge van de vroege openstelling te verwachten hinder niet zodanig ernstig is dat van openstelling vanaf 06.30 uur moet worden afgezien. Daarbij neemt de Afdeling in aanmerking dat de openstelling vanaf 06.30 uur enkel op werkdagen is toegestaan en dat de bebouwingsdichtheid van woningen rondom GAE klein is.

**Toerisme**

**2.14**

Appellant sub 11 stelt dat de geluidgevolgen van het A-besluit voor het toerisme in de omgeving van GAE in het algemeen en voor zijn camping in het bijzonder, onvoldoende zijn bezien. Volgens hem houdt het A-besluit een ernstige belemmering in van de bedrijfsvoering van zijn camping.

**2.14.1**

De camping van appellant sub 11 ligt in de huidige situatie op een afstand van ongeveer acht kilometer ten zuidwesten van GAE. Door de verlenging van de baan aan de zuidwestelijke zijde van GAE wordt de afstand tussen GAE en de camping kleiner. Uit het ADECS-rapport blijkt dat de camping zowel in de huidige situatie als in de situatie na baanverlenging buiten de 20 Ke-contour ligt. Niet in geschil is echter dat de geluidbelasting ter plaatse van de camping van appellant sub 11 door de baanverlenging kan toenemen.

**2.14.2**

Gelet op de afstand van de camping tot de verlengde baan op GAE en gelet op de ligging van de camping ruim buiten de 20 Ke-contour, acht de Afdeling niet aannemelijk gemaakt dat de toename van geluidhinder ter plaatse van de camping van appellant sub 11 zodanig zal zijn dat moet worden gevreesd voor de continuïteit van het campingbedrijf. Ook is niet gebleken van onaanvaardbare negatieve gevolgen voor het toerisme in de regio. Bij haar oordeel betrekt de Afdeling dat het door appellant sub 11 aangehaalde TNO-onderzoek, waarin is geconcludeerd dat 13 procent van de toeristen weg zal blijven uit het gebied als de overlast van GAE fors zou toenemen, was gebaseerd op de vlootmix die op dat moment van GAE gebruik maakte. Onder verwijzing naar overweging 2.8.8. overweegt de Afdeling dat verweerders in redelijkheid van de verwachting hebben kunnen uitgaan dat de geluidhinder die van GAE wordt ondervonden ten gevolge van het uitsluiten van circuitvluchten met zware toestellen en het stellen van stringente beperkingen aan het uitvoeren van circuitvluchten met lichte toestellen, relatief gezien zal afnemen ten opzichte van de huidige situatie. De Afdeling acht op grond van het in overweging 2.6.2. genoemde ontwikkelingsrapport GAE en het rapport Buck voorts niet onaannemelijk dat de toeristische sector in de omgeving van GAE niet enkel negatieve effecten ten gevolge van geluid zal ondervinden, maar dat ook toeristen zullen kunnen worden aangetrokken door de verruimde capaciteit van GAE.

In artikel 13 van het A-besluit is een nadeelcompensatieregeling opgenomen. Ingevolge dat artikel is het bepaalde in de Regeling nadeelcompensatie Verkeer en Waterstaat 1999 van toepassing op de behandeling van een verzoek tot nadeelcompensatie. Niet is gebleken dat aan de eventuele schade van appellant sub 11 niet op grond van de voornoemde Regeling nadeelcompensatie Verkeer en Waterstaat 1999 kan worden tegemoet gekomen.

**Luchtkwaliteit**

**2.15**

De Milieufederatie, appellant sub 3, IVN, appellant sub 6 en VOLE en andere stellen dat het A-besluit in strijd is met het Besluit luchtkwaliteit 2005 (hierna: het Blk 2005) en met het streven om de milieubelasting te verlagen, zoals in onder meer het NMP neergelegd.

**2.15.1**

Wat betreft het betoog dat het bestreden besluit in strijd is met het NMP overweegt de Afdeling onder verwijzing naar overweging 2.9.1. dat uit de formulering en juridische status van het NMP3 en het NMP4, alsmede uit artikel 4.3 van de Wet milieubeheer volgt dat met het opnemen van algemene beleidsdoelstellingen in het NMP 3 en het NMP4, zoals onder meer de verbetering van de leefomgeving, wordt beoogd te verzekeren dat het milieubelang in de belangenafweging omtrent een concreet besluit wordt betrokken. Uit de omstandigheid dat het A-besluit gevolgen heeft voor de luchtkwaliteit, wat ook van die gevolgen zij, volgt derhalve niet reeds dat in strijd wordt gehandeld met het NMP3 en NMP4.

**2.15.2**

In het kader van het bestreden besluit is onderzoek gedaan naar de gevolgen van de baanverlenging voor de luchtkwaliteit, waarvan de resultaten zijn neergelegd in het ADECS-rapport.

De Afdeling ziet in hetgeen appellant sub 3 heeft aangevoerd geen grond voor het oordeel dat bij het onderzoek naar de gevolgen van het A-besluit voor de luchtkwaliteit onjuiste invoergegevens zijn gebruikt of dat het gebruik van het Nieuw Nationaal Model (hierna: het NNM) leidt tot onbetrouwbare prognoses. Daartoe wordt overwogen dat in het deskundigenbericht staat dat rekening is gehouden met vlootomvang, het soort motoren en de daarmee gepaard gaande emissies, en de verscheidene fasen van voortstuwing van vliegtuigen. In het deskundigenbericht staat verder dat bij de berekeningen, anders dan appellanten betogen, geen rekening is gehouden met het schoner of zuiniger worden van vliegtuigmotoren. Voorts is, gelet op het deskundigenbericht, niet aannemelijk geworden dat voor het berekenen van de verspreiding van stoffen geen gebruik kon worden gemaakt van het NNM.

**2.15.3**

Voor de berekening van de luchtkwaliteit ten gevolge van het bestreden besluit, dienen de immissies ten gevolge van de vliegtuigemissies te worden opgeteld bij de heersende achtergrondconcentratie, aldus het deskundigenbericht.

De resultaten van de berekeningen van de emissies stikstofdioxide (NO2) en zwevende deeltjes (PM10) worden in het ADECS-rapport op kaarten weergegeven door middel van een contour rond GAE, waarbij het aantal microgram per kubieke meter als 98-percentielwaarde is aangeduid. Het weergeven van de bijdrage van GAE aan de concentraties in de lucht in de grootheid 98-percentielwaarde heeft, gelet op de omstandigheid dat zowel de grenswaarden in het Blk 2005 als de achtergrondconcentraties in andere grootheden worden uitgedrukt, tot gevolg dat de bijdrage van GAE niet zonder meer kan worden opgeteld bij de achtergrondconcentraties en er ook geen directe toetsing aan het Blk 2005 kan plaatsvinden. Om deze reden zijn in het ADECS-rapport omrekeningen gemaakt teneinde de concentraties bij elkaar op te kunnen tellen. In het kader van het deskundigenonderzoek zijn de omrekeningen door ADECS toegelicht.

**2.15.4**

Op de kaarten in het ADECS-rapport is te zien dat de 98-percentielwaardecontouren ruim buiten de grenzen van GAE liggen. Volgens het deskundigenbericht is in het ADECS-rapport beoogd van een worst case-situatie uit te gaan. De berekeningen die betrekking hebben op de 98-percentielcontouren voor NO2 respectievelijk PM10 zoals op de kaarten bij het ADECS-rapport weergegeven, leveren volgens het deskundigenbericht derhalve een overschatting van concentraties op. Dat de weergegeven 98-percentielwaardecontouren een overschatting van de luchtkwaliteitsituatie inhouden, doet er echter niet aan af dat voor de ruimte gelegen tussen GAE en de op de kaarten weergegeven contouren geen berekeningsresultaten zijn gegeven. De Afdeling overweegt onder verwijzing naar het deskundigenbericht dat op basis van een inschatting van de concentraties ter plaatse van de gronden binnen de contouren niet kan worden uitgesloten dat de grenswaarden voor de jaargemiddelde concentratie NO2 respectievelijk PM10 ter plaatse van de gronden tussen de luchthaven en de contouren zoals in het ADECS-rapport weergegeven, worden overschreden. Gelet op het voorgaande overweegt de Afdeling dat op grond van het ADECS-rapport niet kan worden geconcludeerd dat gebruikmaking van de door het A-besluit geboden mogelijkheden niet zal leiden tot een overschrijding van de grenswaarden zoals opgenomen in het Blk 2005.

**2.15.5**

In aanvulling op het ADECS-rapport is de notitie ‘Toelichting luchtkwaliteit; Baanverlenging GAE’ (hierna: de notitie luchtkwaliteit) opgesteld door ADECS, gedateerd 21 juni 2005. In de notitie luchtkwaliteit staat dat de achtergrondconcentraties inmiddels lager zijn dan de achtergrondconcentratie waarmee in het ADECS-rapport rekening is gehouden. Voorts bevat de notitie luchtkwaliteit een berekening van de maximale uurgemiddelde bijdrage van PM10, die uit de 98-percentielcontour in het ADECS-rapport kan worden afgeleid, waaruit vervolgens de vierentwintig-uurgemiddelde concentratie kan worden afgeleid. Deze berekeningen leiden volgens de notitie luchtkwaliteit tot de conclusie dat wat betreft PM10 wordt voldaan aan de grenswaarden die in het Blk 2005 zijn opgenomen. Gelet op het deskundigenbericht, waarin deze conclusie wordt bevestigd, acht de Afdeling niet aannemelijk gemaakt dat deze conclusie onjuist is.

**2.15.6**

Met betrekking tot stikstofdioxide (NO2) wordt in de notitie luchtkwaliteit opgemerkt dat het van belang is te bepalen hoeveel procent van de NOx-emissie van vliegtuigen uit NO2 bestaat, omdat van vliegtuigen slechts de NOx-emissie bekend is. In de notitie luchtkwaliteit wordt een percentage van vijf gehanteerd. Met gebruikmaking van de NOx-contour zoals in het ADECS-rapport weergegeven, leidt deze verhouding volgens de notitie luchtkwaliteit tot de conclusie dat de norm voor de uurgemiddelde concentratie NO2 niet wordt overschreden. Voor de jaargemiddelde concentratie NO2 geldt dat wordt uitgegaan van het worst case-scenario, inhoudende dat de daggemiddelde concentratie gelijk is aan de jaargemiddelde concentratie. Met gebruikmaking van de eerdergenoemde verhouding van vijf procent van de emissie NOx die NO2 is, leidt dit volgens de notitie luchtkwaliteit tot de conclusie

dat de jaargemiddelde norm voor stikstofdioxide niet wordt overschreden.
Appellanten hebben niet aannemelijk gemaakt dat niet van de in de notitie luchtkwaliteit gehanteerde verhouding tussen NOx en NO2 mocht worden uitgegaan. Nu appellanten ook overigens niet aannemelijk hebben gemaakt dat de conclusies van de notitie luchtkwaliteit onjuist zijn, ziet de Afdeling in hetgeen appellanten hebben aangevoerd geen aanleiding voor het oordeel dat verweerders zich niet op het standpunt hebben kunnen stellen dat wat betreft NO2 zal worden voldaan aan de grenswaarden die in het Blk 2005 zijn opgenomen.

**2.15.7**

Gelet op het vorenstaande ziet de Afdeling in hetgeen de Milieufederatie, appellant sub 3, IVN, appellant sub 6 en VOLE en andere hebben aangevoerd, geen aanleiding voor het oordeel dat verweerders op grond van het ADECS-rapport en de notitie luchtkwaliteit niet hebben mogen concluderen dat het bestreden besluit niet in strijd is met de luchtkwaliteitsnormen van het Blk 2005.

**Externe veiligheid**

**2.16**

Appellant sub 3 en VOLE en andere stellen dat het A-besluit leidt tot een onaanvaardbare toename van het externe veiligheidsrisico. In dat verband stellen zij dat de gevolgen van het A-besluit voor de externe veiligheid onjuist zijn berekend, nu onjuiste en onvolledige uitgangspunten zijn gehanteerd. Ten onrechte is voorts geen rekening gehouden met de aanwezigheid van munitiedepots in Norg en Veenhuizen.

**2.16.1**

In het kader van het bestreden besluit is een externe veiligheidsanalyse opgesteld. Bij deze analyse is onder meer gebruik gemaakt van externe veiligheidsberekeningen. De resultaten van deze berekeningen zijn neergelegd in het rapport ‘Extern veiligheidsrisico rondom GAE’, opgesteld door het Nationaal Lucht- en Ruimtevaartlaboratorium en gedateerd maart 2005 (hierna: het NLR-rapport).
De berekeningen in het NLR-rapport zijn uitgevoerd met gebruikmaking van het zogenoemde Regionaal model uit 2002. Gesteld noch gebleken is dat het Regionaal model niet voor de situatie rond GAE mag worden gebruikt, of dat het gebruik van het Regionaal model leidt tot onjuiste prognoses.

**2.16.2**

Het Regionaal model maakt gebruik van de modelelementen ongevalkansen, ongevallocaties en ongevalgevolgen. Blijkens het NLR-rapport zijn lesvluchten met zware vliegtuigen in de berekeningen betrokken en is geen rekening gehouden met een meer dan gemiddeld aantal lesvluchten met lichte vliegtuigen. Nu niet in geschil is dat lesvluchten met zware toestellen op GAE zijn verboden, overweegt de Afdeling dat in het NLR-rapport in zoverre is uitgegaan van vlootgegevens die niet aansluiten bij de geprognosticeerde vlootgegevens van GAE. Anders dan appellant sub 3 en VOLE en andere stellen, leidt dit echter niet tot het oordeel dat de resultaten van de externe veiligheidsberekeningen niet langer als representatief voor GAE kunnen worden beschouwd. De Afdeling overweegt daartoe dat de ongevalkansen, zowel van lestoestellen als van andere toestellen, blijkens het deskundigenbericht zijn verrekend in de totale gemiddelde ongevalkans per vliegtuigtype. Dit brengt mee dat slechts het vliegtuigtype en niet de kwalificatie als lesvliegtuig relevant is voor de uitkomst van de berekeningen van het veiligheidsrisico. Appellant sub 3 en VOLE en andere hebben in zoverre niet aannemelijk gemaakt dat berekeningen waarin het gemiddelde ongevalsrisico wordt betrokken, resultaten opleveren die niet representatief zijn voor de situatie op GAE.

**2.16.3**

In het NLR-rapport staat dat de veiligheidsrisico's van helikoptervluchten niet zijn betrokken in de berekeningen van de effecten van het A-besluit op het externe veiligheidsrisico van GAE, omdat geen berekeningsmodel voor de risico's van helikoptervluchten beschikbaar is. Dat helikoptervluchten niet bij de externe veiligheidsberekeningen in het NLR-rapport zijn betrokken, brengt naar het oordeel van de Afdeling echter niet reeds mee dat de risico's van helikoptervluchten onvoldoende bij het nemen van het A-besluit zijn betrokken. Naar het oordeel van de Afdeling hebben verweerders zich in redelijkheid op het standpunt kunnen stellen dat het toestaan van helikoptervluchten op GAE niet tot ernstige veiligheidsrisico's leidt. Daartoe overweegt de Afdeling dat het aandeel van helikoptervluchten in het gehele aantal vluchten op GAE blijkens het NLR-rapport en het deskundigenbericht beperkt is, nu dit ongeveer 2,4 procent bedraagt, en bovendien volgens het deskundigenbericht per helikoptervlucht een zeer beperkt extern veiligheidsrisico geldt. Gelet hierop, en gelet op het vlieggedrag van helikopters zoals in het deskundigenbericht en ter zitting beschreven, is niet aannemelijk dat de externe veiligheidsrisico's van helikopters leiden tot andere risiconiveaus dan in het NLR-rapport weergegeven.

**2.16.4**

Vast staat dat in de berekeningen met betrekking tot de externe veiligheid geen rekening is gehouden met het al dan niet bestaan van een taxibaan ter plaatse van de luchthaven. Blijkens de stukken en de toelichting van verweerders daarop ter zitting heeft een ongeval op de start- en landingsbaan nauwelijks externe veiligheidseffecten, nu eventuele ongelukken die verband houden met het al dan niet bestaan van een taxibaan, zich met name op en in de zeer dichte nabijheid van GAE zullen voordoen. Appellant sub 3 en VOLE en andere hebben niet aannemelijk gemaakt dat deze stelling, die in het deskundigenbericht wordt onderschreven, onjuist is. De Afdeling ziet in hetgeen appellant sub 3 en VOLE en andere hebben aangevoerd, geen aanleiding voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat het al dan niet bestaan van een taxibaan niet een omstandigheid is die in de berekeningen in het kader van de externe veiligheid behoeft te worden betrokken.

**2.16.5**

Met betrekking tot de stelling van VOLE en andere dat in het kader van de externe veiligheid van GAE ten onrechte geen rekening is

gehouden met de nabijgelegen munitiedepots Norg en Veenhuizen, overweegt de Afdeling dat de externe veiligheidscontouren van deze munitiedepots respectievelijk GAE elkaar blijkens het deskundigenbericht en het verhandelde ter zitting niet overlappen. Gelet op de afstand van ongeveer zes kilometer tussen het meest dichtbij gelegen munitiedepot en GAE, alsmede de in oppervlakte beperkte veiligheidsrisico's van munitiedepots zoals in het deskundigenbericht beschreven, hebben verweerders de externe veiligheidsrisico's van munitiedepots naar het oordeel van de Afdeling bij het nemen van het A-besluit in redelijkheid buiten beschouwing kunnen laten.

**2.16.6**

Naar aanleiding van hetgeen hiervoor is overwogen, is de Afdeling van oordeel dat, hoewel vast staat dat het externe veiligheidsrisico ten gevolge van het A-besluit toeneemt ten opzichte van de huidige situatie, geen aanleiding bestaat voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat kan worden aangesloten bij de conclusie van het NRL-rapport, inhoudende dat deze toename niet leidt tot een onaanvaardbare veiligheidssituatie.

**Natuurwaarden: soortenbescherming**

**2.17**

IVN, appellante sub 5 en VOLE en andere stellen dat de baanverlenging leidt tot de verstoring van onder meer vier vleermuissoorten, alsmede de heikikker en de poelkikker. Volgens hen kan geen ontheffing van de Flora- en faunawet worden verleend, nu het zwaarwegende belang van baanverlenging niet is aangetoond.

**2.17.1**

Ten behoeve van de beslissing op bezwaar is het rapport ‘Ecologisch onderzoek en verkenning flora en faunawet op de locatie van een baanverlening op de luchthaven Eelde’ opgesteld door Bureau Bakker in 2005 (verder: het rapport Bakker). In dat onderzoek zijn de gevolgen van de aanleg van de verlengde baan onderzocht. Daarbij zijn het terreingedeelte van de baanverlenging, de flankerende maatregelen en de zogenoemde destructieve zone meegenomen. Het rapport vormt een actualisering van de eerdere onderzoeken door Bureau Bakker uit 2003 en 2004. In 2003 is een quickscan uitgevoerd en hebben verschillende veldonderzoeken plaatsgevonden. Ten behoeve van het bestreden besluit zijn aanvullende veldonderzoeken uitgevoerd.

**2.17.2**

In het rapport Bakker staat dat in de omgeving van de baanverlenging onder meer de gewone dwergvleermuis, de gewone grootoorvleermuis, de rosse vleermuis en de watervleermuis zijn aangetroffen, alsmede enkele vogelsoorten. Voor zover IVN, appellante sub 5 en VOLE en andere betogen dat in het gebied meer soorten dan de in het rapport Bakker genoemde aanwezig zijn, overweegt de Afdeling dat zij geen gegevens hebben overgelegd die een begin van bewijs leveren dat deze te beschermen diersoorten zich ter plaatse bevinden.

**2.17.3**

De vragen of voor de uitvoering van de baanverlenging ten aanzien van de in het gebied aanwezige soorten een vrijstelling geldt, dan wel een ontheffing op grond van de Flora- en faunawet (hierna: de Ff-wet) nodig is en zo ja, of deze ontheffing kan worden verleend, komen in beginsel aan de orde in een procedure op grond van de Ff-wet. Dat doet er niet aan af dat verweerders het bestreden besluit niet hadden kunnen nemen, indien en voor zover zij op voorhand in redelijkheid hadden moeten inzien dat de Ff-wet aan de uitvoerbaarheid van dat besluit in de weg staat.

Niet in geschil is dat voor de in het rapport Bakker genoemde soorten een ontheffing op grond van artikel 75 van de Ff-wet nodig is en dat de in het gebied van de baanverlenging voorkomende vleermuizen zijn genoemd in Bijlage IV van de Habitatrichtlijn. Ontheffing op grond van artikel 75 van de Ff-wet kan slechts worden verleend indien geen afbreuk wordt gedaan aan een gunstige staat van instandhouding van de soort. Voor soorten genoemd in bijlage IV van de Habitatrichtlijn geldt ingevolge artikel 75 van de Ff-wet, in samenhang met artikel 2, derde lid, onder e, van het Besluit vrijstelling beschermde dier- en plantensoorten zoals gewijzigd bij besluit van 10 september 2004 (*Stb.* 2004, 501), als aanvullende voorwaarde dat ontheffing slechts kan worden verleend wanneer er geen andere bevredigende oplossing bestaat met het oog op dwingende redenen van groot openbaar belang, met inbegrip van redenen van sociale of economische aard.

De Afdeling is van oordeel dat verweerders zich in het bestreden besluit in redelijkheid op het standpunt hebben kunnen stellen dat redelijkerwijs te verwachten is dat een ontheffing op grond van de Ff-wet zal kunnen worden verleend. De Afdeling overweegt daartoe dat verweerders de relevante ontheffingscriteria bij het nemen van het bestreden besluit hebben betrokken. Volgens verweerder komen de gewone dwergvleermuis, de gewone grootoorvleermuis en de watervleermuis algemeen en verspreid in Nederland voor. De rosse vleermuis is volgens verweerder minder algemeen, maar het verlies van één boom waar deze vleermuis verblijft zal, mede gelet op het voorkomen van een grote populatie in de nabijheid van het gebied, geen invloed hebben op de omvang van de totale populatie. In het aan het A-besluit ten grondslag liggende MER 1995 zijn verschillende alternatieven onderzocht alsmede een aantal varianten binnen die alternatieven. Niet aannemelijk is gemaakt dat het rapport Bakker en het MER 1995 ten aanzien van de soortenbescherming zodanige gebreken of leemten in kennis bevatten dat verweerders zich hierop in redelijkheid niet hebben kunnen baseren. Verweerders stellen zich voorts op het standpunt dat baanverlenging een zwaarwegend maatschappelijk belang dient. Onder verwijzing naar overweging 2.6.4. acht de Afdeling de noodzaak van de baanverlenging voldoende aannemelijk gemaakt, zoadat verweerders zich in redelijkheid op dit standpunt hebben kunnen stellen.

Gelet op het vorenstaande ziet de Afdeling in hetgeen IVN, appellante sub 5 en VOLE en andere hebben aangevoerd, geen aanleiding voor het oordeel dat verweerders bij het nemen van het bestreden besluit onvoldoende hebben bezien of dit besluit uitvoerbaar is, zonder daarbij in strijd te handelen met het bepaalde in de Ff-wet.

**Natuurwaarden: gebiedsbescherming**

**2.18**

De Milieufederatie, appellant sub 6, IVN, appellant sub 4, appellante sub 5, appellant sub 7, appellant sub 3 en VOLE en andere betogen dat het A-besluit een onaanvaardbare aantasting van de natuurwaarden van nabijgelegen natuurgebieden inhoudt. Volgens hen is onvoldoende zeker dat het A-besluit geen schadelijke gevolgen voor die natuurgebieden zal hebben.

**2.18.1**

In de nabijheid van de luchthaven bevinden zich verscheidene natuurgebieden. Het Leekstermeergebied, het Zuidlaardermeergebied en het Fochteloërveen zijn aangewezen als speciale beschermingszone (hierna: SBZ) in de zin van de Vogelrichtlijn. Het Fochteloërveen is daarnaast aangemeld als SBZ op grond van de Habitatrichtlijn.

De Drentsche Aa is aangemeld als SBZ op grond van de Habitatrichtlijn.

**2.18.2**

Met betrekking tot het toepasselijke toetsingskader overweegt de Afdeling het volgende.

**2.18.2.1**

Op 1 oktober 2005 is de Natuurbeschermingswet 1998 (hierna: de Nbw 1998) in werking getreden. Met deze wet is beoogd de gebiedsbeschermingsbepalingen uit de Habitat- en de Vogelrichtlijn te implementeren.

Ingevolge artikel 19d van de Nbw 1998 is het, voor zover hier van belang, verboden om zonder vergunning projecten te realiseren die, gelet op de instandhoudingsdoelstelling, de kwaliteit van de natuurlijke habitats en de habitats van soorten in een gebied kunnen verslechteren of een verstorend effect kunnen hebben op de soorten waarvoor het gebied is aangewezen. Zodanige projecten zijn in ieder geval projecten die de natuurlijke kenmerken van het desbetreffende gebied kunnen aantasten. De artikelen 19e tot en met 19i bevatten voorts het kader voor het al dan niet verlenen van een dergelijke vergunning.

Artikel 19d, eerste lid, van de Nbw 1998 is uitsluitend van toepassing op gebieden die zijn aangewezen op grond van artikel 10a, eerste lid, of gebieden waarvan de aanwijzing als zodanig in overweging is genomen als bedoeld in artikel 12, derde lid, van de Nbw 1998. Gelet op artikel V van de Wet van 20 januari 2005 tot wijziging van de Natuurbeschermingswet 1998 in verband met Europeesrechtelijke verplichtingen, gelden de aanwijzingsbesluiten van het Leekstermeergebied, het Zuidlaardermeergebied en het Fochteloërveen tot SBZ in de zin van de Vogelrichtlijn als besluit in de zin van artikel 10a van de Nbw 1998. De uit artikel 19d van de Nbw 1998 voortvloeiende verplichtingen strekken derhalve tot bescherming van die gebieden.

Voor het Fochteloërveen geldt dat het is aangewezen als SBZ op grond van de Vogelrichtlijn en daarnaast is aangemeld als SBZ op grond van de Habitatrichtlijn. Onder verwijzing naar de uitspraak van 29 augustus 2007 (zaakno. 200606081/1, *JM* 2007, 140) ziet de Afdeling geen beletsel artikel 19d van de Nbw 1998 richtlijnconform uit te leggen in die zin dat dit voorschrift tevens het uit artikel 6, derde lid, van de Habitatrichtlijn voortvloeiende beschermingsregime omvat, in dit geval voor het Habitatrichtlijngebied het Fochteloërveen.

Onder verwijzing naar de uitspraak van 28 februari 2007 (zaaknr. 200604026/1, *AB* 2007, 183) overweegt de Afdeling dat de in artikel 19d Nbw 1998 vervatte vergunningplicht niet geldt voor de Drentsche Aa, nu dat gebied enkel is aangemeld als SBZ op grond van de Habitatrichtlijn. Gelet hierop dient het bestreden besluit in zoverre te worden getoetst aan artikel 6 van de Habitatrichtlijn.

**2.18.2.2**

De materiële toets die ingevolge de artikelen 19f en verder van de Nbw 1998 bij vergunningverlening dient te worden uitgevoerd, is vergelijkbaar met de toets in artikel 6, derde lid, van de Habitatrichtlijn. Ingevolge artikel 19f en artikel 6, derde lid, van de Habitatrichtlijn dient, indien niet kan worden uitgesloten dat het project significante gevolgen kan hebben voor de desbetreffende gebieden, een passende beoordeling van de gevolgen voor het gebied te worden gemaakt, waarbij rekening wordt gehouden met de instandhoudingsdoelstellingen van dat gebied. Voor het project wordt slechts toestemming gegeven, indien de zekerheid is verkregen dat het de natuurlijke kenmerken van het betrokken gebied niet zal aantasten. Dit is het geval wanneer er wetenschappelijk gezien redelijkerwijs geen twijfel bestaat dat er geen schadelijke gevolgen zijn.

Voor zover op de desbetreffende gebieden het regime van de Nbw 1998 van toepassing is, overweegt de Afdeling dat de vragen of voor de uitvoering van het A-besluit en het RO-besluit een vergunning nodig is op grond van de Nbw 1998, en zo ja, of deze vergunning kan worden verleend, aan de orde komen in een eventueel te voeren procedure op grond van de Nbw 1998, waarbij gelet op het voorgaande tevens de gevolgen van de uitvoering van die besluiten voor het Fochteloërveen als Habitatrichtlijngebied dienen te worden beoordeeld. Dat doet er echter niet aan af dat verweerders het bestreden besluit niet had kunnen nemen indien en voor zover zij op voorhand hadden moeten inzien dat de Nbw 1998 aan de uitvoerbaarheid van het A-besluit en het RO-besluit in de weg staat.

**2.18.3**

In het kader van het besluit op bezwaar is door Bureau Waardenburg onderzoek verricht naar de gevolgen van het A-besluit voor de speciale beschermingszones in de nabijheid van het luchtvaartterrein. De resultaten daarvan zijn neergelegd in het in overweging 2.7.3. genoemde rapport Waardenburg.

In het rapport Waardenburg staat dat het rapport kan worden beschouwd als een passende beoordeling. Het onderzoek betreft een literatuurstudie en is gebaseerd op beschikbare literatuur over de verstoring van fauna door vliegverkeer.

**2.18.4**

Wat betreft het mechanisme van verstoring van fauna door vliegverkeer staat in het rapport Waardenburg dat de mogelijke verstoring van fauna door vliegverkeer een auditieve en een visuele component heeft. De mate van verstoring is volgens het rapport Waardenburg

afhankelijk van de vliegroutes, de vlieghoogte, het type vliegtuig en het aantal vliegbewegingen, waarbij een onderscheid wordt gemaakt tussen landende en stijgende vliegtuigen. Volgens het deskundigenbericht wordt in het rapport Waardenburg voorts onderbouwd dat dieren zich tot op zekere hoogte kunnen aanpassen aan omstandigheden en verstoring, indien de locatie geschikt is als foerageerplaats, rustplaats en om jongen groot te brengen. Deze factoren kunnen ertoe leiden dat een bepaalde mate van verstoring wordt getolereerd. De tolerantiegrens voor verstoringen kan voorts volgens het rapport Waardenburg opschuiven door gewenning bij regelmatige blootstelling aan een prikkel zonder reëel negatief effect.

**2.18.4.1**

In het rapport Waardenburg en het verweerschrift staat dat er bij de beoordeling van verstoring onderscheid moet worden gemaakt tussen inkomend en startend vliegverkeer. Inkomend vliegverkeer vliegt met minimaal motorvermogen volgens een vast glijpad, en zal daarom volgens het rapport Waardenburg en het verweerschrift minder verstoring meebrengen dan een stijgend vliegtuig. Appellanten hebben naar het oordeel van de Afdeling niet aannemelijk gemaakt dat verweerders niet in redelijkheid hebben mogen aansluiten bij de in het rapport Waardenburg opgenomen conclusies dat fauna minder auditieve hinder ondervindt van landend vliegverkeer en dat wordt ingeschat dat de tolerantie daarvoor groter is, omdat het glijpad voorspelbaar is.

**2.18.4.2**

In het rapport Waardenburg wordt geconcludeerd dat binnen een afstand van 2.000 meter en een hoogte van 3.000 ft van passerende vliegtuigen verstoringen te verwachten zijn. In het rapport staat dat uit literatuurstudies blijkt dat tot een vlieghoogte van 1.000 ft vrijwel iedere passage van een vliegtuig tot verstoring leidt. Bij een vlieghoogte tussen 1.000 ft en 2.000 ft kan sprake zijn van matige verstoring. Boven een hoogte van 2.000 ft is er voornamelijk sprake van lichte verstoring. Bij vlieghoogten van 3.000 ft zijn nauwelijks of geen effecten meer te verwachten, aldus het rapport Waardenburg.

Appellanten hebben aangevoerd dat het in het rapport Waardenburg uiteengezette mechanisme van verstoring, met name de door het rapport genoemde koppeling tussen vlieghoogte en mate van verstoring, onvoldoende is onderbouwd. Volgens hen is onvoldoende zeker dat voor de effectbeoordeling van groot vliegverkeer kan worden aangesloten bij de gegevens die bekend zijn over verstoring ten gevolge van de kleine burgerluchtvaart. In het deskundigenbericht staat hierover dat er inderdaad leemten in kennis bestaan ten aanzien van de zogenoemde dosis-effectrelatie tussen vliegverkeer en verstoring van fauna. In het rapport Waardenburg is volgens het deskundigenbericht echter gebruik gemaakt van de beste beschikbare kennis, welke kennis voorts uitvoerig en volledig in het rapport is gepresenteerd. Volgens het deskundigenbericht is het uitgangspunt van het rapport Waardenburg, om voor de effectbeoordeling van het grote vliegverkeer gebruik te maken van gegevens die betrekking hebben op de kleine burgerluchtvaart, gebaseerd op een reële inschatting. Een kwantitatieve vertaling van die kennis is volgens de deskundige niet mogelijk.

Wat betreft de in het rapport Waardenburg gehanteerde horizontale verstoringsafstand van 2.000 meter merkt het deskundigenbericht op dat deze voldoende en navolgbaar is onderbouwd.

Gelet op het vorenstaande ziet de Afdeling in hetgeen appellanten hebben aangevoerd geen grond voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat er wetenschappelijk gezien redelijkerwijs geen twijfel bestaat dat er geen schadelijke gevolgen zijn voor de natuurlijke kenmerken van een gebied indien over de speciale beschermingszones wordt gevlogen op een hoogte hoger dan 3.000 ft en op afstanden van meer dan 2.000 meter.

**2.18.4.3**

Teneinde te beoordelen of de uitvoering van het A-besluit zal leiden tot schadelijke gevolgen voor de natuurlijke kenmerken van de betrokken speciale beschermingszones, is in het rapport Waardenburg een aantal criteria uiteengezet. Bij de beoordeling van de effecten van een bepaalde ingreep in een SBZ zijn volgens het rapport Waardenburg onder meer van belang het aantal vogels in de SBZ in relatie tot de biogeografische populatie, het aantal vogels in het ingreepgebied en de geschatte afname van vogels in en rond het ingreepgebied.

**2.18.4.4**

In het rapport Waardenburg worden de gegevens over het aantal vluchten op GAE, het type vliegtuig dat van GAE gebruik maakt, de routestelsels die de vliegtuigen volgen en de vlieghoogten op bepaalde afstanden van GAE beschreven. Appellanten voeren in dit verband aan dat in het rapport Waardenburg ten onrechte wordt uitgegaan van een beperkte toename van het vliegverkeer ten gevolge van het A-besluit. Daarover wordt in het deskundigenbericht opgemerkt dat het saldo van het aantal vliegbewegingen niet relevant is voor het onderzoek naar de gevolgen, omdat van grote toestellen andere gevolgen zijn te verwachten dan van kleine toestellen. Gelet hierop hebben verweerders deze opmerking in het rapport Waardenburg terecht niet relevant geacht voor de uitkomsten die in het rapport zijn beschreven. In het deskundigenbericht staat verder dat in het rapport Waardenburg is uitgegaan van de aantallen vliegtuigen die zijn geprognosticeerd voor de toekomstige situatie. De Afdeling overweegt dat niet is gebleken dat bij het opstellen van het rapport niet van deze aantallen mocht worden uitgegaan.

**2.18.4.5**

De vliegroutes van en naar GAE bestrijken het gebied ten noordoosten van GAE, waar het Zuidlaardermeergebied ligt, naar het zuiden, ter plaatse van het gebied de Drentsche Aa, en naar het zuidwesten, waar het Fochteloërveen ligt. De vliegroutes bestrijken het gebied ten noordwesten van GAE niet. Gelet hierop en op het horizontale verstoringsgebied, de eerdergenoemde afstand van 2.000 meter, hebben verweerders zich in redelijkheid op het standpunt kunnen stellen dat het vliegverkeer van GAE geen gevolgen heeft voor de waarden in het ten noordwesten van GAE gelegen Leekstermeergebied.

**2.18.4.6**

Gelet op de ligging van de start- en landingsbanen voor groot vliegverkeer en de vliegroutes hebben verweerders zich in redelijkheid op het standpunt kunnen stellen dat zich in het gebied de Drentsche Aa geen verstoringen ten gevolge van groot vliegverkeer voordoen, nu zwaar vliegverkeer het gebied boven een hoogte van 3.000 ft passeert.
Eén van de circuits van de kleine luchtvaart gaat over de Drentsche Aa. De circuitvluchten waarvan het gebied hinder zou kunnen ondervinden, hebben volgens het rapport Waardenburg echter geen of nauwelijks invloed op de vegetatietypen en habitats voor vissen en amfibieën die reden vormen voor de aanmelding van het gebied als SBZ als bedoeld in de Habitatrichtlijn. Appellanten hebben niet aannemelijk gemaakt dat deze conclusie onjuist is. Gelet hierop ziet de Afdeling in hetgeen appellanten hebben aangevoerd, geen aanleiding voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat de uitvoering van het A-besluit niet leidt tot een aantasting van de natuurlijke kenmerken van de Drentsche Aa.

**2.18.4.7**

Het Fochteloërveen, dat op ongeveer 15 kilometer van GAE ligt, wordt door inkomend verkeer op een hoogte van 2.500–3.000 ft overvlogen. Volgens het rapport Waardenburg zijn op twee van de drie dagen hooguit lichte vormen van verstoring te verwachten door een klein aantal vliegbewegingen. Bovendien is de auditieve component van verstoring minimaal als gevolg van het beperkte motorvermogen tijdens de landing, aldus het rapport Waardenburg. Voorts wordt ingeschat dat ten aanzien van de visuele component sprake zal zijn van gewenning, omdat landende vliegtuigen een vast glijpad hebben. Gelet hierop ziet de Afdeling geen aanleiding voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat de uitvoering van het A-besluit niet leidt tot een aantasting van de natuurlijke kenmerken van het Fochteloërveen.

**2.18.4.8**

Het Zuidlaardermeergebied kwalificeert zich als SBZ op grond van de Vogelrichtlijn vanwege de aanwezigheid van de kolgans, smient en de kleine zwaan. Het Zuidlaardermeergebied omvat het Zuidlaardermeer en enkele polders, waaronder de Onnerpolder, die alle ten noorden van het meer liggen.
In het rapport Waardenburg staat dat de ganzen en zwanen de polders ten noorden van het Zuidlaardermeer overdag gebruiken als foerageergebied. De smienten gebruiken het Zuidlaardermeergebied overdag om te rusten.

**2.18.4.9**

Volgens het rapport Waardenburg en het verweerschrift vliegt het uitgaande vliegverkeer dat via het noordoosten opstijgt, op een afstand tussen 8 en 11 kilometer na de start over het Zuidlaardermeergebied. De lichtere vliegtuigen zijn op die afstand na de start gestegen tot meer dan 3.000 ft hoogte. Alleen de zwaarste vliegtuigen vliegen op een hoogte tussen 2.000 ft en 3.000 ft over het Zuidlaardermeergebied. De vliegroute bij een start in noordoostelijke richting leidt over het Zuidlaardermeer, waar in de winter smienten rusten, maar kruist het foerageergebied de Onnerpolder niet. Volgens het rapport Waardenburg heeft het uitgaand vliegverkeer, gelet op de horizontale verstoringsafstand, geen gevolgen voor de in deze polders foragerende ganzen en zwanen.
Gelet op de boven Nederland heersende luchtstromingen, zal volgens het rapport Waardenburg ongeveer 35 procent van het uitgaande vliegverkeer in noordoostelijke richting opstijgen, waaruit volgt dat slechts één op de drie dagen uitgaand over het Zuidlaardermeer wordt gevlogen. Een beperkt aantal van die uitgaande vliegbewegingen in noordoostelijke richting, namelijk enkel de zwaarste vliegtuigen, heeft boven het Zuidlaardermeer nog niet een hoogte van meer dan 3.000 ft bereikt. Gelet op deze omstandigheden en gelet op de aantrekkelijkheid van het Zuidlaardermeergebied als foerageer- en rustgebied, zullen volgens het rapport Waardenburg naar schatting geen substantiële aantallen ganzen en zwanen het gebied verwisselen voor gebieden elders.

**2.18.4.10**

Het inkomend vliegverkeer dat landt vanuit het noordoosten, moet zich volgens het verweerschrift op 11,3 kilometer vanaf het begin van de landingsbaan op een voorgeschreven punt ten noordoosten van het Zuidlaardermeer op 2.000 ft bevinden. Vervolgens dalen de vliegtuigen recht boven het Zuidlaardermeergebied, van 2.000 ft tot het begin van de landingsbaan. In het verweerschrift wordt, anders dan in het rapport Waardenburg, geconcludeerd dat dit gelet op de ligging van het Zuidlaardermeergebied meebrengt dat boven dat gebied op hoogten tussen 2.000 ft en 1.000 ft wordt gevlogen. Het glijpad bij een landing vanuit noordoostelijke richting, leidt over de polders waar de ganzen en zwanen foerageren.
In het rapport Waardenburg staat dat de schatting is dat door het relatief rustige gedrag van inkomend verkeer, de aantrekkelijkheid van het foerageergebied het wint van de schrik van een vliegtuig. Daarom zullen volgens het rapport Waardenburg geen substantiële aantallen ganzen en zwanen het gebied verlaten.
Onder verwijzing naar hetgeen in 2.18.4.2. is overwogen, dient gelet op de vlieghoogte van inkomend verkeer over het Zuidlaardermeergebied in beginsel te worden uitgegaan van matige verstoring. In het rapport Waardenburg en het deskundigenbericht staat dat het aannemelijk is dat, bij gelijke hoogte, een startend toestel meer verstoort dan een landend toestel vanwege de geluidsproductie. Wat betreft de visuele component wordt in het rapport Waardenburg vermeld dat de bewegingen van inkomende vliegtuigen voorspelbaar zijn vanwege het vaste glijpad, en dat daarom gewenning zal optreden.

**2.19**

In het rapport Waardenburg wordt geconcludeerd dat het A-besluit een toename van verstoring meebrengt voor de fauna in het Zuidlaardermeergebied. De frequentie van verstoring zal toenemen, maar naar verwachting beneden de drempelwaarde waarboven wezenlijke effecten in de zin dat substantiële aantallen vogels het gebied verlaten, optreden. Er zal daarom ook in de toekomst geen sprake zijn van significante effecten in de zin van de Vogelrichtlijn, aldus het rapport Waardenburg.

**2.19.1.1**

In hetgeen appellanten hebben aangevoerd, ziet de Afdeling geen aanleiding voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat in het rapport Waardenburg op basis van de beste wetenschappelijke kennis ter zake, alle aspecten van het A-besluit die op zichzelf of in combinatie met andere plannen of projecten de instandhoudingsdoelstellingen van de SBZ het Zuidlaardermeer in gevaar kunnen brengen, zijn geïnventariseerd. In dat verband overweegt de Afdeling dat het betoog van appellanten dat niet kon worden volstaan met een literatuurstudie, maar dat in plaats daarvan een veldonderzoek had moeten plaatsvinden, faalt. Daartoe overweegt de Afdeling dat het volgens het rapport Waardenburg en het deskundigenbericht op korte termijn niet is te verwachten dat meer uitgebreide of nauwkeuriger kennis over de mechanismen van verstoring van fauna door vliegverkeer beschikbaar zal zijn dan waarvan de onderzoekers gebruik hebben gemaakt. Volgens het deskundigenbericht zijn de in het rapport Waardenburg gehanteerde uitgangspunten en aannames duidelijk en objectiveerbaar geformuleerd. De Afdeling acht voorts niet aannemelijk gemaakt dat het rapport Waardenburg met betrekking tot de in het Zuidlaardermeer voorkomende flora en fauna gebreken of leemten in kennis vertoont. De Afdeling overweegt over de in het rapport Waardenburg gehanteerde relatie tussen vlieghoogte en mate van verstoring dat deze relatie volgens het deskundigenbericht een orde van grootte van de effectbeoordeling verschaft. Gelet op de beschikbare wetenschappelijke kennis over het mechanisme van verstoring kan een effectbeoordeling op basis van dat mechanisme enkel een kwalitatieve beoordeling van de gevolgen van het A-besluit voor de nabijgelegen natuurgebieden inhouden. Gelet hierop en gelet op het deskundigenbericht, waarin staat dat het met de thans beschikbare wetenschappelijke kennis niet mogelijk is een kwantitatieve beoordeling te geven van de effecten, faalt het betoog van appellant sub 6 dat niet met een kwalitatieve beoordeling kon worden volstaan. De Afdeling is gelet hierop van oordeel dat verweerders zich in redelijkheid op het standpunt hebben kunnen stellen dat een broedvogelkartering en het in kaart brengen van de delen van de SBZ het Zuidlaardermeer die door verstoring van vliegverkeer worden beïnvloed, geen volledige beeld zouden hebben gegeven van de effecten van het vliegverkeer op het Zuidlaardermeergebied. De in het rapport Waardenburg gegeven kwalitatieve beoordeling van de effecten van het A-besluit voor nabijgelegen speciale beschermingszones is volgens het deskundigenbericht voorts aan te merken als een ‘expert judgement’.
Wat betreft het betoog van appellanten dat is uitgegaan van een onjuiste afstand van het moment van opstijgen tot de grens van de SBZ het Zuidlaardermeer, overweegt de Afdeling dat in het deskundigenbericht staat dat, gelet op de gehanteerde orde van grootte van de relatie tussen vlieghoogte en mate van verstoring, de afstand van het moment van opstijgen van een vliegtuig tot de grens van de SBZ voldoende nauwkeurig is bepaald om binnen de kaders van de beoordelingscriteria de effecten te kunnen inschatten.
Gelet op het vorenstaande is de Afdeling van oordeel dat verweerders zich in redelijkheid op het standpunt hebben kunnen stellen dat er wetenschappelijk gezien redelijkerwijs geen twijfel bestaat dat er geen schadelijke gevolgen zijn voor de natuurlijke kenmerken van de nabijgelegen SBZ het Zuidlaardermeer. Daaruit volgt dat, voor zover voor de uitvoering van het project vergunningen op grond van artikel 19d van de Nbw 1998 zijn vereist, appellanten niet aannemelijk hebben gemaakt dat verweerders er niet in redelijkheid van hebben kunnen uitgaan dat het besluit uitvoerbaar is, zonder daarbij in strijd te komen met de Nbw 1998.

**Natuurwaarden: overig**

**2.20**

VOLE en andere betogen dat het bestreden besluit in strijd is met het Structuurschema Groene Ruimte (hierna: het SGR) en provinciaal beleid, omdat de baanverlenging een aantasting van waardevol cultuurlandschap en de ecologische hoofdstructuur meebrengt.

**2.20.1**

Een deel van het landschap rondom GAE is in het SGR aangemerkt als ‘waardevol cultuurlandschap’. In het SGR staat dat deze aanwijzing indicatief is, en dat voor de waardevolle cultuurlandschappen op provinciaal of regionaal niveau een toekomstperspectief moet worden opgesteld. Op provinciaal niveau zijn deze gebieden nader begrensd en zijn de gebieden Drentsche Aa en Noordenveld in het ‘Gebiedsperspectief WCL Drenthe’ aangewezen als waardevolle cultuurlandschappen. Mede gelet op de grote afstand tussen GAE en deze gebieden ziet de Afdeling in hetgeen VOLE en andere aanvoeren geen aanleiding voor het oordeel dat verweerders zich niet in redelijkheid op het standpunt hebben kunnen stellen dat het beleid met betrekking tot deze waardevolle cultuurlandschappen niet in de weg staat aan het A-besluit.

**2.20.2**

Tevens zijn delen van de omgeving van GAE in het SGR aangewezen als globale ecologische hoofdstructuur (hierna: EHS). In het Provinciaal Omgevingsplan Drenthe (hierna: het POPII) is de globaal begrensde EHS nader begrensd op provinciaal niveau (hierna: de PEHS). Als EHS is aangewezen de zogenoemde Natte As-Noord, waar onder meer het Leekstermeer en het Zuidlaardermeer deel van uitmaken. De Afdeling ziet in hetgeen appellanten hebben aangevoerd, geen aanleiding voor het oordeel dat het A-besluit in de weg staat aan de verwezenlijking van de in het POP II voor de robuuste verbindingszones gestelde doelen, namelijk het mogelijk maken van verplaatsing, verspreiding en uitwisseling van planten- en diersoorten tussen gescheiden liggende biotopen.

**Staatssteun**

**2.21**

Appellant sub 7, appellant sub 10, appellant sub 6, appellante sub 5 en VOLE en andere stellen dat de uitvoerbaarheid van het A-besluit niet is gegarandeerd, nu de bijdrage van het Rijk ten behoeve van baanverlenging volgens hen moet worden aangemerkt als steunmaatregel in de zin van artikel 87, eerste lid, van het Verdrag tot oprichting van de Europese Gemeenschap (hierna: het EG-Verdrag) die had moeten worden aangemeld.

**2.21.1**

Het in geding zijnde bestreden besluit behelst de beslissing van 14 maart 2006 op de bezwaren tegen het A-besluit, waarin de

luchthaven Eelde wordt aangewezen en het gebruik daarvan wordt geregeld, en het RO-besluit.
Het RO-besluit betreft een aanwijzing in de zin van artikel 37 van de WRO. Dit besluit brengt ingevolge artikel 37, zevende lid, van de WRO mee dat de raden van de gemeenten waarop de aanwijzing betrekking heeft, binnen een jaar een bestemmingsplan moeten vaststellen dat in overeenstemming is met de inhoud van het aanwijzingsbesluit. In de bestemmingsplanprocedures kan ten aanzien van de in de RO-aanwijzing gegeven opdrachten geen nadere afweging worden gemaakt. De verplichting de bestemmingsplannen in overeenstemming te brengen met de RO-aanwijzing, vloeit direct uit artikel 37 WRO voort. Het bestaan van die verplichting is niet afhankelijk van de vraag of gebruik wordt gemaakt van de mogelijkheden die het A-besluit biedt.
Ingevolge artikel 2 van het RO-besluit, houdt de in artikel 37 van de WRO bedoelde aanwijzing in het onderhavige geval in, dat de gemeenteraden van Tynaarlo en Haren de bestemmingsplannen voor de gronden binnen de in het A-besluit neergelegde geluidszones moeten herzien. In deze bestemmingsplannen moeten de geluidscontouren zoals in het A-besluit neergelegd worden weergeven. Voor de gronden binnen deze contouren geldt ingevolge artikel 3 van het RO-besluit, in samenhang met het Besluit geluidsbelasting grote luchtvaart, dat beperkingen worden opgelegd met betrekking tot het leggen van bestemmingen en met betrekking tot de gebruiksmogelijkheden van gronden en opstallen. Binnen de 35 Ke-geluidscontour zijn in beginsel geen nieuwe woningen, andere geluidsgevoelige gebouwen of woonwagenstandplaatsen toegestaan. Voor vervangende nieuwbouw van reeds bestaande woningen, andere geluidsgevoelige gebouwen of woonwagenstandplaatsen geldt een maximale geluidbelasting, wat meebrengt dat vervangende nieuwbouw in bepaalde gevallen niet toegestaan is. Voor bestaande woningen geldt ook een maximale geluidbelasting en bij overschrijding daarvan dienen geluidwerende maatregelen te worden getroffen.
Tegenover de hiervoor beschreven verregaande beperkingen in het gebruik van de gronden waarop het RO-besluit ziet, dient een belang te staan dat deze beperkingen rechtvaardigt. De beperkingen zijn alleen dan gerechtvaardigd te achten, indien zij in verband met de aanleg en het gebruik van de verlengde start- en landingsbaan noodzakelijk zijn. De noodzaak tot het opleggen van dergelijke beperkingen is naar het oordeel van de Afdeling slechts dan aanwezig indien voldoende vast staat dat van de in het A-besluit neergelegde mogelijkheden daadwerkelijk gebruik zal kunnen worden gemaakt. In dit verband is van belang dat voldoende vast staat en niet in geschil is dat tot de aanleg en het gebruik van de verlengde start- en landingsbaan alleen zal worden overgegaan indien GAE voor de financiering van de baanverlenging waarop het A-besluit ziet, kan rekenen op een financiële bijdrage die de kosten van de baanverlenging dekt.

**2.21.2**

Ingevolge artikel 87 van het EG-Verdrag zijn, behoudens de afwijkingen waarin het Verdrag voorziet, steunmaatregelen van de Lidstaten of in welke vorm ook met staatsmiddelen bekostigd, die de mededinging door begunstiging van bepaalde ondernemingen of bepaalde producties vervalsen of dreigen te vervalsen, onverenigbaar met de gemeenschappelijke markt, voor zover deze steun het handelsverkeer tussen de Lidstaten ongunstig beïnvloedt.
Ingevolge artikel 88, eerste lid, van het EG-Verdrag onderwerpt de Commissie tezamen met de Lidstaten de in die staten bestaande steunregelingen aan een voortdurend onderzoek. Zij stelt de dienstige maatregelen voor, welke de geleidelijke ontwikkeling of de werking van de gemeenschappelijke markt vereist.
Ingevolge artikel 88, derde lid, van het EG-Verdrag wordt de Commissie van elk voornemen tot invoering of wijziging van steunmaatregelen tijdig op de hoogte gebracht, om haar opmerkingen te kunnen maken. Indien zij meent dat zulk een voornemen volgens artikel 87 van het EG-Verdrag onverenigbaar is met de gemeenschappelijke markt, vangt zij onverwijld de in het tweede lid bedoelde procedure aan. De betrokken lidstaat kan de voorgenomen maatregelen niet tot uitvoering brengen voordat die procedure tot een eindbeslissing heeft geleid.

**2.21.3**

Nu de laatste zin van artikel 88, derde lid, van het EG-Verdrag rechtstreekse werking heeft (arrest van het Hof van Justitie van de Europese Gemeenschappen (hierna: het Hof van Justitie) van 21 november 1991, zaak C-354/90, jurisprudentie 1991 I-05505), ziet de Afdeling zich, gelet op hetgeen in 2.21.1. is overwogen, voor de vraag gesteld of bijdragen van het Rijk ten behoeve van de uitvoering van het A-besluit door verweerders bij de Commissie hadden moeten worden aangemeld. Appellanten hebben in dat verband gewezen op onder meer een bijdrage ten behoeve van de aanleg van de in het A-besluit opgenomen baanverlenging, bijdragen ten behoeve van de exploitatie en bijdragen ten behoeve van drainagesystemen.

**2.21.4**

Met betrekking tot de bijdrage van het Rijk van €18,6 miljoen ten behoeve van de aanleg van de verlengde baan, overweegt de Afdeling als volgt.

**2.21.4.1**

Verweerders hebben zich met betrekking tot de bijdrage ten behoeve van baanverlenging in de eerste plaats op het standpunt gesteld dat geen sprake is van staatssteun, omdat niet wordt voldaan aan alle in artikel 87 van het EG-Verdrag vervatte criteria. Volgens verweerders kan GAE N.V. niet als onderneming worden aangemerkt.

**2.21.4.2**

Niet in geschil is dat voor de kwalificatie van een entiteit als onderneming niet relevant is of de houder van de aandelen van die entiteit een overheidslichaam is. In onder meer het arrest van 23 april 1991 (Höfner en Elser, zaak C-41/90, juris. 1991, blz. I-01979) is door het Hof van Justitie overwogen dat het begrip onderneming elke eenheid omvat die een economische activiteit uitoefent, ongeacht haar rechtsvorm en de wijze waarop zij wordt gefinancierd. In onder meer het arrest van het Hof van Justitie van 16 juni 1987 (Commissie

tegen Italië, zaak 118/85, juris. 1987, blz. 02599) is het begrip economische activiteit gedefinieerd als het aanbieden van goederen en diensten op een bepaalde markt.
Nu GAE N.V. als beheerder van de infrastructuur van de luchthaven Eelde diensten op een bepaalde markt aanbiedt, moet GAE N.V. naar het oordeel van de Afdeling worden aangemerkt als onderneming in de zin van artikel 87 van het EG-Verdrag.
Overigens heeft het kabinet al in de door verweerders genoemde nota 'Regionale luchthavenstrategie' (*Kamerstukken II* 1996/97, 25 230, nrs. 1–2. Ook: de nota RELUS) opgemerkt dat regionale luchthavens naar juridische maatstaven ondernemingen zijn.
In aanvulling op hetgeen hiervoor is overwogen over de kwalificatie van GAE N.V. als onderneming, merkt de Afdeling voorts nog op dat de Commissie de Afdeling op de door haar gestelde vraag of de bedoelde bijdrage voldoet aan de in artikel 87 van het EG-Verdrag vervatte criteria, heeft geantwoord:

> 'Ten slotte blijkt ook dat de luchthavenbeheerder een onderneming is in de zin van artikel 87 van het EG-Verdrag. Zowel het Gerecht van eerste aanleg als het Hof van Justitie hebben in de arresten Aéroports de Paris (arrest van 12 december 2000 in zaak T-128/98 en arrest van 24 oktober 2002 in zaak C- 82/01 P) verklaard dat wanneer luchthaveninstallaties ter beschikking worden gesteld van luchtvaartmaatschappijen en verschillende dienstverrichters, tegen betaling van een vergoeding waarvan het tarief vrij is vastgesteld, dit een activiteit van economische aard is.'

**2.21.4.3**
Niet in geschil is dat de bijdrage van het Rijk aan GAE N.V. ten behoeve van de verlenging van de start- en landingsbaan voldoet aan de overige in artikel 87 van het EG-Verdrag vervatte criteria, namelijk dat sprake is van staatsmiddelen, toerekenbaarheid, beïnvloeding van de handel tussen lidstaten en (dreigende) vervalsing van de mededinging, selectiviteit van de maatregel en bevoordeling, zodat moet worden vastgesteld dat wat betreft die bijdrage aan alle in artikel 87 van het EG-Verdrag vervatte criteria wordt voldaan.
**2.21.5**
Dat wat betreft de bijdrage van het Rijk aan GAE N.V. ten behoeve van baanverlenging aan alle in artikel 87 van het EG-Verdrag vervatte criteria wordt voldaan, brengt mee dat de maatregel in beginsel niet tot uitvoering kan worden gebracht voordat de Commissie een eindbeslissing omtrent die bijdrage heeft genomen. Voor zover in het kader van dit geding van belang, lijdt dat slechts uitzondering indien de maatregel kan worden aangemerkt als bestaande steun, of als verweerders anderszins hebben mogen begrijpen dat de maatregel geen aanmelding behoefde.
**2.21.5.1**
Verweerders hebben zich in dat verband op het standpunt gesteld dat de bijdrage van het Rijk ten behoeve van de baanverlenging haar oorsprong vindt in de Wet houdende oprichting van naamloze vennootschappen voor de luchtvaartterreinen Eelde, Zuid-Limburg en Texel (wet van 21 december 1955, *Stb.* 622, hierna: de wet uit 1955) en derhalve moet worden aangemerkt als een maatregel die reeds voor de inwerkingtreding van het EEG-Verdrag in werking was.
De wet uit 1955 kan naar het oordeel van de Afdeling niet worden aangemerkt als een concrete basis voor het verlenen door het Rijk van de bijdrage ten behoeve van baanverlenging. Daartoe wordt overwogen dat de wet uit 1955 ziet op de oprichting van naamloze vennootschappen voor onder meer het luchtvaartterrein Eelde en voorziet in de statuten voor die naamloze vennootschappen. In de wet uit 1955 noch de daarbij behorende statuten valt echter te lezen dat het Rijk zich verplicht alle toekomstige kosten van aanleg of uitbreiding van infrastructuur op zich te nemen, nog daargelaten of een dergelijke verplichting zou hebben kunnen leiden tot het oordeel dat bij het nadien uitvoering geven aan die verplichting sprake is van steun die reeds voor de inwerkingtreding van het EG-Verdrag bestond.
Voor zover verweerders betogen dat de bijdrage van het Rijk ten behoeve van de baanverlenging voortvloeit uit bestendig rijksbeleid dat al voor de inwerkingtreding van het EEG-Verdrag is ingezet, overweegt de Afdeling dat, wat ook van het door verweerders bedoelde beleid zij, dit niet kan worden aangemerkt als een steunregeling in de zin van artikel 87 van het EG-Verdrag, waaruit het verlenen van toekomstige bijdragen ten behoeve van luchtinfrastructuur zonder meer voortvloeit.
**2.21.5.2**
Verweerders hebben zich voorts op het standpunt gesteld dat sprake is van bestaande steun omdat de bijdrage ten behoeve van de aanleg van de verlengde baan reeds in 1992 is verleend. Volgens verweerders is de in 1992 gedane toezegging tot het verlenen van een bijdrage aan de baanverlenging aan te merken als de uitvoering of inwerkingtreding van een steunmaatregel. Dit zou meebrengen dat voor de vraag of die steunmaatregel moest worden aangemeld alvorens die maatregel tot uitvoering werd gebracht, het jaar 1992 bepalend is. Op dat moment werd de bijdrage volgens verweerders niet aangemerkt als steun die moest worden aangemeld.
**2.21.5.3**
Verweerders hebben in dit verband gewezen op een brief van 10 januari 1992, waarbij de minister van Verkeer en Waterstaat de Raad van Bestuur van GAE N.V. heeft medegedeeld dat de besluitvorming over de baanverlenging is afgerond. In de brief staat dat de minister baanverlenging noodzakelijk acht voor het toekomstperspectief van de luchthaven Eelde en de ontwikkeling van de regio. In de brief staat verder dat GAE N.V. er nota van moet nemen dat het Rijk niet meer betaalt voor de baanverlenging dan deze kost, waarbij een bedrag van fl. 22,2 miljoen wordt genoemd. Met de voorgaande kanttekeningen kan GAE N.V. volgens de brief uitgaan van een positieve stellingname van de rijksoverheid met betrekking tot onder meer de baanverlenging. De gepaste procedures kunnen verder op gang worden gebracht, aldus de brief.
**2.21.5.4**
Op 16 december 2003 is een overeenkomst gesloten tussen de Staat, vertegenwoordigd door de minister van Verkeer en Waterstaat,

en GAE N.V. over de baanverlenging en de waarde van het luchtvaartterrein van GAE. In die overeenkomst staat dat de Staat aan GAE N.V. een éénmalige bijdrage van afgerond maximaal €18,6 miljoen betaalt voor verlenging van de start- en landingsbaan. In de overeenkomst zijn verder de voorwaarden voor betaling van die bijdrage neergelegd.

**2.21.5.5**

De Afdeling vat het betoog van verweerders aldus op dat de brief uit 1992 moet worden aangemerkt als het moment van uitvoering van een steunregeling, omdat de steunverlening in de vorm van de bijdrage voor baanverlenging met de toezegging in die brief was afgerond. In de overeenkomst uit 2003 is volgens verweerders slechts neergelegd wat al in 1992 was besloten.

**2.21.5.6**

De Afdeling overweegt dat uit onder meer de beschikking van de Commissie van 14 juli 1998 betreffende steun aan de linzentelers Nomos Lefkas (Pb 1999, L 32, blz. 25) blijkt dat, om een brief als die uit 1992 te kunnen kwalificeren als uitvoering van een steunmaatregel, deze brief zou moeten kunnen worden aangemerkt als het moment van het verlenen van de nodige bevoegdheden om de steun zonder verdere formaliteiten te kunnen toekennen. Het Hof van Justitie heeft voorts geoordeeld (arrest van 15 februari 2001, zaak C-99/98, Oostenrijk/Commissie (Siemens)) dat sprake moet zijn van een onvoorwaardelijke en rechtens bindende toezegging tot het verlenen van de betrokken steun. De brief uit 1992 bevat zo een onvoorwaardelijke en rechtens bindende toezegging niet, en zeker niet tot een bedrag van €18,6 miljoen. De Afdeling is daarentegen van oordeel dat met de overeenkomst uit 2003 een in deze van belang zijnde concretisering heeft plaatsgehad, die niet nodig zou zijn geweest indien kan worden volgehouden dat de brief uit 1992 al de bevoegdheid had geschapen om zonder verdere formaliteiten uiteindelijk een bedrag van €18,6 miljoen aan GAE N.V. te betalen. Uit het vorenstaande volgt dat, anders dan verweerders betogen, de brief uit 1992 niet doorslaggevend is voor het bepalen van het moment waarop de steun is verleend, maar dat aan de overeenkomst uit 2003 in dat verband de doorslaggevende betekenis toekomt. Uit het vorenstaande volgt dat het betoog van verweerders dat sprake is van bestaande steun, faalt.

**2.21.5.7**

Verweerders stellen zich verder op het standpunt dat, indien geen sprake is van bestaande steun, zij aan de Mededeling van de Commissie van 10 december 1994 inzake de toepassing van de artikelen 92 en 93 van het EG-Verdrag (thans artikelen 87 en 88 van het EG-Verdrag) en van artikel 61 van de EER-overeenkomst op steunmaatregelen van de staten in de luchtvaartsector (Pb 94/C 350/07; hierna: de Mededeling uit 1994) het vertrouwen hebben mogen ontlenen dat de Commissie bekostiging van infrastructurele voorzieningen ten behoeve van een luchtvaartterrein, zoals de aanleg van de verlengde baan, ten tijde van het uitvoeren van de maatregel in 2003 niet zou aanmerken als steunverlening, althans niet als steunverlening die aanmelding behoefde. Eerst met de Mededeling uit 2005 van de Commissie inzake communautaire richtsnoeren voor financiering van luchthavens en aanloopsteun van de overheid voor luchtvaartmaatschappijen met een regionale luchthaven als thuishaven (PB C van 9 december 2005, 312/01; hierna: de Mededeling uit 2005) zou duidelijk zijn geworden dat de Commissie dit standpunt had verlaten.

**2.21.5.8**

De Afdeling stelt voorop dat de beslissing op bezwaar van 14 maart 2006 een heroverweging inhoudt van het A-besluit en het RO-besluit, beide van 15 mei 2001. De heroverweging dient te geschieden met inachtneming van alle feiten en omstandigheden zoals die zich voordoen op het tijdstip van de heroverweging.

**2.21.5.9**

Blijkens de inleiding en de doelstellingen van de Mededeling uit 1994 ziet deze primair op ontwikkelingen op het gebied van concurrentie tussen luchtvaartmaatschappijen. Niettemin bevat de Mededeling uit 1994 ook een standpunt over de aanleg van luchtinfrastructuur.

Onder punt 12 van onderdeel II.3. van de Mededeling uit 1994, waarnaar verweerders hebben verwezen, staat dat de aanleg van nieuwe of de uitbreiding van bestaande infrastructuur (zoals luchthavens, autowegen, bruggen enzovoorts) een algemene economische beleidsmaatregel betreft waarop de Commissie geen invloed kan uitoefenen op grond van de voorschriften inzake steunmaatregelen van de Staten van het Verdrag.

Anders dan verweerders betogen, hadden verweerders naar het oordeel van de Afdeling echter in ieder geval ten tijde van het nemen van het bestreden besluit moeten inzien dat de Mededeling uit 1994 geen grond bood voor hun opvatting dat buiten twijfel is dat aanmelding van de steunverlening in 2003 niet nodig was.

Daartoe wijst de Afdeling in de eerste plaats op de tekst van de Mededeling uit 1994 zelf. Achter de zin in punt 12 van onderdeel II.3. van de Mededeling uit 1994 waar verweerders op wijzen, is een voetnoot geplaatst met een verwijzing naar het antwoord van de Commissie op een schriftelijke vraag nr. 28 van de heer Dehousse uit 1967 (10 april 1967, PB nr. 118 van 20 juni 1967, blz. 2311/67). In dit antwoord staat dat de uitvoering door de overheid van infrastructuurwerken die traditioneel ten laste van de begroting van de Staat of van lagere publiekrechtelijke organen komen, geen steunmaatregel in de zin van artikel 92 van het E.E.G.-Verdrag (thans: artikel 87 van het EG-Verdrag) vormt, maar dat dit anders kan liggen wanneer deze werken worden uitgevoerd ten gunste van een of meer bepaalde ondernemingen of bepaalde producties. Nu GAE N.V. in 2003 in elk geval moest worden aangemerkt als onderneming, zoals eerder in 2.21.4.2. overwogen, hadden verweerders reeds op grond van de tekst van de Mededeling uit 1994 twijfels kunnen hebben omtrent de vraag of in 2003 kon worden afgezien van aanmelding van de bijdrage ten behoeve van baanverlenging.

Naast de in overweging 2.21.4.2. bedoelde vraag heeft de Afdeling voorts aan de Commissie gevraagd of uit de Mededeling uit 1994 volgt dat bijdragen van de lidstaten ten behoeve van de aanleg van luchtinfrastructuur enkel behoeven te worden aangemeld als met die infrastructuur een bevoordeling van een luchtvaartmaatschappij wordt bewerkstelligd. De Commissie heeft daarop geantwoord dat

op het moment van toekenning van de betrokken steun in 2003 uit de rechtspraak van het Hof van Justitie volgde dat de bijdrage moest worden aangemeld op grond van artikel 88, derde lid, laatste zin, van het EG-Verdrag. Dit is volgens de Commissie bevestigd in de Mededeling uit 2005 en is door de Commissie toegepast in alle recente beschikkingen in verband met steun aan luchthavens. De Commissie verwijst naar de arresten inzake Aéroports de Paris (arrest van het Gerecht van Eerste Aanleg van 12 december 2000 in zaak T-128/98 en arrest van het Hof van Justitie van 24 oktober 2002 in zaak C-82/01 P) en noemt in dit verband haar besluit van 10 juni 2007 om met betrekking tot de luchthaven Lübeck de procedure van artikel 88, tweede lid, van het EG-Verdrag in te leiden.
In de zaak Aéroports de Paris was de terbeschikkingstelling van luchthaveninstallaties en het beheer daarvan aan de orde. In de arresten is geoordeeld dat het ter beschikking van luchtvaartmaatschappijen en verschillende dienstverrichters stellen van luchthaveninstallaties door een overheidsinstelling tegen betaling van een vergoeding waarvan het tarief vrijelijk door haar is vastgesteld, alsmede het beheer ervan, activiteiten van economische aard betreffen die weliswaar op het publiek domein worden verricht, maar daardoor nog niet de uitoefening van een overheidstaak vormen.
De Afdeling merkt hierover op dat, hoewel de arresten niet zien op de aanleg van luchtinfrastructuur, uit deze arresten kan worden afgeleid dat de aanleg en het in werking houden van luchthavens niet langer zonder meer als een overheidstaak kunnen worden beschouwd. Dit wordt bevestigd door het besluit van de Commissie inzake Lübeck, waarin de Commissie onder verwijzing naar de arresten inzake Aéroports de Paris heeft overwogen dat het sedert 2000 niet langer mogelijk is de toepassing van staatssteunregels op luchthavens a priori uit te sluiten.
Gelet op het vorenstaande is de Afdeling van oordeel dat verweerders ten tijde van het nemen van het bestreden besluit, in 2006, hadden moeten begrijpen dat zij niet, althans niet langer, op grond van de Mededeling uit 1994 het vertrouwen mochten hebben dat de Commissie de in 2003 verleende bijdrage van het Rijk in de bekostiging van de verlenging van de start- en landingsbaan niet zou aanmerken als steunverlening, althans niet als steunverlening die aanmelding behoefde.

**2.21.5.10**

De conclusie is dat de bijdrage van €18,6 miljoen moet worden aangemerkt als staatssteun als bedoeld in artikel 87 van het EG-Verdrag en dat verweerders ten tijde van het nemen van het bestreden besluit aan de Mededeling uit 1994 niet het gerechtvaardigd vertrouwen mochten ontlenen dat de Commissie een bijdrage van het Rijk ter bekostiging van de verlenging van de start- en landingsbaan van GAE niet zou aanmerken als steunverlening, althans niet als steunverlening die aanmelding behoefde. Naar het oordeel van de Afdeling hadden verweerders daarom de voorgenomen verlening van staatssteun moeten aanmelden, dan wel de Commissie moeten benaderen teneinde zekerheid te verkrijgen dat aanmelding volgens de Commissie niet nodig is. Door dit na te laten, is in strijd gehandeld met de op Nederland als lidstaat rustende verplichting voortvloeiend uit artikel 88, derde lid, van het EG-Verdrag.

**2.21.5.11**

Daargelaten de vraag of de overige door appellanten genoemde bijdragen van het Rijk aan GAE N.V., zoals de exploitatiebijdrage, vanwege het in 2.21.1. overwogene bij de beoordeling van het bestreden besluit een rol kunnen spelen, overweegt de Afdeling dat de betogen van appellanten met betrekking tot die bijdragen gelet op het vorenstaande geen bespreking meer behoeven.

**Conclusie**

**2.22**

De conclusie is dat hetgeen appellant sub 7, appellant sub 10, appellant sub 6, appellante sub 5 en VOLE en andere hebben aangevoerd, aanleiding geeft voor het oordeel dat het bestreden besluit, voor zover daarbij een beslissing op bezwaar is genomen inzake het RO-besluit, is genomen in strijd met de op Nederland als lidstaat rustende verplichting voortvloeiend uit artikel 88, derde lid, van het EG-Verdrag. Het bestreden besluit komt derhalve voor vernietiging in aanmerking. Hieruit volgt, gelet op de onverbrekelijke samenhang tussen het RO-besluit en het A-besluit, dat tevens aanleiding bestaat voor vernietiging van het bestreden besluit voor zover daarbij een beslissing op bezwaar is genomen inzake het A-besluit voor zover dat
A-besluit voorziet in de verlenging van de baan 23-05 en de daarmee samenhangende gebruiksmogelijkheden, waaronder de Ke-zone. De beroepen van appellant sub 7, appellant sub 10, appellant sub 6, appellante sub 5 en VOLE en andere zijn in zoverre gegrond.

**2.23**

Voor het overige zijn de beroepen van appellant sub 7, appellant sub 10, appellant sub 6, appellante sub 5 en VOLE en andere ongegrond. De beroepen van de Milieufederatie, de IVN, appellant sub 4, appellant sub 11, de gemeenteraad van Haren en appellant sub 3 zijn geheel ongegrond.

**2.24**

Verweerders dienen in de proceskosten van appellant sub 7, appellant sub 10, appellant sub 6, appellante sub 5 en VOLE en andere te worden veroordeeld. Met betrekking tot de beroepen van de Milieufederatie, de IVN, appellant sub 4, appellant sub 11, de gemeenteraad van Haren en appellant sub 3 bestaat voor een proceskostenvergoeding geen aanleiding.

**3. Beslissing**

De Afdeling bestuursrechtspraak van de Raad van State;
recht doende:

**I.** verklaart het beroep van appellant sub 8 niet-ontvankelijk;

**II.** verklaart de beroepen van appellante sub 5, appellant sub 6, appellant sub 7, VOLE en andere en appellant sub 10 tegen de beslissing op bezwaar gedeeltelijk gegrond;

**III.** vernietigt de beslissing op bezwaar van 14 maart 2006, voor zover het betreft de in het A-besluit opgenomen Ke-zone, de baan 23-05 voor zover deze langer is dan 1.800 meter, met het daarbij behorende codenummer en de codeletter, en voor zover het betreft de beslissing op bezwaar van 14 maart 2006 inzake het RO-besluit;

**IV.** schorst het besluit van de Minister van Verkeer en Waterstaat van 15 mei 2001, voor zover het de baan 23-05, voor zover langer dan 1.800 meter, betreft, tot zes weken nadat verweerders opnieuw hebben beslist op de bezwaren;

**V.** verklaart de beroepen van appellante sub 5, appellant sub 6, appellant sub 7, VOLE en andere en appellant sub 10 voor het overige, en de beroepen van de Milieufederatie, de IVN, appellant sub 4, appellant sub 11, de gemeenteraad van Haren en appellant sub 3 geheel ongegrond;

**VI.** veroordeelt verweerders tot vergoeding van bij appellante sub 5 in verband met de behandeling van het beroep opgekomen proceskosten tot een bedrag van € 44,18 (zegge: vierenveertig euro en achttien cent); het dient door de Staat der Nederlanden aan appellante sub 5 onder vermelding van het zaaknummer te worden betaald;
veroordeelt verweerders tot vergoeding van bij appellant sub 6 in verband met de behandeling van het beroep opgekomen proceskosten tot een bedrag van € 44,18 (zegge: vierenveertig euro en achttien cent); het dient door de Staat der Nederlanden aan appellant sub 6 onder vermelding van het zaaknummer te worden betaald;
veroordeelt verweerders tot vergoeding van bij appellant sub 7 in verband met de behandeling van het beroep opgekomen proceskosten tot een bedrag van € 45,38 (zegge: vijfenveertig euro en achtendertig cent); het dient door de Staat der Nederlanden aan appellant sub 7 onder vermelding van het zaaknummer te worden betaald;
veroordeelt verweerders tot vergoeding bij appellant sub 10 in verband met de behandeling van het beroep opgekomen proceskosten tot een bedrag van €177,29 (zegge: honderdzevenenzeventig euro en negenentwintig cent); het dient door de Staat der Nederlanden aan appellant sub 10 onder vermelding van het zaaknummer te worden betaald;
veroordeelt verweerders tot vergoeding van bij VOLE en andere in verband met de behandeling van het beroep opgekomen proceskosten tot een bedrag van € 966 (zegge: negenhonderdzesenzestig euro) geheel toe te rekenen aan door een derde beroepsmatig verleende rechtsbijstand; het dient door de Staat der Nederlanden aan VOLE en andere onder vermelding van het zaaknummer te worden betaald, met dien verstande dat betaling aan een van hen bevrijdend werkt ten opzichte van de anderen;

**VII.** gelast dat de Staat der Nederlanden aan appellanten vergoedt het door hen voor de behandeling van de beroepen betaalde griffierecht ten bedrage van € 141 (zegge: honderdeenenveertig euro) voor appellante sub 5, € 141 (zegge: honderdeenenveertig euro) voor appellant sub 6, € 141 (zegge: honderdeenenveertig euro) voor appellant sub 7, € 281 (zegge: tweehonderdeenentachtig euro) voor VOLE en andere met dien verstande dat betaling aan een van hen bevrijdend werkt ten opzichte van de anderen, en € 141 (zegge: honderdeenenveertig euro) voor appellant sub 10.

## Noot van P.C. Adriaanse

**1**

Met haar uitspraak van 11 juni 2008 steekt de Afdeling bestuursrechtspraak in een reeds lang lopende procedure ten tweeden male (zie eerder ABRvS 3 december 2003, *JOM* 2008, 94) een stokje (althans voorlopig) voor de verlenging van een start- en landingsbaan op *Groningen* Airport Eelde (hierna GAE). Ditmaal gebeurt dat wellicht onverwacht — gelet op de hoedanigheid van appellanten (kort gezegd omwonenden en milieuorganisaties) — op grond van miskenning van het Europese staatssteunrecht bij de onderliggende besluitvorming. Extra opmerkelijk is deze uitspraak, omdat de Afdeling bestuursrechtspraak mede tot haar oordeel over de miskenning van het staatssteunrecht komt na vragen te hebben gesteld aan de Europese Commissie. Dat komt niet zo vaak voor. Het is niet de eerste keer dat de Afdeling bestuursrechtspraak zich uitspreekt over eventuele miskenning van de Europese staatssteunregels in het kader van planologische besluitvorming. Zie o.m. ABRvS 6 mei 2004, *AB* 2004, 225, m.nt. F.A.G. Groothuijse; ABRvS 11 augustus 2004, *AB* 2004, 343, m.nt. F.A.G. Groothuijse en R. Ortlep; ABRvS 26 juli 2006, *AB* 2006, 367, m.nt. F.A.G. Groothuijse; ABRvS 6 september 2006, *AB* 2006, 336, m.nt. A.G.A. Nijmeijer; ABRvS 26 september 2007, *LJN* BB4338; ABRvS 16 januari 2008, *BR* 2008, 418, m.nt. P.H.L.M. Kuypers en E.W.J. de Groot. In vergelijking met vorige uitspraken komt de Afdeling bestuursrechtspraak in de onderhavige uitspraak echter tot een afwijkende toepassing van het staatssteunrecht, in het bijzonder van art. 88, derde lid, EG. Ter bespreking hiervan wordt voor het juiste perspectief onder punt 2 eerst kort ingegaan op de inhoud van art. 88, derde lid, EG, alsook op de wijze waarop deze bepaling volgens vaste communautaire rechtspraak een rol kan spelen in procedures bij de nationale rechter. Onder punt 3 wordt vervolgens nader ingegaan op de wijze waarop de Afdeling bestuursrechtspraak in zaken in de sfeer van de ruimtelijke ordening gewoonlijk met het staatssteunrecht, in het bijzonder art. 88, derde lid, EG, omgaat. Tegen die achtergrond komt daarna onder de punten 4 en 5 de afwijkende toepassing van het staatssteunrecht in de onderhavige uitspraak van 11 juni 2008 nader ter sprake. In punt 6 wordt gesteld dat de toepassing van art. 88, derde lid, EG hierin niet gelukkig is gekozen. Deze bespreking mondt uit in de vraag onder punt 7 of een beroep op art. 88, derde lid, EG in dit soort zaken eigenlijk wel de bedoeling is. Onder punt 8 worden de diverse lijnen samengebracht tot een conclusie, waarna in punt 9 wordt afgesloten met enkele opmerkingen over de (mogelijke) consequenties van deze uitspraak.

**2**

Art. 88, derde lid, EG legt in de eerste zin een verplichting aan de lidstaten op tot aanmelding van voorgenomen nieuwe steunmaatregelen, met inbegrip van wijzigingen in bestaande steun. De laatste volzin van art. 88, derde lid, EG legt de lidstaten daarnaast ook een opschortings- of standstillverplichting op. Om de Commissie de tijd te geven aangemelde steunmaatregelen op hun verenigbaarheid met de gemeenschappelijke markt te beoordelen, mogen voorgenomen steunmaatregelen niet ten uitvoer worden gelegd voordat de Commissie haar goedkeuring heeft gegeven. Hoewel geformuleerd als een verbodsbepaling, heeft het Hof van Justitie van de EG in vaste rechtspraak bepaald dat *de laatste volzin* van art. 88, derde lid, EG ook rechten voor particulieren schept

waarop zij rechtstreeks een beroep kunnen doen (zie o.m. HvJ EG 11 december 1973, zaak 120/73, Gebr. Lorenz, *Jur.* 1973, p. 1471). Aan de eerste volzin van art. 88, derde lid, EG (de aanmeldingsverplichting) wordt op zichzelf geen rechtstreekse werking toegekend. Dat valt te verklaren met het feit dat het enkele niet-aanmelden van een voorgenomen aanmeldingsplichtige steunmaatregel het preventieve controlestelsel voor de beoordeling van nieuwe steunmaatregelen, zoals dat in art. 88, derde lid, EG ligt besloten, nog niet ondermijnt. Dat is pas het geval wanneer nieuwe steun in strijd met de laatste volzin van art. 88, derde lid, EG daadwerkelijk *tot uitvoering wordt gebracht*, hetzij zonder deze überhaupt aan te melden, hetzij na aanmelding, maar voordat de Commissie haar goedkeuring heeft gegeven. Daarom is volgens art. 1, sub f, van Verordening (EG) nr. 659/1999 (*PbEG* 1999, L 83/1) pas in die situatie sprake van onrechtmatige (staats)steun.

Van de nationale rechter wordt volgens vaste communautaire rechtspraak verwacht dat hij aan een dergelijke miskenning van het gemeenschapsrecht overeenkomstig zijn nationale recht alle consequenties verbindt om justitiabelen die zich hierop kunnen beroepen (zie ook punt 7) effectieve rechtsbescherming te bieden. Te denken valt in het bijzonder aan het gelasten van de terugvordering van de onrechtmatig verleende steun, het toekennen van schadevergoeding en, zo nodig, het gelasten van voorlopige maatregelen. In deze communautaire benadering van de toepassing van art. 88, derde lid, EG in nationale procedures zal de aangezochte rechter eerst zelfstandig moeten vaststellen of in het voorliggende geval sprake is van onrechtmatige staatssteun. Daarvoor dienen de volgende vragen cumulatief bevestigend te zijn beantwoord: 1. Is sprake van staatssteun in de zin van art. 87, eerste lid, EG? 2. Is sprake van nieuwe steun? 3. Is sprake van aanmeldingsplichtige staatssteun? Voor bepaalde categorieën steun is in een algemene groepsvrijstellingsverordening een uitzondering gemaakt op de aanmeldingsverplichting (zie Verordening (EG) nr. 800/2008, *PbEU* 2008, L 214/3). 4. Is sprake van onrechtmatige staatssteun, dat wil zeggen is de steun ten uitvoer gelegd voordat de Commissie haar goedkeuring heeft gegeven? Zie over dit stappenschema verder P.C. Adriaanse, *Handhaving van EG-recht in situaties van onrechtmatige staatssteun*, Deventer: Kluwer 2006, p. 49 e.v.

Deze communautaire benadering van de toepassing van art. 88, derde lid, EG in procedures bij de nationale rechter is door het Hof van Justitie van de EG in eerste instantie ontwikkeld in relatie tot concurrentenklachten over (beweerdelijk) onrechtmatige staatssteun aan een concurrent. Zie o.m. HvJ EG 11 juli 1996, zaak C-39/94, SFEI, *Jur.* 1996, p. I-3547. Zie voor een illustratie van een concurrentenklacht over staatssteun op nationaal niveau ABRvS 17 december 2003, *AB* 2004, 262, m.nt. M.J. Jacobs & W. den Ouden. In de loop der jaren is het Hof van Justitie deze benadering ook gaan toepassen in relatie tot klachten over (beweerdelijk) onrechtmatige staatssteun in het kader van beroep tegen een betaalde heffing, voor zover tussen beide een dwingend bestemmingsverband bestaat. Zie o.m. gev. zaken C-261/01 en C-262/01, Van Calster en Cleeren, *Jur.* 2003, p. I-12249. De ratio hiervan is dat de wijze van financiering van invloed kan zijn op de beoordeling van de verenigbaarheid van de steun en, voor zover sprake is van een dwingend bestemmingsverband, de heffing bijgevolg ook dient te worden aangemeld. Zie voor een illustratie op nationaal niveau CBB 7 april 2004, *LJN* AO7843. Zie over toepassing van het staatssteunrecht door de nationale rechter uitgebreid W. den Ouden (red.), *Staatssteun en de Nederlandse rechter*, Deventer: Kluwer 2005.

**3**

Voor zover bekend, heeft het Hof van Justitie art. 88, derde lid, EG nooit in verband gebracht met zaken in de sfeer van de ruimtelijke ordening, waarin noch de eigenlijke steunmaatregel, noch een in dat verband betaalde heffing, maar besluitvorming omtrent een bestemmingsplan voorwerp van geschil vormt. Kenmerkend voor dit soort zaken is dat de miskenning van het staatssteunrecht, in het bijzonder van art. 88, derde lid, EG, wordt aangevoerd in beroep tegen besluitvorming rond (de goedkeuring of vrijstelling van) bestemmingsplannen, ‘slechts’ met als doel de financiële uitvoerbaarheid daarvan in twijfel te trekken. Daarbij wordt doorgaans aangevoerd dat een bepaalde overheidsbijdrage ter financiering van het plan (in de onderhavige uitspraak de rijksbijdrage ter hoogte van € 18,6 mln) niet conform de Europese staatssteunregels is aangemeld, hetgeen de status van die bijdrage onzeker maakt, waardoor de financiële uitvoerbaarheid van het plan niet zou zijn gegarandeerd. Het zijn meestal geen concurrenten van de ontvanger van de (vermeende) staatssteun die zich in dit soort zaken op het staatssteunrecht beroepen, maar andere partijen, zoals omwonenden en milieuorganisaties in de onderhavige uitspraak over *vliegveld* Eelde. Kuypers en De Groot stellen in hun annotatie bij ABRvS 16 januari 2008, *BR* 2008, 418 dat voor deze partijen veelal geldt ‘schieten op alles wat beweegt’.

Kijken we nu naar de wijze waarop de Afdeling bestuursrechtspraak in dit soort zaken doorgaans met art. 88, derde lid, EG omgaat, dan valt op dat de Afdeling de hiervoor besproken communautaire benadering normaliter ook niet probeert toe te passen. Zij beperkt zich in dit soort zaken gewoonlijk tot een lichtere ‘aannemelijkheidstoets’, waarin louter wordt beoordeeld of sprake is van een vermoeden van staatssteun en zo ja, of sprake is van een ‘mogelijke schending’ van de aanmeldingsverplichting uit de eerste volzin van art. 88, derde lid, EG. Van de vijf hiervoor geformuleerde vragen worden in die benadering dus hooguit de eerste en de derde vraag, zij het nog zeer voorzichtig, beantwoord. Op het punt van de beoordeling van het vermoeden van staatssteun, ontwaren Kuypers en De Groot in de uitspraken van de Afdeling (ten minste) twee benaderingen. In de eerste benadering gaat de Afdeling aan de hand van communautaire richtlijnen van de Commissie uit van een vermoeden van staatssteun, dat alleen kan worden weerlegd door een andersluidende eindbeslissing van de Commissie in het kader van een procedure op grond van art. 88, tweede lid, EG. In de tweede benadering neemt de Afdeling aan dat een eventueel vermoeden van staatssteun op basis van communautaire richtlijnen van de Commissie, ook buiten de procedure van art. 88, tweede lid, kan worden weerlegd. De Afdeling lijkt in de eerste benadering sneller geneigd het bestreden besluit te vernietigen. Zie bijv. ABRvS 6 mei 2004, *AB* 2004, 225, m.nt. F.A.G. Groothuijse en ABRvS 26 september 2007, *LJN* BB4338. In ieder geval blijkt van groot belang te zijn hoe zorgvuldig het besteden besluit is voorbereid en in hoeverre daarbij al rekening is gehouden met de mogelijkheid dat gelet op de financiële uitvoerbaarheid van het bestemmingsplan of aanverwant RO-besluit sprake

zou kunnen zijn van aanmeldingsplichtige staatssteun. Indien de Afdeling de financiële uitvoerbaarheid van het bestemmingsplan onvoldoende onderzocht acht, volgde tot de onderhavige uitspraak vernietiging van het bestreden besluit vanwege strijd met art. 3:2 Awb. Een dergelijke uitspraak kan gelet op het voorwerp van geschil slechts directe consequenties hebben voor dat bestreden besluit zelf en niet voor de financiering die in dat verband als (vermoedelijke) staatssteun wordt beschouwd. Kuypers en De Groot merken in dit verband op: 'De rol van de Afdeling staat bij een beoordeling van een mogelijke schending van art. 88 lid 3 EG een stap verder verwijderd dan een rechter die op vordering van bijvoorbeeld een concurrent moet oordelen over de rechtmatigheid van de "tenuitvoerlegging" van een steunmaatregel.' ( *BR* 2008, 418). De mogelijke miskenning van de aanmeldingsverplichting uit art. 88, derde lid, EG blijkt in dit soort zaken ook relatief te zijn. Wanneer voldoende is aangetoond dat de financiële uitvoerbaarheid van het plan ook zonder de (als vermoedelijke staatssteun bestempelde) overheidsbijdrage kan worden gerealiseerd, verbindt de Afdeling aan deze mogelijke miskenning gewoonlijk geen consequenties. Zie bijv. ABRvS 9 augustus 2006, Gst. 7248, nr. 51, m.nt. J.M.H.F. Teunissen en ABRvS 26 juli 2006, *AB* 2006, 367, m.nt. F.A.G. Groothuijse. Ook recentelijk — na de onderhavige uitspraak van 11 juni 2008 — koos de Afdeling voor deze benadering. Zie ABRvS 22 oktober 2008, *LJN* BG1152. In de volgende twee punten zal nu worden bezien hoe de uitspraak van 11 juni 2008 zich tot deze 'gangbare' rechtspraak verhoudt.

**4**

Het valt in de eerste plaats op dat de Afdeling in de onderhavige zaak ter beoordeling van het beroep op het staatssteunrecht gebruik heeft gemaakt van de mogelijkheid om vragen te stellen aan de Commissie. Bijna vier maanden later heeft de Commissie schriftelijk op deze vragen (acht in totaal) geantwoord. De vragen en antwoorden zijn aangehecht bij de uitspraak, zoals gepubliceerd op de website van de Raad van State. Deze vorm van 'loyale samenwerking' tussen een nationaal rechtscollege en de Commissie is vrij uitzonderlijk. Zie voor twee eerdere Nederlandse voorbeelden CBB 7 april 2004, *LJN* AO7843 en CBB 14 december 2006, *AB* 2007, 136, m.nt. P.C. Adriaanse en W. den Ouden in samenhang met CBB 10 juli 2007, *AB* 2008, 68, m.nt. P.C. Adriaanse en W. den Ouden.

De mogelijkheid voor nationale rechters om zich bij vragen omtrent (aanmelding van) staatssteun te wenden tot de Commissie is op basis van rechtspraak van het Hof van Justitie van de EG (HvJ EG 11 juli 1996, zaak C-39/94, SFEI, *Jur.* 1996, p. I-3547) nader uitgewerkt in de 'Bekendmaking van de Commissie betreffende samenwerking tussen nationale rechterlijke instanties en de Commissie op het gebied van steunmaatregelen van de Staten' (*PbEG* 1995, C 312/8). Inmiddels heeft de Commissie ter consultatie een concept-'Mededeling over de handhaving van de staatssteunregels door de nationale rechtbanken' op haar website geplaatst, die is bedoeld om te zijner tijd de Bekendmaking uit 1995 te vervangen. In deze concept-Mededeling wordt ten opzichte van de eerdere Bekendmaking verduidelijkt dat de Commissie op twee manieren bijstand kan verlenen aan nationale rechters (par. 79 e.v.). In de eerste plaats kan een rechter de Commissie verzoeken relevante informatie te verstrekken waarover laatstgenoemde beschikt. Het kan gaan om procedurele informatie (zoals bijvoorbeeld in de onderhavige zaak over de aanmeldingsplichtigheid van een steunmaatregel), maar ook om praktische informatie (bijvoorbeeld over documenten waarover de Commissie beschikt). De Commissie dient er volgens de concept-Mededeling naar te streven de gevraagde inlichtingen binnen één maand na de datum van ontvangst van het verzoek te verstrekken (par. 84). In de tweede plaats, zo blijkt nu expliciet uit de concept-Mededeling, kan een nationale rechter de Commissie om advies vragen over de toepassing van de staatssteunregels. Dit advies kan in beginsel betrekking hebben op alle economische, feitelijke of juridische vraagstukken die zich in het kader van de nationale procedure voordoen. Te denken valt aan de vraag of een bepaalde maatregel als staatssteun in de zin van art. 87, eerste lid, EG moet worden aangemerkt, of het bestaande steun dan wel nieuwe steun betreft, of deze staatssteun aanmeldingsplichtig is of dat wellicht op de aanmeldingsverplichting een uitzondering bestaat op grond van een groepsvrijstellingsverordening of anderszins. Vragen over de uitlegging van het staatssteunrecht dienen in beginsel binnen vier maanden na de datum van ontvangst van het verzoek te zijn beantwoord (par. 94). In de concept-Mededeling staat dat de Commissie zich in haar advies beperkt tot het verschaffen van de feitelijke informatie of de economische of juridische toelichting waarom is verzocht, zonder nader in te gaan op de grond van de bij de nationale rechtbank aanhangige zaak. Bovendien is het advies van de Commissie, anders dan de authentieke uitlegging van het gemeenschapsrecht door de rechterlijke instanties van de EG, juridisch niet bindend voor de nationale rechter (par. 93).

Kijken we nu naar de vragen en antwoorden in de onderhavige zaak over de baanverlenging op GAE, dan valt in de eerste plaats op dat de vragen van de Afdeling bestuursrechtspraak passen in de categorie vragen over de toepassing van het staatssteunrecht en daarmee dus geheel terecht zijn gesteld. De Afdeling vraagt (kernachtig samengevat) of de bijdrage van de Staat van € 18,6 mln kan worden aangemerkt als staatssteun in de zin van art. 87, eerste lid, EG, en zo ja, of dit dan bestaande of nieuwe steun betreft en of deze steun in de zin van art. 88, derde lid, EG moest worden aangemeld, mede in het licht van diverse Mededelingen, relevante beschikkingen of andere besluiten van de Commissie en communautaire rechtspraak. Zoals reeds gezegd, volgden de antwoorden van de Commissie bijna vier maanden later (met excuses van de zijde van de Commissie hiervoor) en dus nog net binnen de in de concept-Mededeling gestelde termijn. Het valt op dat de Commissie uitvoerig en gericht antwoord heeft gegeven op de gestelde vragen. Op diverse punten in de uitspraak van de Afdeling bestuursrechtspraak wordt naar deze antwoorden verwezen. Ten aanzien van één vraag beperkt de Commissie zich niet tot een uitleg van het staatssteunrecht, maar gaat zij zelfs ook over tot uitleg van de toepasselijke nationale wetgeving (de Wet houdende oprichting van naamloze vennootschappen voor de luchtvaarttereinen Eelde, Zuid-Limburg en Texel van 21 december 1955, *Stb*. 1955, 622) en daarbij behorende parlementaire geschiedenis. Daarbij moet wel worden opgemerkt dat hiernaar in de vraagstelling uitdrukkelijk was verwezen en dat de desbetreffende stukken als bijlage waren meegestuurd naar de Commissie. Hoewel de Commissie daarbij zelf al opmerkt dat de uitleg van nationale wetgeving in de eerste plaats een taak is van de nationale rechter, moet in het licht van voornoemde concept-Mededeling toch worden betwijfeld of zij hiermee niet te ver is gegaan in

haar verplichting tot 'loyale samenwerking' met de nationale rechterlijke instanties. Afgezien van deze kanttekening, toont de onderhavige zaak aan dat het mechanisme van vraag en antwoord in staatssteunzaken voor nationale rechters (zeker wanneer zij niet regelmatig met het staatssteunrecht van doen hebben) toch van groot nut kan zijn. Na een wat teleurstellende ervaring in het verleden (zie CBB 10 juli 2007, *AB* 2008, 68, m.nt. P.C. Adriaanse en W. den Ouden) kan dat zondermeer als een positieve uitkomst van deze zaak worden beschouwd.

**5**

Het valt vervolgens op dat de Afdeling bestuursrechtspraak in de onderhavige uitspraak veel concreter en directer toetst aan art. 88, derde lid, EG dan in voorgaande uitspraken. Mede op basis van de antwoorden van de Commissie komt de Afdeling niet slechts tot een vermoeden van staatssteun (zoals gebruikelijk in eerdere uitspraken), maar concludeert zij op basis van een reeks overwegingen stellig dat de rijksbijdrage van € 18,6 mln voor de aanleg van de verlengde start- en landingsbaan op GAE als staatssteun moet worden aangemerkt. Ook gaat de Afdeling in deze uitspraak, zoals gezegd, uitvoerig in op de tweede vraag uit het eerder genoemde stappenschema in relatie tot toepassing van art. 88, derde lid, EG, namelijk of sprake is van nieuwe steun. De Afdeling concludeert dat geen sprake is van bestaande steun, waaruit kan worden afgeleid dat dus sprake is van nieuwe steun. Art. 1, sub c, van Verordening (EG) nr. 659/1999 omschrijft nieuwe steun immers als 'alle steun (…) die geen bestaande steun is, met inbegrip van wijzigingen in bestaande steun'. Ook de derde vraag in het eerder genoemde stappenschema van de communautaire benadering (i.e. de vraag of sprake is van aanmeldingsplichtige steun) komt expliciet aan de orde. Op dit punt is de Afdeling iets voorzichtiger in haar beantwoording. De Afdeling overweegt: 'dat verweerders ten tijde van het nemen van het besluit (d.w.z. de beslissing op de bezwaren tegen het A-besluit en het RO-besluit) aan de Mededeling uit 1994 (een beleidsdocument van de Commissie) niet het gerechtvaardigd vertrouwen mochten ontlenen dat de Commissie een bijdrage van het Rijk ter bekostiging van de verlenging van de start- en landingsbaan van GAE niet zou aanmerken als steunverlening, althans niet als steunverlening die aanmelding behoefde'. Volgens de Afdeling hadden verweerders de voorgenomen verlening van staatssteun daarom moeten aanmelden, dan wel de Commissie moeten benaderen teneinde zekerheid te krijgen dat aanmelding volgens de Commissie niet nodig is (r.o. 2.21.5.10). De Afdeling concludeert dus zelf niet dat sprake is van aanmeldingsplichtige steun, maar gaat uit van een sterke aannemelijkheid voor aanmelding, al was het maar om uitsluitsel van de Commissie daarover te verkrijgen. Gelet op haar eerdere uitspraken is deze benadering niet zo opmerkelijk. Wel bijzonder is dat de Afdeling vervolgens overweegt: 'Door dit na te laten is in strijd gehandeld met de op Nederland als lidstaat rustende verplichting voortvloeiend uit art. 88, derde lid, van het EG-Verdrag'. Hieruit blijkt dat de Afdeling nu niet zoals gebruikelijk art. 3:2 Awb als uiteindelijke toetssteen hanteert, maar direct aan art. 88, derde lid, EG toetst. De gebruikelijke link naar de financiële uitvoerbaarheid van het bestreden besluit wordt, hoewel aangevoerd door appellanten, door de Afdeling in het geheel niet meer gemaakt. Daarmee wijkt de Afdeling duidelijk af van haar eerdere uitspraken (zie punt 3) en lijkt zij meer aansluiting te zoeken bij de communautaire benadering, zoals ontwikkeld in concurrentenzaken en heffingszaken (zie punt 2). Wel moet daarbij worden opgemerkt dat Europeesrechtelijk gezien van een schending van art. 88, derde lid, EG pas sprake kan zijn als onomstotelijk vaststaat dat de steun daadwerkelijk aanmeldingsplichtig is. Dat is in casu juist nog niet het geval, nu de Afdeling zich beperkt tot een aannemelijkheidstoets op dit punt. De stellige conclusie van de Afdeling in de hiervoor aangehaalde overweging lijkt derhalve wat voorbarig.

Maar ook als is in casu wel onomstotelijk zou vaststaan dat sprake is van aanmeldingsplichtige steun, rijst de vraag of de aangehaalde overweging wel zo gelukkig is gekozen. De Afdeling wekt nu de indruk dat bij directe toetsing aan art. 88, derde lid, EG alleen relevant is of de aanmeldingsverplichting uit de eerste volzin van deze bepaling wel of niet is nageleefd. Uit vaste communautaire rechtspraak volgt echter dat nationale rechters vooral moeten toetsen of de standstillverplichting uit de laatste volzin van art. 88, derde lid, EG al dan niet is geschonden. Aan de laatste volzin wordt immers rechtstreekse werking toegekend en aan een miskenning van deze standstillverplichting zal de aangezochte rechter Europeesrechtelijk gezien in het bijzonder consequenties moeten verbinden (zie punt 2). De standstillverplichting komt in de uitspraak van de Afdeling in algemene zin wel ter sprake (r.o. 2.21.3), maar blijft in de verdere beoordeling van het beroep op het staatssteunrecht geheel buiten beschouwing. Geconcludeerd moet worden dat de onderhavige uitspraak van 11 juni 2008 ergens zweeft tussen de communautaire benadering van toepassing van art. 88, derde lid, EG (zoals ontwikkeld in relatie tot concurrentenklachten en heffingsklachten) en de gebruikelijke benadering van de Afdeling bestuursrechtspraak in zaken op het terrein van ruimtelijke ordening.

**6**

De stap van de Afdeling richting een directere toetsing aan art. 88, derde lid, EG in een zaak als de onderhavige is niet zonder juridische haken en ogen. Dat blijkt met name in de conclusie van de uitspraak, waar de Afdeling overweegt: 'dat het bestreden besluit (…) is genomen in strijd met de op Nederland als lidstaat rustende verplichting voortvloeiend uit art. 88, derde lid, van het EG-Verdrag. Het bestreden besluit komt derhalve voor vernietiging in aanmerking' (r.o. 2.22). Hier lijkt de Afdeling wat kort door de bocht te gaan. Nationaalrechtelijk gezien kan naleving van de Europese staatssteunregels een rol spelen in het kader van de beoordeling van de financiële uitvoerbaarheid van het bestreden besluit, Europeesrechtelijk gezien betekent dat nog niet dat het in casu bestreden besluit (de beslissing op de bezwaren tegen het A-besluit en het RO-besluit) zelf ook conform art. 88, derde lid, EG moest worden aangemeld en moest worden opgeschort. Deze verplichtingen gelden volgens de huidige stand van de communautaire rechtspraak alleen voor nieuwe steunmaatregelen als zodanig en, in geval er een dwingend bestemmingsverband bestaat tussen een betaalde heffing en een steunmaatregel, ook voor die heffing (zie punt 2). Het bestreden besluit in de onderhavige zaak kan daaraan niet gelijk worden gesteld. In casu zouden de verplichtingen daarentegen wel direct hebben gegolden voor de rijksbijdrage van € 18,6 mln voor de verlenging van de start- en landingsbaan op GAE, maar daartegen was het beroep niet gericht. Daaraan doet niet af de constatering van de Afdeling

dat tot de aanleg en het gebruik van de verlengde start- en landingsbaan alleen zal worden overgegaan indien GAE voor de financiering van de baanverlenging waarop het A-besluit ziet, kan rekenen op een financiële bijdrage die de kosten van de baanverlenging dekt (r.o. 2.21.1).

De directe toetsing aan art. 88, derde lid, EG loopt in de onderhavige zaak ook spaak als wordt gekeken naar de consequenties die de Afdeling bestuursrechtspraak kan verbinden aan geconstateerde miskenning van deze bepaling. Zij kan hooguit het bestreden besluit vernietigen. De geldigheid van het steunbesluit zelf kan in deze zaak echter niet worden aangetast, terwijl dat volgens vaste rechtspraak van het Hof van Justitie van de EG toch juist één van de consequenties moet zijn bij geconstateerde schending van art. 88, derde lid, EG. Vanwege het andersoortige voorwerp van geschil — in vergelijking met concurrentenzaken gericht tegen de eigenlijke steun — kan de Afdeling dus niet voldoen aan de vergaande eisen (zie punt 2) die het Hof van Justitie van de EG stelt in situaties van onrechtmatige staatssteun.

**7**

Gelet op deze juridische haken en ogen bij directere toetsing aan art. 88, derde lid, EG in procedures als de onderhavige, rijst de vraag of belanghebbenden zonder concurrentiemotieven in procedures bij de nationale rechter eigenlijk wel een beroep (zouden moeten) kunnen doen op schending van deze bepaling. Volgens vaste communautaire rechtspraak is het doel van art. 88, derde lid, EG de invoering van met het EG-Verdrag strijdige steunmaatregelen voorkomen (zie o.m. zaak C-334/99, Duitsland/Commissie, *Jur.* 2003, p. I-1139, r.o. 49). Het materiële rechtsbelang bij de naleving van deze bepaling is door advocaat-generaal Geelhoed ooit omschreven als 'het voorkomen van concurrentievervalsing door steunmaatregelen van staten door eenzijdig en prematuur optreden van lidstaten' (Conclusie van 4 maart 2004 in zaak C-174/02 en zaak C-175/02). Hieruit lijken op zich nog niet direct beperkingen voort te vloeien. Ook het Hof van Justitie van de EG bezigde in uitspraken over art. 88, derde lid, EG lange tijd slechts algemene bewoordingen als 'de justitiabelen die zich op een dergelijke miskenning kunnen beroepen' (HvJ EG 21 november 1991, zaak C-354/90, FNCE, *Jur.* 1991, p. I-5505, r.o. 12). Met het oog op de effectieve werking van het uitvoeringsverbod van art. 88, derde lid, laatste volzin, EG is een dergelijke ruime benadering natuurlijk erg gunstig. De discussie laaide echter op toen het Hof van Justitie in de zaak Streekgewest Westelijk Noord-Brabant als volgt overwoog: 'Een justitiabele kan er belang bij hebben zich voor de nationale rechter te beroepen op de rechtstreekse werking van het uitvoeringsverbod van art. 93, lid 3, laatste volzin, van het Verdrag (nu 88, derde lid, EG), niet alleen om de negatieve gevolgen ongedaan te laten maken van de door de onrechtmatige steunverlening teweeggebrachte concurrentievervalsing, maar ook om terugbetaling te verkrijgen van een heffing die in strijd met die bepaling was geïnd. In dit laatste geval doet de vraag of de justitiabele wordt geraakt door de concurrentievervalsing die het gevolg is van de steunmaatregel, niet ter zake voor de beoordeling van zijn procesbelang. Er dient enkel rekening te worden gehouden met het feit dat de justitiabele aan een heffing is onderworpen die integrerend deel uitmaakt van een steunmaatregel die in strijd met het in deze bepaling neergelegde verbod tot uitvoering is gebracht.' (HvJ EG 13 januari 2005, zaak C-174/02, *Jur.* 2005, p. I-85, r.o. 19, *AB* 2005, 118, m.nt. AdMvV, *SEW* 2005, 36, m.nt. J.H. Jans & J.W. van de Gronden). Jans leest in deze uitspraak van het Hof van Justitie het einde van de discussie over een Europeesrechtelijke Schutznorm (J.H. Jans, *Doorgeschoten? Enkele opmerkingen over de gevolgen van de Europeanisering van het bestuursrecht voor de grondslagen van de bestuursrechtspraak*, *Groningen*: ELP 2005). Wesseling en Neij stellen op basis van deze uitspraak zelfs dat de nietigheid van een niet aangemelde regeling die mogelijk staatssteun vormt door een ieder zou kunnen worden ingeroepen (R. Wesseling & N. Neij, 'Kroniek van het Europees recht', *NJB* 2005, p. 465-470 op p. 467). De Moor-van Vugt leest in de uitspraak van het Hof van Justitie — terecht — juist wel een beperking, in de zin dat als het gaat om de betaling van heffingen, alleen degene die een heffing heeft betaald die integrerend deel uitmaakt van een onrechtmatige steunmaatregel zich op art. 88, derde lid, laatste volzin, EG kan beroepen ( *AB* 2005, 118). Zie in gelijke zin K.J. Defares & S.M. Goossens, 'Streekgewest Westelijk-Noord-Brabant: verduidelijking van de kring van beroepsgerechtigden onder de steunregels', *NTER* 2005, p. 160-163. Volgens vaste rechtspraak van het Hof van Justitie van de EG maakt een heffing integrerend deel uit van een steunmaatregel als sprake is van een dwingend bestemmingsverband tussen de opbrengst van de heffing en de betrokken steunmaatregel (zie o.m. HvJ EG 13 januari 2005, zaak C-175/02, Pape, *Jur.* 2005, p. I-127, r.o. 15). In lijn met de overwegingen van het Hof van Justitie was de Hoge Raad in zijn uitspraak in vervolg op de prejudiciële verwijzing in de zaak Streekgewest Westelijk Noord-Brabant van oordeel dat een dergelijk dwingend bestemmingsverband in casu ontbrak. Zie HR 10 maart 2006, *LJN* AU3098, r.o. 2.3.

Ook anderszins kan echter worden gesteld dat het Hof van Justitie in de uitspraak Streekgewest Westelijk-Noord-Brabant toch een beperking in de kring van beroepsgerechtigden aanbrengt. Het Hof overweegt dat de vraag of de justitiabele geraakt wordt door concurrrentievervalsing 'in dit laatste geval' niet ter zake doet voor de beoordeling van zijn procesbelang. Daarmee doelt het Hof slechts op acties gericht op terugbetaling van heffingen die in verband met onrechtmatige steunverlening zijn geïnd. Voor de overige acties 'om de negatieve gevolgen ongedaan te maken van de door de onrechtmatige steunverlening teweeggebrachte concurrentievervalsing' lijkt de vraag of de justitiabele wordt geraakt door concurrentievervalsing dus wel degelijk van belang te zijn. Steun voor deze lezing valt — zij het nog voorzichtig geformuleerd — al te vinden in de zaak Transalpine Ölleitung (HvJ EG 5 oktober 2006, C-368/04, *Jur.* 2006, p. I-9957, r.o. 46), maar veel duidelijker in de uitspraak in de zaak CELF/SIDE waarin het Hof van Justitie ter onderbouwing van de taak van nationale rechters in relatie tot art. 88, derde lid, laatste volzin, EG overweegt: 'Het is namelijk van belang om de belangen te beschermen van de partijen die zijn geraakt door een verstoring van de concurrentie als gevolg van de toekenning van de onrechtmatige steun.' (HvJ EG 12 februari 2008, zaak C-199/06, CELF/SIDE, n.n.g, r.o. 38). Uitgaande van een dergelijke beperkte kring van beroepsgerechtigden (vanuit communautair perspectief althans) is ook verklaarbaar waarom het Hof van Justitie in vaste rechtspraak aan schending van het uitvoeringsverbod van art. 88, derde lid, laatste zin, EG primair de consequentie verbindt dat de

concurrentieverhoudingen van vóór de onrechtmatige steunverlening dienen te worden hersteld, hetzij door middel van terugvordering (HvJ EG 11 juli 1996, zaak C-39/94, SFEI, *Jur.* 1996, p. I-3547, r.o. 68) hetzij in een situatie van onrechtmatige, maar verenigbaar verklaarde steun louter door middel van vordering van rente (HvJ EG 12 februari 2008, zaak C-199/06, CELF/SIDE, n.n.g., r.o. 52). Zie in dit verband ook HvJ EG 20 september 2001, zaak C-390/98, Banks, *Jur.* 2001, p. I-6117, r.o. 74 en 75.
Dat omwonenden en milieugroeperingen, die ogenschijnlijk heel andere motieven dan concurrentiemotieven hebben, in de onderhavige zaak art. 88, derde lid, EG toch hebben kunnen inroepen, hangt samen met de uitgangspunten van het Nederlandse bestuurs(proces) recht. Zoals bekend kunnen justitiabelen die (om wat voor reden ook) als belanghebbenden worden aangemerkt, 'eenmaal binnen' in beginsel alle mogelijke gronden aanvoeren. In Nederland kennen we in het bestuurs(proces)recht immers geen Schutznorm of relativiteitseis. Dit nationale (proces)recht geldt bij gebreke van communautaire regelgeving ook voor de effectuering van rechtstreeks werkend gemeenschapsrecht in nationale procedures. Het gemeenschapsrecht stelt daarbij slechts de randvoorwaarden van gelijkwaardigheid en effectiviteit (zie HvJ EG 7 september 2006, zaak C-526/04, Laboratoires Boiron, *Jur.* 2006, p. I-7529 en HvJ EG 10 april 2003, zaak C-276/01, Joachim Steffensen, *Jur.* 2003, p. I-3735, r.o. 60). In relatie tot art. 88, derde lid, laatste volzin, EG overwoog het Hof van Justitie in de zaak Streekgewest Westelijk Noord-Brabant in het bijzonder dat de voorschriften van het nationale recht 'niet mogen afdoen aan een doeltreffende rechterlijke bescherming bij de uitoefening van de door de communautaire rechtsorde toegekende rechten' (HvJ EG 13 januari 2005, zaak C-174/02, *Jur.* 2005, p. I-85, r.o. 18). Gelet op de ruime marges in het Nederlandse bestuurs (proces)recht, zal een beperkende werking van het nationale recht in relatie tot art. 88, derde lid, EG op dit punt niet snel worden aangenomen. Sterker gezegd, deze bepaling lijkt zo onderhand een waar communautair breekijzer te worden in nationale procedures, terwijl — zo volgt uit voorgaande analyse — sterk moet worden betwijfeld of dat, gelet op de ratio van art. 88, derde lid, EG, eigenlijk wel de communautaire bedoeling is.

**8**

Zolang het Nederlandse bestuurs(proces)recht daar mogelijkheden voor biedt en nationale rechters bereid en in staat zijn gezien het nationale procesrecht art. 88, derde lid, EG ook los van concurrentiebelangen als 'breekijzer' te hanteren, kan het belanghebbenden niet worden ontzegd op deze bepaling een beroep te doen. De voorgaande analyse van de onderhavige uitspraak van 11 juni 2008 toont echter aan dat de bestuursrechter die een beroep op art. 88, derde lid, EG in relatie tot besluitvorming in de sfeer van ruimtelijke ordening zal moeten beoordelen, zich anders dient op te stellen dan in typische concurrentenzaken. Aan een intensieve en directe toetsing aan art. 88, derde lid, EG in dit soort zaken kleven immers diverse juridische haken en ogen. Na eerdere kritiek op een te terughoudende toetsing van de Afdeling in staatssteunzaken (zie onder meer Jacobs en Den Ouden n.a.v. ABRvS 17 december 2003, *AB* 2004, 262), kan de wil van de Afdeling om intensiever en directer te toetsen aan art. 88, derde lid, EG op zichzelf wel prijzenswaardig worden genoemd, de keuze om dat juist in een zaak als de onderhavige te doen is wat ongelukkig geweest. In zaken als de onderhavige lijkt de 'veilige' toetsing via de band van art. 3:2 Awb juist gepaster. De verdergaande toetsing aan art. 88, derde lid, EG kan dan worden gereserveerd voor behandeling van klachten van concurrenten in beroep tegen steunverlening als zodanig of — zij het minder voor de hand liggend in zaken bij de Afdeling bestuursrechtspraak — voor klachten inzake heffingen ter financiering daarvan.

**9**

Tot slot nog een paar opmerkingen over de consequenties van deze uitspraak van 11 juni 2008. Het bestreden besluit is vernietigd met als praktisch gevolg dat de verlenging van de start- en landingsbaan daardoor voorlopig moet worden uitgesteld. De staatssteun in de vorm van de rijksbijdrage van € 18,6 mln is daarmee niet aangetast. Daarmee is echter niet gezegd dat de onderhavige uitspraak geen consequenties kan hebben voor die rijksbijdrage. Hoewel de Afdeling zelf, zoals eerder gesteld, geen definitief oordeel velt over de aanmeldingsplichtigheid van deze staatssteun, lijkt die aanmeldingsplichtigheid wel te volgen uit de antwoorden van de Commissie op de vragen van de Afdeling, zoals opgenomen in de bijlage bij de uitspraak. Tevens blijkt daaruit (duidelijker dan uit de uitspraak zelf) dat de rijksbijdrage al in 2003 aan GAE is betaald. Daarbij wordt vermeld dat een deel van deze door de Staat ter beschikking gestelde bijdrage door de luchthaven reeds is aangewend ten behoeve van de aankoop van gronden en woningen ter voorbereiding van de aanleg van de verlengde baan. Deze informatie, samen met de constatering van de Afdeling dat aanmelding in casu niet heeft plaatsgevonden, leidt in de onder punt 2 besproken communautaire benadering tot de conclusie dat sprake is van onrechtmatige staatssteun. Nu uit de antwoorden van de Commissie ook blijkt dat over deze staatssteun klachten bij haar zijn ingediend, is er een mogelijkheid dat de Commissie deze steun alsnog in onderzoek neemt. Komt zij dan tot een goedkeuring van deze onrechtmatige staatssteun, dan zou dat voor GAE, gelet op de uitspraak van het Hof van Justitie in de zaak CELF/SIDE (C-199/06), op grond van het gemeenschapsrecht, hoogstens tot een verplichting tot betaling van rente kunnen leiden. Een dramatischer scenario voor het *vliegveld* dreigt, indien de Commissie zou komen tot het oordeel dat sprake is van met de gemeenschappelijke markt onverenigbare staatssteun. In dat geval zal de Commissie in beginsel ook een terugvorderingsbeschikking richten tot Nederland. GAE zal in dat geval worden geconfronteerd met een terugvorderingsclaim voor het gehele bedrag van € 18,6 mln plus rente. Het dan wellicht al in werking getreden wetsvoorstel terugvordering staatssteun (*Kamerstukken II* 2007/08, 31 418) kan in dat geval direct zijn nut bewijzen. Zie over dit wetsvoorstel P.C. Adriaanse & W. den Ouden, 'Effectuering van staatssteunrecht in Nederland', *NTB* 2008, p. 304-315. Saillant detail in dit verband is dat in de overeenkomst over de rijksbijdrage tussen de Staat en GAE N.V. blijkt te zijn bepaald dat de betaalde bijdrage moet worden gerestitueerd indien van de verlenging van de baan wordt afgezien. Gelet op het voorgaande zou het nog wel eens zo kunnen zijn dat op langere termijn juist van baanverlenging moet worden afgezien, omdat de bijdrage moet worden gerestitueerd. En dat allemaal zonder de tussenkomst van concurrent-belanghebbenden!

P.C. Adriaanse

**Voetnoot**

**[1]** Mr. P.C. Adriaanse is universitair docent bij de afdeling Staats- en bestuursrecht van de Universiteit Leiden.

Copyright © Kluwer 2010 Kluwer Online Research
Dit document is gegenereerd op 13-03-2010 AB
Op dit document zijn de algemene leveringsvoorwaarden van Kluwer van toepassing.

EUROPESE COMMISSIE

Brussel, 19.11.2009
C(2009)8677 definitief

**Betreft: Steunmaatregel NN 43/2009 - Nederland**
**Maatregelen ten gunste van Groningen Airport Eelde NV**

Excellentie,

## 1. Procedure

1. Op 2 oktober 2008 en 17 juni 2009 heeft de Commissie, ten gevolge van verscheidene klachten van afzonderlijke personen en van een buurtbewonersvereniging, de Nederlandse autoriteiten verzocht informatie te verstrekken betreffende vermeende steunmaatregelen van de overheid ten gunste van *Groningen Airport Eelde NV*.

2. De Nederlandse autoriteiten hebben de vragen van de Commissie beantwoord op respectievelijk 26 december 2008, 31 juli 2009 en 29 oktober 2009.

## 2. Beschrijving van *Groningen Airport Eelde NV*

3. Groningen Airport Eelde is eigendom van en wordt geëxploiteerd door een onderneming met beperkte aansprakelijkheid "Groningen Airport Eelde NV" (hierna "GAE"), die zelf eigendom is van regionale en lokale autoriteiten[1].

4. GAE is een kleine regionale luchthaven (luchthaven van categorie D), als bedoeld in punt 15 van de communautaire richtsnoeren inzake luchthavens van 2005[2], die zorgt voor internationale en nationale verbindingen met meer bepaald

[1] De huidige aandeelhouders van GAE NV zijn de provincie Groningen (30%), de provincie Drenthe (30%), de stad Groningen (26%), de gemeente Assen (10%) en de gemeente Tynaarlo (4%).

[2] Communautaire richtsnoeren voor financiering van luchthavens en aanloopsteun van de overheid voor luchtvaartmaatschappijen met een regionale luchthaven als thuishaven (PB C 312 van 9.12.2005, blz. 1).

Zijne Excellentie de Heer Maxime VERHAGEN
Minister van Buitenlandse Zaken
Bezuidenhoutseweg 67
NL - 2500 EB Den Haag

de provincies Groningen, Friesland en Drenthe in het noorden van Nederland. In 2007 was de luchthaven goed voor het vervoer van ongeveer 135 000 passagiers (exclusief 31 400 transitpassagiers), die voornamelijk afkomstig waren uit de drie noordelijke provincies van Nederland. De meeste van deze passagiers reisden met bijna 1500 chartervluchten naar en van hun vakantiebestemming in Griekenland, Spanje, Portugal en Turkije.

5. GAE is daarenboven voor Nederland een belangrijk opleidingscentrum voor commerciële piloten. Voorts ontvangt de luchthaven privévliegtuigen (zaken-luchtvaart), taxivluchten, incidentele militaire vluchten en recreatieve vluchten. Tenslotte is de luchthaven ook belangrijk voor maatschappelijke doeleinden, met name in verband met ambulancediensten (traumahelikopter), vluchten voor het vervoer van donororganen ten behoeve van het Universitair Medisch Centrum Groningen en noodinterventies.

## 3. Beschrijving van de steunmaatregelen waarop de klachten betrekking hebben

6. De Nederlandse autoriteiten hebben de volgende maatregelen genomen die kunnen vallen onder het toepassingsgebied van de regels inzake staatssteun:

   a) overheidsfinanciering ten gunste van Luchtverkeersleiding Nederland (hierna "LVNL") voor luchtverkeersleiding op Groningen Airport Eelde

7. De luchtverkeersleiding voor de burgerluchtvaart in Nederland is bij de Luchtvaartwet toegewezen aan LVNL, wat een zogenaamde Autonome administratieve instantie is, die zorgt voor de luchtverkeersleiding in opdracht van het Ministerie van Verkeer en Waterstaat. De kosten van LVNL komen ten laste van de luchtvaartmaatschappijen. De vergoedingen waarop LVNL recht heeft werden tot 2007 ontvangen door Amsterdam Airport Schiphol, Rotterdam airport, de regionale luchthavens en het *Central Route Charges Office* van Eurocontrol. Sinds 1 januari 2008 factureert LVNL haar kosten rechtstreeks aan de luchtvaartmaatschappijen.

8. De staat levert een jaarlijkse bijdrage aan de LVNL-middelen teneinde het exploitatieverlies te dekken dat LVNL lijdt bij de levering van luchtverkeers-diensten ten behoeve van regionale luchthavens. Wat de luchtverkeersleiding door LVNL op Groningen Airport Eelde betreft, liep de overheidsbijdrage in de periode 2003-2007 bijvoorbeeld op tot 12,834 miljoen euro.

**Tabel 1: Overheidsfinanciering van de luchtverkeersleiding op GAE**

| *Jaar* | *Overheidsbijdrage (in miljoen euro)* |
|---|---|

| | |
|---|---|
| ***2003*** | 2,097 |
| ***2004*** | […]* |
| ***2005*** | 3,734 |
| ***2006*** | 2,205 |
| ***2007*** | 2,269 |

Bron: Jaarrekeningen van LVNL

9. De tarieven worden door LVNL berekend in overeenstemming met internationaal erkende richtsnoeren betreffende de waardebepaling van activa en afschrijvingsperiodes, houdende de bepaling dat uitsluitend feitelijke kosten mogen worden aangerekend. Het 'en-route'-tarief wordt vastgelegd op het niveau van Eurocontrol. De compensatie voor de verkeerstoren en de naderingscontrole voor elke luchthaven wordt jaarlijks bepaald door het Ministerie van Verkeer en Waterstaat en wordt gepubliceerd in de Nederlandse Staatscourant.

b) Overheidsfinanciering van de verlenging van de start/landingsbaan van GAE (18,62 miljoen euro)

10. Met het oog op de ontwikkeling van Groningen Airport Eelde heeft de Nederlandse regering in november 1979 in een ontwerpversie van het Structuursplan voor Civiele luchthavens verklaard dat een verlenging van de voornaamste start/landingsbaan van de luchthaven wenselijk was. In 1985 is een eerste milieueffectrapportage (MER) verricht. In een wetsdocument van september 1988, het "Structuurschema Burgerluchtvaartterreinen[3]" (hierna "het SBL"), dat een ruimtelijkeordeningsbesluit is van de nationale regering, is herhaald dat een verlenging van de start/landingsbaan van 1800 tot 2500 meter wenselijk is.

11. Op basis van diverse vervoersstudies en een economische analyse heeft de toenmalige Nederlandse minister van Verkeer en Waterstaat in juni 1991 in overleg met de regio besloten dat de verlenging van de baan gerealiseerd kon worden.

12. Op 10 januari 1992 heeft de minister van Verkeer en Waterstaat de Raad van Beheer van GAE schriftelijk de bevestiging gegeven dat de verlenging van de start/landingsbaan noodzakelijk was voor een verdere ontwikkeling van de luchthaven van Eelde en van de regio. In hetzelfde schrijven heeft de minister bevestigd dat de overheidsfinanciering van de verlenging van de baan beperkt zal blijven tot de kosten van deze verlenging.

13. In het Relus-beleidsdocument van 1997 werd bevestigd dat: "de baanverlenging in Groningen Airport Eelde zal gebeuren met 100% overheidsfinanciering" en "deze financiële betrokkenheid van de overheid in de verlenging van de baan tot 2500 meter is gebaseerd op de aangegane verbintenissen".

[3] Structuurplan voor civiele luchthavens.

* materiële fout – lees 2,529

14. Op 16 december 2003 hebben de staat en GAE een overeenkomst gesloten betreffende onder meer de financiering van de baanverlenging. In dit document zijn de partijen overeengekomen dat de staat zal bijdragen tot de financiering van de baanverlenging ten belope van maximaal 18,62 miljoen euro en dat de onderneming de kosten voor de vernieuwing van de bestaande infrastructuur zal dragen (d.w.z. 3,58 miljoen euro) [4].

15. Het bedrag van 18,62 miljoen euro is betaald in drie termijnen: 7 082 200 euro is betaald op 19 december 2003, 7 000 000 euro op 23 december 2003 en 4 537 800 euro op 23 februari 2004.

16. Op 11 juni 2008 heeft de Nederlandse Raad van State geconcludeerd dat het bedrag van 18,62 miljoen euro moet worden beschouwd als een steunmaatregel van de staat in de zin van artikel 87, lid 1, van het EG-Verdrag. Deze conclusie is gebaseerd op het oordeel van dit nationale Hof dat de overeenkomst van 16 december 2003 uitsluitend een onvoorwaardelijke en juridisch bindende subsidiebelofte inhield[5].

c) Overheidsbijdrage voor de bouw van een nieuwe in 2001 in bedrijf genomen passagiersterminal (1,2 miljoen euro)

17. In kader van het 5e Integrale Structuurplan (ISP) voor het noorden van het land heeft de Nederlandse overheid een bijdrage geleverd van 1,2 miljoen euro voor de bouw van een nieuwe passagiersterminal te GAE[6].

18. Deze subsidie van 1,2 miljoen euro voor het project "GAE Passagiersterminal" is op 4 november 1998 aan GAE toegekend door het Samenwerkingsverband Noord-Nederland, een assemblee van de provincies Groningen, Friesland en Drenthe waaraan de uitvoering van het ISP was toevertrouwd[7]. De uitvoering van het project is van start gegaan in mei 2000 en de terminal is opgeleverd en in bedrijf genomen in mei 2001.

d) Compensatie van de exploitatieverliezen van GAE sinds de oprichting van de NV

19. Na de tweede wereldoorlog is de Nederlandse staat gestart met overleg inzake de aanleg en exploitatie van bepaalde civiele luchthavens, onder meer die van Eelde.

---

4 De totale investeringskosten (renovatie en verlenging van de bestaande start/landingsbaan) werden in 2002 geraamd op 22,2 miljoen euro, wat dus een gemiddelde steunintensiteit van 84% inhoudt.

5 Zie bijvoorbeeld Zaak C99/98, Oostenrijk tegen Commissie [2001] Jurispr. blz. I-1101.

6 De totale kosten van het project waren geraamd op 3,86 miljoen euro.

7 Het ISP heeft de overheidsbijdrage (uit de begroting van het Ministerie van Economische zaken) ingebed in een breder programma ter ondersteuning van de regionale economische structuur van Noord-Nederland, het zogenaamde 'Economisch Meerjarenperspectief Noord-Nederland 1994-2000' dat is opgesteld door het SNN (Samenwerkingsverband Noord-Nederland). Dit meerjarenperspectief vormde ook het kader voor de uitrol van fondsen van de Europese structuurfondsen waarvoor Noord-Nederland in aanmerking kwam.

20. In die context is in een schrijven, d.d. 1 november 1947, van het Ministerie van Vervoer aan het gemeentebestuur van Groningen voorgesteld een financiële regeling te treffen voor de oprichting van een onderneming met beperkte aansprakelijkheid. Daarbij werd onder meer voorgesteld dat de publieke aandeelhouders van de op te richten onderneming de exploitatieverliezen van de luchthaven zouden dekken met een verdeelsleutel van 40% (Staat) - 60% (regionale en lokale autoriteiten).

21. In een schrijven d.d. 15 september 1951 heeft de afgevaardigd bestuurder van de NV Luchtvaartterrein Noord Nederland[8] zijn aandeelhouders gevraagd of zij het eens waren met het ministeriële voorstel, bv. of zij ermee akkoord gingen de exploitatieverliezen van de opvolger van NV Luchtvaartterrein te dekken overeenkomstig bovenstaande verdeelsleutel.

22. In een schrijven d.d. 30 september 1952 heeft de afgevaardigd bestuurder van de NV Luchtvaartterrein Noord Nederland de minister van Vervoer ervan op de hoogte gesteld dat, overeenkomstig zijn schrijven van 15 september 1951, alle aandeelhouders ermee hadden ingestemd om samen met de overheid een rol te spelen bij het oprichten van de onderneming en het dekken van de exploitatieverliezen van deze onderneming.

23. GAE werd opgericht in 1955 in uitvoering van de 'Wet houdende oprichting van Naamloze Vennootschappen voor de luchtvaartterreinen Eelde, Zuid-Limburg en Texel Act'. Op het moment van de oprichting van de NV werd in de artikelen met betrekking tot de toetreding van de onderneming tot de associatie, als bijlage aangehecht bij de wet van 1955, vermeld dat het tot de opdracht van de onderneming behoort de luchthaven aan te leggen, te onderhouden, te ontwikkelen en te exploiteren.

24. Sinds de oprichting van de NV in 1955 hebben de Nederlandse autoriteiten het belang erkend van Groningen Airport Eelde, met betrekking tot de toegang tot en de economische ontwikkeling van de regio Noord-Nederland. Zij hebben dan ook de volle verantwoordelijkheid genomen voor de exploitatie van de luchthaven.

25. In 1988 hebben de Nederlandse autoriteiten dit standpunt in het SBL herhaald. Overeenkomstig dit wetgevingsbesluit is GAE ertoe gehouden de toegankelijkheid van de regio via de lucht te waarborgen en op die wijze bij te dragen tot de ruimtelijke structuur en de socioculturele en sociale ontwikkeling van Noord-Nederland. Bij die gelegenheid hebben de Nederlandse autoriteiten GAE ook aangewezen als de locatie voor het centrum van de nationale luchtvaartschool voor piloten die instrumentvliegvoorschriften (Instrument Flight Rules - IFR) volgen. Voorts heeft het SBL bevestigd dat de (openbare) aandeelhouders ten volle verantwoordelijk zullen blijven voor de exploitatie van de luchthaven.

[8] De onderneming die voorafging aan GAE.

26. In die context zijn sinds de oprichting van de NV aan GAE overheidssubsidies toegekend op jaarbasis teneinde de exploitatieverliezen van de onderneming te dekken[9]. Sinds 1990 heeft GAE bijvoorbeeld de volgende bedragen ontvangen:

**Tabel 2: Overheidssubsidies voor GAE ter compensatie van exploitatieverliezen (in miljoen euro) sinds 1990**

| 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1,2 | 1,6 | 1,4 | 1,2 | 1,1 | 1,5 | 1,4 | 1,1 | 1,1 | 1,0 | 1,1 | 0,9 | 1 |

27. Op 16 december 2003 hebben de regionale en lokale autoriteiten besloten om tijdens de periode 2003-2012 hun aandeel van 60% bij het dekken van de exploitatieverliezen van GAE te verminderen tot een jaarlijkse vaste kapitaalinjectie van 1 miljoen euro[10].

e) Overheidssteun ten bedrage van 2,7 miljoen euro voor de vernieuwing van het riolerings- en drainagesysteem

28. Op 12 december 2001 heeft de Nederlandse staat zich ertoe verbonden de vernieuwing van het riolerings- en drainagesysteem van de luchthaven volledig te bekostigen. De investeringssteun van de overheid bedroeg in het totaal 2,7 miljoen euro en is volledig betaald op 1 januari 2002.

## 4. Toepassingsgebied van het onderhavige besluit

29. Dit besluit heeft betrekking op alle hierboven omschreven maatregelen, met uitzondering van maatregel d), Compensatie van de exploitatieverliezen van GAE sinds de oprichting van de NV.

30. De Nederlandse autoriteiten hebben beklemtoond dat deze maatregel een bestaande steunmaatregel is. Na een eerste analyse van de door de Nederlandse autoriteiten toegezonden informatie, zal de Commissie een en ander verder onderzoeken in een afzonderlijke procedure overeenkomstig artikel 17 van Verordening (EG) nr. 659/1999[11] en zal zij dan de nodige maatregelen treffen.

---

[9] Overeenkomstig het Relus-beleidsdocument van 1997 werd in 2001 besloten om de staatstussenkomst in GAE te beperken. Met name werd overeengekomen dat de centrale overheid haar jaarlijkse bijdrage van 40% ter dekking van de exploitatieverliezen van GAE zou beëindigen. In die context heeft de Nederlandse staat op 1 januari 2002 een eenmalige buyout van de toekomstige exploitatieverliezen van GAE verricht voor een bedrag van 7,2 miljoen euro. Dit bedrag bestaat uit 4,3 miljoen euro (wat overeenstemt met de nettowaarde van het overheidsaandeel (40%) in de voorspelde exploitatieverliezen gedurende de periode 2001-2016 tegen een afschrijvingspercentage van 6,5%) en uit 2,9 miljoen euro voor het verlies van inkomsten ten gevolge van het verbod van opleidingsvluchten met grote vliegtuigen.

[10] De huidige nettowaarde van de opeenvolgende kapitaalinjecties (d.w.z. 7,2 miljoen euro tegen 6,5% over 10 jaar) ligt lager dan wat aan GAE zou moeten worden betaald ingeval bedoelde autoriteiten hun aandeel (60%) in de exploitatieverliezen blijven betalen.

[11] Verordening (EG) nr. 659/1999 van de Raad van 22 maart 1999 tot vaststelling van nadere bepalingen voor de toepassing van artikel 93 van het EG-Verdrag (PB L 83 van 27.3.1999, blz. 1).

## 5. Beoordeling van de overheidsfinanciering van de door LVNL aan GAE geleverde luchtverkeersleidingsdiensten (maatregel a))

31. De Commissie erkent dat LVNL namens de Nederlandse overheid taken uitvoert van algemeen belang die erop gericht zijn bij te dragen tot de handhaving en verbetering van de luchtverkeersveiligheid.

32. De Commissie merkt ook op dat LVNL bevoegd is om de routeheffingen, opgelegd aan de gebruikers van het luchtruim, te innen. Deze heffingen zijn niets meer dan de door de gebruikers te betalen vergoeding voor het verplichte en exclusieve gebruik van de luchtverkeersleidingsfaciliteiten en -diensten. LVNL treedt in die zin op namens de Nederlandse autoriteiten, zonder daarbij enige invloed te hebben op het bedrag van de routeheffingen. Bovendien is de overheidsfinanciering beperkt tot de compensatie van de reëel gemaakte kosten en wordt zij niet gebruikt ter financiering van andere economische activiteiten.

33. In het licht van het bovenstaande is de Commissie van oordeel dat, overeenkomstig de jurisprudentie van het Hof, de werkzaamheden van LVNL neerkomen op het uitoefenen van prerogatieven inzake de controle en het toezicht op het luchtruim die typisch overheidsprerogatieven zijn. Zij hebben geen economisch karakter dat de toepassing van de mededingingsregels van het Verdrag zou kunnen rechtvaardigen[12]. Zij concludeert dus dat de door LVNL uitgevoerde luchtverkeersleiding typisch een activiteit is die onder de verantwoordelijkheid van de overheid valt bij de uitoefening van haar officiële bevoegdheden als een overheidsinstantie, en als zodanig dus niet valt binnen de werkingssfeer van de regels inzake staatssteun.

34. Op die basis concludeert de Commissie dat overheidsfinanciering van de kosten van luchtverkeersleiding geen staatssteun inhoudt in de zin van artikel 87, lid 1, van het EG-Verdrag.

## 6. Beoordeling van de maatregelen met betrekking tot GAE

### 6.1. Overheidsbijdrage voor de nieuwe passagiersterminal (maatregel c))

35. Bij de beoordeling van een nationale maatregel in het kader van de regels inzake staatssteun moet in de eerste plaats worden bepaald of de desbetreffende maatregel onder het toepassingsgebied van artikel 87, lid 1, van het EG-Verdrag valt.

36. Overeenkomstig de jurisprudentie vallen activiteiten die normaliter behoren tot de verantwoordelijkheid van de overheid bij de uitoefening van haar officiële bevoegdheden als overheidsinstantie, immers niet onder het toepassingsgebied van de regels inzake staatssteun (zie punt 33).

37. Het Hof heeft integendeel gesteld dat het begrip onderneming elke eenheid omvat die een economische activiteit uitoefent, ongeacht haar rechtsvorm en de

[12] Zaak C 364/92, Eurocontrol [1994] Jurispr. I-43, punt 30.

wijze waarop zij wordt gefinancierd[13], en dat elke activiteit bestaande uit het aanbieden van goederen en diensten op een gegeven markt een economische activiteit is[14]. Wat het bestaan van staatssteun betreft, moet derhalve worden bepaald of de begunstigde al dan niet een economische activiteit uitoefent[15].

38. Tot onlangs werden bij de ontwikkeling van luchthavens vaak louter territoriale overwegingen, en soms militaire eisen, in acht genomen. Bij de exploitatie van de luchthavens werd meer de logica van een administratie dan die van een commerciële onderneming gevolgd. Voorts was de concurrentie tussen luchthavens en luchthavenexploitanten veeleer beperkt. Rekening houdend met deze omstandigheden werd de financiering van luchthavens en luchthaven-infrastructuur voordien beschouwd als iets wat tot de werkingssfeer van het openbaar beleid behoorde, zodat het probleem van eventuele staatssteun niet aan de orde was.

39. In de afgelopen jaren is deze situatie echter veranderd. De liberalisering van de markt voor luchtvervoersdiensten had tot gevolg dat meer luchtvaart-maatschappijen vliegen op meer luchthavens, waardoor de concurrentie tussen die luchthavens is toegenomen. Hoewel in sommige gevallen dezelfde overwegingen inzake ruimtelijke ordening en dezelfde administratieve structuren voortleven, is in vele andere gevallen de controle van de luchthavens overgedragen van de staat naar de regio's, en worden zij voortaan in sommige gevallen geëxploiteerd door overheidsondernemingen of zelfs door de particuliere sector. Het proces van overdracht naar de particuliere sector verliep doorgaans via een privatisering of de geleidelijke opening van de kapitaal-structuur. In de afgelopen jaren hebben participatiemaatschappijen en investerings- en pensioenfondsen veel belangstelling getoond voor de overname van luchthavens.

40. De luchthavensector van de Gemeenschap heeft de afgelopen jaren dan ook ingrijpende organisationele wijzigingen ondergaan, die niet alleen het gevolg zijn van de actieve belangstelling van privé-investeerders, maar ook van een gewijzigde instelling van de overheid wat de bijdrage van private investeringen bij de ontwikkeling van luchthavens betreft. Deze ontwikkeling heeft geleid tot een grotere diversificatie en complexiteit van de door luchthavens uitgevoerde taken.

41. Deze recente ontwikkelingen hebben ook geresulteerd in een wijziging van de commerciële relaties tussen luchthavens onderling. Terwijl luchthavens in het verleden grotendeels als een publieke infrastructuur werden beheerd die tot doel

---

[13] Zaak C-35/96 Commissie tegen Italië [1998] Jurispr. I-3851, punt 36; C-41/90 Höfner en Elser [1991] Jurispr. I-1979, punt 21; Zaak C-244/94 Fédération Française des Sociétés d'Assurances tegen Ministère de l'Agriculture et de la Pêche [1995] Jurispr. I-4013, punt 14; Zaak C-55/96 Job Centre [1997] Jurispr. I-7119, punt 21.

[14] Zaak 118/85 Commissie tegen Italië [1987] Jurispr. 2599, punt 7; Zaak 35/96 Commissie tegen Italië [1998] Jurispr. I-3851, punt 36.

[15] Overeenkomstig de jurisprudentie van het Europees Hof van Justitie is elke activiteit bestaande uit het aanbieden van goederen en diensten op een gegeven markt een economische activiteit. Zie Zaak C-35/96 *Commissie tegen Italië* [1998] Jurispr. I-3851 en Zaken C-180/98 t/m 184/98 *Pavlov* [2000] Jurispr. I-6451.

had de toegankelijkheid en de territoriale ontwikkeling te bevorderen, hebben in de afgelopen jaren steeds meer luchthavens ook commerciële oogmerken gekregen en concurreren zij onderling om luchtverkeer aan te trekken.

42. De veranderde aard van de luchthavens moet daarom weerspiegeld worden in de juridische beoordeling van luchthavenactiviteiten in het licht van de wetgeving inzake staatssteun. Het is niet langer mogelijk de exploitatie en bouw van luchthavens te beschouwen als een taak voor een administratie die in beginsel buiten het toepassingsgebied van het toezicht op staatssteun valt.

43. In de zaak "Aéroports de Paris"[16] heeft het Europees Hof gesteld dat de exploitatie van een grote luchthaven, inclusief de levering van luchthavendiensten aan luchtvaartmaatschappijen en aan de verschillende dienstverrichters op de luchthaven, een economische activiteit is omdat "*het ter beschikking van luchtvaartmaatschappijen en verschillende dienstverrichters stellen van luchthaveninstallaties ... tegen betaling van een vergoeding waarvan het tarief vrijelijk door de beheerder is vastgesteld, een activiteit van economische aard is die weliswaar op het publieke domein kan worden verricht, maar daardoor nog niet de uitoefening van een overheidstaak vormt*". De luchthavenexploitant verricht dus in beginsel een economische activiteit in de zin van artikel 87, lid 1, van het EG-Verdrag, waarop de regels inzake staatssteun van toepassing zijn.

44. Gezien de huidige ontwikkelingen in de sector is deze aanpak sindsdien door de Commissie in haar in 2005 vastgestelde luchthavenrichtsnoeren uitgebreid tot alle soorten luchthavens, inclusief kleinere luchthavens.

45. Tegen deze achtergrond is de Commissie van mening dat het vanaf 12 december 2000 niet langer *a priori* mogelijk is om de exploitatie van luchthavens uit te sluiten van de toepassing van de regels inzake staatssteun, en zal zij deze regels derhalve met ingang van dat jaar volledig toepassen in de onderhavige zaak.

46. Wat de overheidsfinanciering van de nieuwe terminal betreft, merkt de Commissie op dat de door de Nederlandse staat aangegane financierings-verbintenis is genomen op 4 november 1998, d.w.z. voordat het arrest *Aéroports de Paris* was gewezen. Op dat moment kon niet worden uitgesloten dat de hele exploitatie van luchthavens binnen de werkingssfeer van het publiek domein viel en derhalve geen economische activiteit uitmaakte waarop artikel 87, lid 1, van het EG-Verdrag van toepassing is.

47. Bijgevolg en in het licht van punt 45 van dit besluit en overeenkomstig haar besluitvormingspraktijk[17] concludeert de Commissie dat de overheidssubsidie voor de bouw van een nieuwe passagiersterminal geen staatssteun was op het moment dat de subsidie werd toegekend.

---

[16] Arrest van het Gerecht van Eerste Aanleg van 12 december 2000 in Zaak T-128/98 Aéroports de Paris tegen Commissie [2000] Jurispr. II-3929, bevestigd door het Hof van Justitie in Zaak C-82/01 P Aéroports de Paris tegen Commissie [2002] Jurispr. I-9297.

[17] Zie bijvoorbeeld het besluit van de Commissie van 25.2.2009 betreffende de luchthaven van Kassel-Calden (PB C 97 van 28.4.2009, blz. 4.)

### 6.2. Overheidssubsidies toegekend voor de verlenging van de start/landingsbaan (EUR 18.6 miljoen euro) en voor de vernieuwing van het riolerings- en drainagesysteem (2,7 miljoen euro) (maatregelen b) en d))

#### 6.2.1. Aanwezigheid van staatssteun

48. Overeenkomstig artikel 87, lid 1, van het EG-Verdrag 'zijn steunmaatregelen van de staten of in welke vorm ook met staatsmiddelen bekostigd, die de mededinging door begunstiging van bepaalde ondernemingen of bepaalde producties vervalsen of dreigen te vervalsen, onverenigbaar met de gemeenschappelijke markt, voor zover deze steun het handelsverkeer tussen de lidstaten ongunstig beïnvloedt'.

49. Om te bepalen of een nationale maatregel elementen van staatssteun in de zin van artikel 87, lid 1, van het EG-Verdrag bevat, moet worden vastgesteld: 1) of de maatregel een economisch voordeel biedt aan de betrokken onderneming(en), 2) of dit voordeel met staatsmiddelen is bekostigd, 3) of dit voordeel de mededinging vervalst of dreigt te vervalsen en, ten slotte, 4) of de maatregel het handelsverkeer tussen lidstaten ongunstig beïnvloedt. Indien de beoordeelde maatregel niet aan één van deze criteria voldoet, is de kwalificatie 'staatssteun' niet van toepassing.

*Economisch voordeel*

50. De Commissie merkt op dat de NV GAE sinds haar oprichting twee subsidies heeft ontvangen van de Nederlandse overheid die bedoeld waren om investeringsprojecten te financieren.

51. De Commissie is van mening dat bovengenoemde overheidssubsidies als resultaat hebben dat de onderneming niet de kosten hoeft te dragen die in normale omstandigheden uit eigen financiële middelen zouden moeten worden geput, en op die manier tot gevolg hebben dat de marktkrachten niet hun normale rol spelen[18].

52. Op die basis concludeert de Commissie dat deze overheidssubsidies een specifiek economisch voordeel opleveren voor GAE.

*Gebruik van staatsmiddelen*

53. De Commissie merkt op dat deze subsidies door de Nederlandse staat zijn betaald uit overheidsmiddelen. Zij zijn dus met staatsmiddelen bekostigd.

*Vervalsing van de mededinging en ongunstige beïnvloeding van het*

[18] Zaak C-301/87 *Frankrijk tegen Commissie* [1990] Jurispr. blz. I-307, punt 41.

*handelsverkeer*

54. Wanneer door een lidstaat toegekende staatssteun de positie van een onderneming versterkt ten koste van andere ondernemingen die concurreren op het terrein van de intracommunautaire handel, moet worden geoordeeld dat deze laatsten ongunstig worden beïnvloed door die maatregel. Overeenkomstig de jurisprudentie wordt een maatregel geacht het handelsverkeer te vervalsen wanneer de begunstigde van de staatssteun met andere ondernemingen concurreert op markten die open staan voor mededinging.

55. Zoals hierboven reeds uiteengezet, bestaat er niet alleen concurrentie tussen de luchtvaartmaatschappijen, maar ook tussen luchthavens. Regionale luchthavens, zelfs van categorie D, concurreren momenteel steeds meer om lagekosten-maatschappijen aan te trekken. Het is daarom niet mogelijk om van bij het begin luchthavens van categorie D uit te sluiten van het toepassingsgebied van artikel 87, lid 1, van het EG-Verdrag. De prognoses qua luchtverkeer op GAE maken het niet mogelijk zonder meer uit te sluiten dat het handelsverkeer tussen de lidstaten dreigt te worden verstoord.

56. Elk economisch voordeel dat GAE ontvangt om haar ontwikkeling te financieren, versterkt haar positie tegenover concurrenten op de Europese markt van leveranciers van luchtvaartdiensten. De hier besproken overheids-financiering vervalst derhalve de mededinging of dreigt die te vervalsen en beïnvloedt het handelsverkeer tussen de lidstaten op ongunstige wijze.

57. In het licht van het bovenstaande is de Commissie van mening dat de overheidssubsidies die aan GAE zijn toegekend om investeringsprojecten te financieren, staatssteun zijn in de zin van artikel 87, lid 1, van het EG-Verdrag.

### 6.2.2. Wettelijkheid van de maatregelen

58. Overeenkomstig artikel 88, lid 3, van het EG-Verdrag moet de Commissie van elk voornemen tot invoering of wijziging van steunmaatregelen tijdig op de hoogte worden gebracht om haar opmerkingen te kunnen maken. De betrokken lidstaat kan de voorgenomen steunmaatregelen niet tot uitvoering brengen voordat die procedure tot een eindbeslissing heeft geleid.

59. In het onderhavige geval hebben de Nederlandse autoriteiten de Commissie op 28 december 2008 formeel in kennis gesteld van het feit dat zij GAE in 2001 staatssteun hebben toegezegd ten bedrage van 2,7 miljoen euro teneinde het riolerings- en drainagesysteem van de luchthaven te vernieuwen, en in 2003 18,6 miljoen euro teneinde de start/landingsbaan te verlengen. De Commissie merkt dan ook op dat deze staatssteun tot uitvoering is gebracht voordat de Commissie haar eindbeslissing over de desbetreffende steunmaatregelen heeft genomen.

60. Gezien het voorgaande concludeert de Commissie dat Nederland, door de staatssteun in kwestie tot uitvoering te brengen, heeft gehandeld in strijd met artikel 88, lid 3, van het EG-Verdrag.

### 6.2.3. Evaluatie van de verenigbaarheid

61. De Commissie is van mening dat de maatregelen in kwestie uitsluitend kunnen worden geëvalueerd in het licht van artikel 87, lid 3, onder c), van het EG-Verdrag waarin is bepaald dat: *"steunmaatregelen om de ontwikkeling van bepaalde vormen van economische bedrijvigheid of van bepaalde regionale economieën te vergemakkelijken, mits de voorwaarden waaronder het handelsverkeer plaatsvindt daardoor niet zodanig worden veranderd dat het gemeenschappelijke belang wordt geschaad,"* als verenigbaar met de gemeenschappelijke markt kunnen worden beschouwd. Sinds het "Aéroports de Paris"-arrest heeft de Commissie een reeks criteria uitgewerkt waarop zij zich in haar besluitvorming op dit gebied baseert.

62. De Commissie moet met name onderzoeken of:

- de bouw en de exploitatie van de infrastructuur beantwoorden aan een duidelijk omschreven doel van algemeen belang (regionale ontwikkeling, toegankelijkheid, enz.);
- de infrastructuur nodig is en in verhouding staat tot het gestelde doel;
- de infrastructuur op middellange termijn voldoende gebruiksmogelijkheden biedt, het gebruik van de bestaande infrastructuur in aanmerking genomen;
- de infrastructuur voor alle potentiële gebruikers gelijkelijk en zonder discriminatie toegankelijk is;
- het handelsverkeer niet zodanig wordt beïnvloed dat dit in strijd is met het communautair belang.

*(i) De bouw en de exploitatie van de infrastructuur beantwoorden aan een duidelijk omschreven doel van algemeen belang (regionale ontwikkeling, toegankelijkheid, enz.)*

63. In de eerste plaats erkent de Commissie dat beide projecten tot doel hebben GAE uit te bouwen tot een regionale luchthaven die op veilige wijze toegankelijk is voor grotere en zwaardere vliegtuigen. Dit biedt nieuwe kansen zoals het vervoer van luchtvracht en de verstrekking van geregelde luchtdiensten met bestemming buiten Europa.

64. Voorts neemt de Commissie er akte van dat GAE de opdracht heeft gekregen de luchthavendiensten op gelijke wijze toegankelijk te maken voor alle burgers en ondernemingen in een afgelegen gebied van het Nederlandse territorium. In dat

verband verwachten de Nederlandse autoriteiten dat de uitbouw van GAE de aantrekkelijkheid van het noordoosten van Nederland voor ondernemingen zal vergroten, en bijgevolg de werkgelegenheid voor de inwoners van de regio zal verbeteren.

65. Er moet ook worden opgemerkt dat de luchthaven GAE een integrerend onderdeel vormt van het trans-Europese vervoersnetwerk (TEN-T) overeenkomstig het netwerkschema vervat in punt 6.1 van bijlage I bij Beschikking nr. 1692/96/EG van het Europees Parlement en de Raad van 23 juli 1996 betreffende communautaire richtsnoeren voor de ontwikkeling van een trans-Europees vervoersnet[19] (hierna "de TEN-beschikking"). Overeenkomstig artikel 2, lid 1, van de TEN-beschikking is het een doelstelling van de Gemeenschap om de luchthaven te ontwikkelen tot een integrerend onderdeel van het trans-Europese vervoersnet (regionale component en toegangscomponent). GAE komt in aanmerking als een regionaal verbindingspunt en toegangspunt voor het trans-Europees net van luchthavens als bedoeld in afdeling 6 van de TEN-beschikking. Overeenkomstig bijlage II bij deze beschikking is GAE een luchthaven die in een geïsoleerde regio van de Gemeenschap is gelegen en commerciële diensten aanbiedt met vliegtuigen met een maximumstartmassa van meer dan 10 ton. De luchthaven is gelegen op een afstand van meer dan 100 km van de dichtstbijgelegen internationale luchthaven (Amsterdam Schiphol) of communautaire verbindingspunten (Bremen, Munster/Osnabruck). De Commissie concludeert derhalve dat het ontwikkelingsproject overeenkomstig artikel 7, leden 1 en 2, kan worden beschouwd als een project van gemeenschappelijk belang.

66. In deze omstandigheden is de Commissie van oordeel dat de desbetreffende investeringen bijdragen tot het bereiken van een duidelijk omschreven doel van algemeen belang.

*(ii) De infrastructuur is nodig en staat in verhouding tot het gestelde doel*

67. De door de Nederlandse autoriteiten verstrekte gegevens tonen duidelijk aan dat, zonder de investeringen in kwestie, de luchthaven niet kan voldoen aan de verwachte groei, noch qua passagiersvervoer, noch qua vrachtvervoer. Zoals hierboven reeds vermeld, wordt verwacht dat de luchthaven in de komende jaren een geleidelijke, maar aanzienlijke toename van het passagiers- en vrachtvolume zal kennen. Momenteel is de luchthaven niet geschikt voor geregelde luchtdiensten met bestemming buiten Europa.

68. De huidige start/landingsbaan van 1800 meter wordt in het licht van de verwachte toename van het passagiersvervoer en de ontwikkeling van de regio als inadequaat beschouwd, voornamelijk omdat deze bescheiden lengte de vluchtmogelijkheden van grotere vliegtuigen beperkt. Deze inadequaatheid heeft ook een aanzienlijk effect op de financiële situatie van de luchthaven.

[19] PB L 228 van 9.9.1996, blz. 1, als gewijzigd bij Beschikking nr. 884/2004/EG van 29 april 2004, PB L 201 van 30.4.2004, blz. 1.

69. Om veiligheids- en beveiligingsredenen is bovendien een modernisering van de bestaande infrastructuur vereist om zelfs maar het bestaande verkeer te kunnen behouden. Voorts is de Commissie van mening dat de vernieuwing van het riolerings- en drainagesysteem van de luchthaven de versterking van de veiligheid op het platform en de start/landingsbaan ten doel heeft, meer bepaald bij start en landing in alle weersomstandigheden. In dat verband erkent de Commissie dat de desbetreffende investeringen vereist zijn overeenkomstig de regelgeving die is afgeleid van de *International Standards and Recommended practices* als omschreven in bijlage 14 bij ICAO20. Krachtens deze regelgeving moet regenwater op adequate wijze worden afgevoerd teneinde de veiligheid van de baan en het platform te waarborgen.

70. Zoals hierboven reeds gesteld, zal de ontwikkeling van GAE de toegankelijkheid van de regio Noord-Nederland verbeteren.

71. Afgezien daarvan hebben de Nederlandse autoriteiten kunnen aantonen dat de door de overheid gefinancierde infrastructuurprojecten noodzakelijk zijn om de vastgestelde doelstellingen te bereiken en dat de projecten niet onevenredig omvangrijk zijn.

72. Tot slot zijn de financieringsmogelijkheden voor de luchthaven, afgezien van de financiering die wordt verstrekt door de publieke aandeelhouders, zeer beperkt. In die context, en gezien het feit dat GAE een kleine regionale luchthaven is, kan de Commissie in dit geval het niveau van de staatssteun, zoals omschreven in de punten 14 en 28 van dit besluit, aanvaarden.

73. Gezien het voorgaande concludeert de Commissie dat deze investeringen noodzakelijk zijn en in verhouding staan tot het gestelde doel.

*(iii) de infrastructuur biedt op middellange termijn voldoende gebruiksmogelijkheden, het gebruik van de bestaande infrastructuur in aanmerking genomen*

74. Gezien haar locatie en de omringende markt, beschikt de luchthaven over groeipotentieel. Naar verwachting zal de luchtvervoersector op middellange termijn blijven groeien, maar de huidige luchthavenfaciliteiten hebben te kampen met congestieproblemen en beperkingen van de nachtvluchten.

75. In de afgelopen jaren is het luchtverkeer in Europa aanzienlijk toegenomen. Het luchtverkeer binnen Europa is alleen al in de periode 1991 t/m 2003 bijna verdubbeld. De passagiersaantallen zijn gestegen van ongeveer 555 miljoen in 1991 tot ongeveer 1,1 miljard in 2003. Dit houdt een groei in van 98%, of ongeveer 5,8% per jaar. Deze cijfers volgen de algemene trend in Nederland, waar de vraag om luchtvervoer tussen 1998 en 2007 met 4,5% per jaar is toegenomen. Overeenkomstig de door de Nederlandse autoriteiten verstrekte verkeersprognoses voor geheel Nederland zal het aantal passagiers in Nederland stijgen van ruwweg 31 miljoen in 2009 tot ongeveer 39 miljoen in 2015. Dit komt neer op een jaarlijkse groei met 4,1%.

[20] ICAO, bijlage 14, volume I, *Aerodromes*, hoofdstuk 2, paragraaf 2.9.

76. Wat de toename van het aantal passagiers op GAE betreft, gaan de Nederlandse autoriteiten ervan uit dat het aantal passagiers zal toenemen van 147 456 in 2008 tot 626 000 in 2015.

77. Naar verwachting zal de luchthaven het break-even-punt bereiken in 2016, na verliezen in de eerste jaren na de verlenging van de baan.

78. Op middellange termijn biedt het ontwikkelingsproject van GAE dus goede vooruitzichten voor het gebruik, met name gelet op de bestaande luchthaven-infrastructuur, die door de geplande werkzaamheden zal worden geoptimaliseerd.

*(iv) de infrastructuur is voor alle potentiële gebruikers gelijkelijk en zonder discriminatie toegankelijk*

79. Zoals aangegeven door de Nederlandse autoriteiten hebben, gezien de aard van de investeringen, alle potentiële gebruikers, namelijk luchtvaartmaatschappijen, toegang tot de nieuwe infrastructuur op gelijke en niet-discriminerende basis.

*(v) het handelsverkeer wordt niet zodanig beïnvloed dat dit in strijd is met het communautair belang*

80. De luchthaven valt momenteel in categorie D, als omschreven in punt 15 van de luchthavenrichtsnoeren van 2005. Zelfs na de verlenging van de baan en de investeringen ter renovatie van de luchthaven wordt verwacht dat de luchthaven tegen 2015 niet meer dan ongeveer 626 000 passagiers zal verwerken en een vrij kleine categorie D-luchthaven zal blijven.

81. Hoewel er enig effect zal zijn op de concurrentie en het handelsverkeer op communautair niveau, zal dit effect bijgevolg zeer beperkt blijven.

82. Gezien het bovenstaande concludeert de Commissie dat de ontwikkeling van het handelsverkeer niet zodanig wordt beïnvloed dat dit in strijd is met het communautair belang.

*(vi) Conclusie*

83. De Commissie is van mening dat de staatssteun van 18,62 miljoen euro voor de verlenging van de start/landingsbaan en van 2,7 miljoen euro voor de vernieuwing van het riolerings- en drainagesysteem van de luchthaven voor zover dit steunmaatregelen betreft, geen schade toebrengt aan het gemeenschappelijk belang.

## 7. Conclusie

De Commissie heeft daarom besloten geen om geen bezwaar te maken tegen de maatregelen in kwestie op grond van het feit dat:

- de overheidsfinanciering ten gunste van LVNL voor luchtverkeersleiding op Groningen Airport Eelde geen steunmaatregel is;

- de overheidssubsidie van 1,2 miljoen euro voor de bouw van een nieuwe passagiersterminal geen staatssteun was op het moment dat de subsidie werd toegekend;
- de overheidssteun ten bedrage van 18,62 miljoen euro voor de verlenging van de start/landingsbaan en van 2,7 miljoen euro voor de vernieuwing van het riolerings en drainagesysteem van de luchthaven verenigbaar is met de gemeenschappelijke markt overeenkomstig artikel 87, lid 3, onder c), van het EG-Verdrag.

De Commissie betreurt evenwel dat Nederland de staatssteun in kwestie daadwerkelijk heeft toegekend, in strijd met het bepaalde in artikel 88, lid 3, van het EG-Verdrag.

Ingeval deze brief vertrouwelijke gegevens mocht bevatten die niet mogen worden bekendgemaakt, wordt u verzocht de Commissie daarvan binnen vijftien werkdagen vanaf de ontvangst van dit schrijven in kennis te stellen. Ontvangt de Commissie binnen de vastgestelde termijn geen met redenen omkleed verzoek, dan neemt zij aan dat u instemt met mededeling aan derden en bekendmaking van de volledige tekst van dit schrijven in de authentieke taal op de website:
http://ec.europa.eu/community_law/state_aids/state_aids_texts_nl.htm
Dit verzoek dient bij aangetekend schrijven of bij faxbericht te worden gericht aan:

Europese Commissie
Directoraat-generaal Energie en Vervoer
Directoraat A – Interne markt en Duurzaamheid
Kantoor: De Motstraat 28
B-1049 Brussel

Fax: 32 2 296 41 04

Hoogachtend,
Voor de Commissie

Antonio TAJANI
Vicevoorzitter van de Commissie

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05 May 2009
C(2009) 3218

**OPINION OF THE COMMISSION**

**delivered upon request of Germany according to Art. 6 (4) Sub Par. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats as well as the wild animals and plants, concerning the approval of the extension of the Lübeck-Blankensee airport**

**(Only the German text is authentic)**

**OPINION OF THE COMMISSION**

**delivered upon request of Germany according to Art. 6 (4) Sub Par. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats as well as the wild animals and plants[1], concerning the approval of the extension of the Lübeck-Blankensee airport**

## I. The legal framework

Article 6 (3) of directive 92/43/EEC requires that any plan or project not directly connected with or necessary to the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of its implications for the site and subject to the provisions of paragraph 4, the competent national authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

According to article 6 (4) of directive 92/43/EEC, a plan or a project may be carried out in spite of a negative assessment of the implications for a Natura 2000 site, in the absence of alternative solutions, if it is justified for imperative reasons of overriding public interest, including those of a social or economic nature. In this case the Member States shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and it shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, and if considerations relating to human health, public safety or beneficial consequences of primary importance for the environment cannot be invoked, the project can be justified, further to an opinion from the Commission, by other imperative reasons of overriding public interest.

## II. The German request

On 10.09.2008, the Commission received a letter, together with accompanying technical dossiers, from the German Permanent Representation requesting an opinion of the Commission pursuant to Art. 6 (4) of the Directive 92/43/EEC ("Habitats Directive") concerning the approval of the extension of the Lübeck-Blankensee airport.

## III. The project

The project concerns the prolongation of the airport's runway on 155 m and the development of the existing infrastructure including the renovation of positioning and navigation installations, the addition of buffer zones around the runway, the construction of service buildings and parking lots, the enlargement of utility services, the building of new fences and the improvement of the surface drainage systems. According to the German authorities, these infrastructure improvements will enable more airlines to operate in a more efficient way (higher number of flights will be better synchronised in time) as well as to dispatch a higher volume in freight and passenger (both linear and low-cost) transport, thereby enabling Lübeck-Blankensee airport to provide an additional discharge capacity function to the nearby Hamburg airport. Complementing intermodal transport infrastructure measures will better connect the Lübeck-Blankensee airport with its regional infrastructure environment (new train connection, A 20 highway).

[1] O.J. No. L206 of 22.7.1992, p. 7

## IV. The sites

Site DE 2130391, "Grönauer Heide, Grönauer Moor und Blankensee", is a Site of Community Importance (SCI) designated under the Habitats Directive. This site, situated in the Continental biogeographical region, covers an area of 345 hectares and surrounds the airport. Site DE 2130491, "Grönauer Heide", is a Special Protection Area according to the Birds Directive and is completely enclosed by the larger site DE 2130391. The area is mainly characterised by small patches of priority habitat types of Annex I to the Habitats Directive (species-rich *Nardus* grasslands – habitat type 6230*, and bog forests – habitat type 91D0*) and non-priority habitat types such as ponds, dry heath lands, wet grasslands and fens as well as oak forests. Despite the small patch size, the overall habitat mosaic makes the area the most species-rich site in the region of Schleswig-Holstein, and important on European level.

All the construction works which are to be carried, with the exception of some electricity cables, water pipes and associated, small technical buildings occupying an area of approximately 500 m², will take place outside the perimeter of the Natura 2000 site. However, the operation of the enlarged airport will impact about 12 hectares of habitat types contained in Annex I of the Habitats Directive. The responsible authorities contend that there are no alternatives for the project and that there are compelling social and economic reasons of an overriding public interest.

The location of the airport in relation to the Natura 2000 sites is illustrated in Annex 1.

## V. Implications of the project on the site

Construction works will necessitate the digging up of a 200 m² dry heath land area (non-priority habitat type 4030), which will be restored after the works are completed. No further habitats will be damaged directly by the carrying out of the works, neither will any habitat be destroyed by the runway construction. However, the operation of the extended airport will have impacts on the site and its species, due to the increased air traffic and the associated increase in atmospheric pollutants. The competent authorities have assessed other potential impacts, such as increased road traffic to and from the airport, the problems of noise, dust and light emissions, the temporary changes in ground water levels, the sealing of soils due to the prolonged runway and the consequences of higher visitor numbers. The authorities have concluded that none of these changes will have a significant impact upon the conservation status of the habitats and species in the Natura 2000 site.

The following priority and other habitats recognized under the Habitats Directive will be affected by the long-term operation of the airport. These habitats suffer from an inadequate, unfavourable or bad conservation status on European scale (within the Continental biogeographical region)[2]. The site itself presents a good or significant overall conservation value for these habitats, which underlines the importance to maintain quality and function of the affected habitats of this site.

6230* Priority habitat: Species-rich *Nardus* grasslands, on siliceous substrates in mountain areas (and submountain areas in Continental Europe)

2310 Dry sand heaths with *Calluna* and *Genista*

2330 Inland dunes with open *Corynephorus* and *Agrostis* grasslands

4010 Northern Atlantic wet heaths with *Erica tetralix*

[2] According to status reports from EU Member States, following the provisions of Art. 17 Habitats Directive. Published by ETC/BD on http://biodiversity.eionet.europa.eu/article17.

4030 European dry heaths

7140 Transition mires and quaking bogs

9190 Old acidophilus oak woods with *Quercus robur* on sandy plains.

Two species, 1040 *Leucorrhinia pectoralis*, and 1166, *Triturus cristatus*, could possibly be impacted by the deterioration of their habitat (7140, above). Two further species, the snails *Vertigo angustior* 1016 and *V. moulisiana* 1014, could, potentially, suffer negative impacts resulting from the deterioration of habitat type 7140.

One of the long-term impacts of the airport on the Natura 2000 site concerns the on-going deposition of nitrogen (coming from plane engines, on-site vehicle engines, visitor traffic etc). Deposited nitrogen enriches the soil and can result in significant changes to the plant species found on the site. Many of the habitat types and associated flora and fauna found in the site neighbouring the airport are typical of nutrient poor localities and they are highly sensitive to soil enrichment. One of the main challenges for future site management will be to address the issue of nitrogen deposition which will be accelerated if the airport is enlarged.

The following bird species could be negatively impacted by the project, with pair numbers in brackets (): *Anthus campestris (2), Caprimulgus europaeus (1), Lanius collurio (>15), Lullula arborea (5), Sylvia nisoria (7), Pernis apivorus (1), Crex crex (3), Dendrocopus medius (1)* (all in Annex I); and *Miliaria calandra (5), Alauda arvensis (10), Coturnix coturnix (2)* and *Acrocephalus schoenobaenus (2)* – all are migrating birds according to Art. 4 (2). However, according to modelling calculations, noise levels both during the construction period and during airport operation will not have significant effects on the birds. The construction works will furthermore be implemented outside the breeding season.

In conclusion, the project will adversely affect in the sense of Art. 6 (3) of the directive the integrity of a Natura 2000 site hosting several protected habitats, including two priority habitat types and a number of protected species. Consequently, the project may only go ahead if it satisfies the requirements set down in Article 6 (4) of the Directive.

**VI. Fulfilment of the requirements under Art. 6 (4)**

**- Alternative solutions**

The German authorities have informed the Commission that the economic development of the region will require an increase in air travel and a concomitant increase in airport capacity. An extension to Hamburg Airport, or the construction of a completely new airport in the region, was considered as impractical as well as having very high environmental costs. With regard to the development of the Lübeck-Blankensee airport, five technical variants for the prolongation of the runway have been assessed regarding their impact on the Natura 2000 sites, of which the least damaging solution has been selected. According to the competent authorities, the chosen length of the runway is the minimum necessary for guaranteeing the intended enlargement of the airport. As the flight modelling and regional-economic assessments show, none of the alternatively evaluated measures will adequately guarantee the targeted transport functions, which are requested in the legal planning instruments ("Landesraumordnungsplan" and "Regionalplan") for the forecasted higher passenger numbers (in 2020, 3.25 mio. passengers, compared to 1.8 m. in the business-as-usual scenario, are expected for Lübeck-Blankensee airport). For the service functions, none of the other alternatives would create less damaging effects on the impacted habitats.

The competent authorities therefore consider that the development of the regional airport capacity can best be achieved through the implementation of the extension of the Lübeck-Blankensee airport according to the project proposal presented to the Commission.

**- Imperative reasons of overriding public interest**

The claim that there exist compelling reasons of an overriding public interest is based on the arguments the extension of the Lübeck-Blankensee airport will be indispensable for the further economic development of the region, due to the better connection of Lübeck to national and international air traffic. This is seen as fundamental precondition for the promotion of the region in economic, research and touristic terms. Regional economic models suggest that the extension could create up to 5.300 direct and indirect jobs up to 2020 and beyond.

**- Impact mitigation**

Accompanying measures to the construction works will have advantageous effects on the environment, especially for the Natura 2000 habitats and species. The current contamination with NOx is already reaching critical loads, and the additional deposition of NOx might reach significant levels – the project applies a precautionary strategy, i.e. to assume significant impacts to all areas up to 300 m N and 200 m S of the runway. Mitigation measures will limit the NOx deposition effects, which are due to the intensified use of the airport. The planned measures (creation of nutrient-poor soil patches, removal of upper soil layers with subsequent grazing or mowing, rising water levels and cutting shrubs) will lead to a reduction of the already existing high NOx charge of the soil. The linked habitat improvement will enhance the living conditions for the concerned species. Additional actions such as the improvement of the run-off drainage will enhance the overall quality of the site habitats.

Additionally, a mediation between stakeholder groups and the private airport investor in the framework of the planning procedure resulted in the creation of the "Grönauer Heide" foundation, to ensure the sustainable management of the site and to facilitate compensation measures and awareness raising programmes beyond the borders of the site. The foundation is donated with 2.5 mio. EUR from the airport and is managed by a consortium of nature NGOs and institutions.

**- Compensatory measures**

To compensate the expected impacts of the project the following measures are planned (all actions have undergone a Natura 2000 impact assessment):

Creation of 4 ha of the habitat type "7140 Transition mires and quaking bogs" by the restoration of a degraded mire within the same Natura 2000 site (this is to compensate for 2 ha of significantly effected 7140 habitat near to the airport, which will gradually lose its ecological functions).

There will be a conversion of 4 ha of coniferous forest into the habitat type "9190 Old acidophilus oak woods with *Quercus robur* on sandy plains", in the 7 km distant Natura 2000 sites DE 2130352 "Moorwälder am Wesloer Moor und am Herrnburger Landgraben" and DE 2031401 "Traveförde" (compensation of 1.13 ha affected 9190 habitat). Selective tree-cutting and subsequent abandonment of forestry management will be applied altogether on 10 ha of neighbouring forest parcels in the above mentioned Natura 2000 sites. Again, the ecological functions will be gradually developed in the newly created habitat, whilst the areas affected by the extension of the airport will gradually lose their functions.

Long-term process and habitat monitoring is part of the compensation measures. Accompanying planning measures (compulsory according to national law) have been adopted ("Landschaftspflegerischer Begleitplan").

**VII. Opinion of the Commission**

Based on the information submitted by the competent German authorities, the Commission concludes that an increase in airport capacity is justified in the context of the regional development plan and that there are no viable alternatives to the expansion of the Lübeck-Blankensee airport. Various alternatives have been assessed, and the chosen extension of the airport results as the best alternative ensuring a sustainable air traffic growth in the region whilst minimising the environmental effects of intensified air traffic, airport management and construction works. Neither the possible extension of nearby Hamburg airport, nor the null-alternative would achieve these targets to the same extent.

With regard to mitigation measures, the Commission considers (on the basis of the available information) that the least damaging alternative has been selected, and the actions to be implemented will limit the negative effects both of the construction and the operation of the enlarged airport. The mitigation measures are adequate and follow the precautionary approach. The project is however still likely to have disturbance effects to two habitat types, which need to be compensated.

The damage that will be caused to transition bog and old oak forest habitats will be compensated by the creation of equivalent habitats on a total area that will be 2 to 3 times larger than the areas that will be affected. The location of the compensation areas will contribute to the coherence of Natura 2000.

In the light of the above, the Commission considers that the proposed compensatory measures are acceptable under the following conditions:

The species *Leucorrhinia pectoralis, Triturus cristatus, Vertigo angustior* and *V. moulisiana*, which are strongly associated with the affected habitat type 7140 (transition mires and quaking bogs) will be closely monitored, and if their protection would be at stake, all measures should be taken to ensure the presence of a viable population in the area.

The management plan for the Natura 2000 site should take into account the dynamic nature of the natural processes shaping the nature of the site such as to allow appropriate adaptation of the foreseen compensation measures where necessary.

For the affected habitat types 2310, 2330, 4010, 4030 and 6230*, the actions foreseen under the current Art. 6(4) procedure, and the measures to be financed and implemented by the foundation, shall restore the conservation status of the concerned habitats and take measures to increase the population of the affected bird species. Special consideration should be given to the improvement of the conservation status of priority habitat 6230* within the heath and grassland habitat complex.

**On the basis of the detailed information and explanations provided by the German authorities and taking into account in particular the issues set out in the present document, the Commission is of the opinion that the adverse effects of implementing the extension of the Lübeck-Blankensee airport on the Natura 2000 sites DE 2130491 "Grönauer Heide" and DE 2130391, "Grönauer Heide, Grönauer Moor und Blankensee", are justified by imperative reasons of overriding public interest.**

In reaching this opinion, the Commission has taken particular account of the detailed assessment of ecological impacts when drawing up the planning documents, and the participation of the relevant stakeholders, which has been made in that process. The Commission also takes note of the creation of a foundation, which is accepted by the main participatory groups in the area, and which will ensure the sustainable management of Natura 2000 in that area.

The Commission would take this opportunity to remind the German authorities that projects such as the extension of the Lübeck airport which are based on an expected increase in air

traffic must be seen in the wider context of Germany's commitments to reduce greenhouse gas emissions in the light of EU objectives to mitigate climate change.

**The opinion is subject to the following conditions:**

– The compensatory measures will be implemented and monitored as described in the documents submitted to the Commission by the German authorities, and as requested in chapter VII. above,

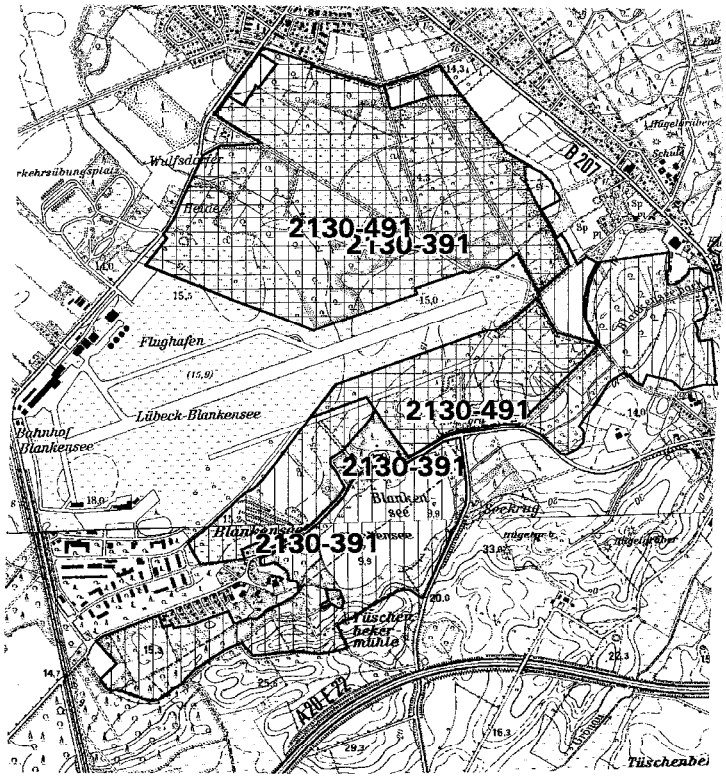
– Detailed reports on the implementation and monitoring of these measures shall be prepared by the responsible authorities and be made available to the Commission upon request.

## ANNEX

Map of Lübeck airport (image centre) and surrounding Natura 2000 sites

Site DE 2130391, "Grönauer Heide, Grönauer Moor und Blankensee" (SCI)

Site DE 2130491, "Grönauer Heide" (SPA)



**RAAD VAN STATE, AFDELING BESTUURSRECHTSPRAAK**

**Xe KAMER**

**A R R E S T**

**nr. 206.911 van 13 augustus 2010**
**in de zaak A. 192.847/X-14.210.**

In zake: 1. de gemeente BORSBEEK
2. de stad MORTSEL
bijgestaan en vertegenwoordigd door
advocaten Dirk Lindemans en Filip De Preter
kantoor houdend te 1000 BRUSSEL
Keizerslaan 3
bij wie woonplaats wordt gekozen

tegen:

het VLAAMSE GEWEST, vertegenwoordigd door de Vlaamse regering
bijgestaan en vertegenwoordigd door
advocaat Johan Claes
kantoor houdend te 2550 KONTICH
Mechelsesteenweg 160
bij wie woonplaats wordt gekozen

---

*I. Voorwerp van de vordering*

1. De vordering, ingesteld op 2 juni 2009, strekt tot de schorsing van de tenuitvoerlegging van het besluit van 20 maart 2009 van de Vlaamse regering houdende definitieve vaststelling van het gewestelijk ruimtelijk uitvoeringsplan "R11-omleiding luchthaven Antwerpen".

*II. Verloop van de rechtspleging*

2. Bij arrest nr. 202.197 van 22 maart 2010 worden de vordering tot schorsing en het beroep tot nietigverklaring verworpen in hoofde van de derde en de vierde verzoekende partijen, worden de debatten in de vordering tot schorsing en in het annulatieberoep heropend en worden de debatten volgens de gewone procedure voortgezet.

Auditeur Ann Eylenbosch heeft een verslag opgesteld.

Met toepassing van artikel 90, § 1, vierde lid van de wetten op de Raad van State, gecoördineerd op 12 januari 1973, is de zaak verwezen naar een kamer met drie leden.

De partijen zijn opgeroepen voor de terechtzitting, die heeft plaatsgevonden op 25 juni 2010.

Kamervoorzitter Roger Stevens heeft verslag uitgebracht.

Advocaat Filip De Preter, die verschijnt voor de verzoekende partijen, en advocaat Anneleen Claes, die loco advocaat Johan Claes verschijnt voor de verwerende partij, zijn gehoord.

Auditeur Ann Eylenbosch heeft een met dit arrest eensluidend advies gegeven.

Er is toepassing gemaakt van de bepalingen op het gebruik der talen, vervat in titel VI, hoofdstuk II, van de wetten op de Raad van State, gecoördineerd op 12 januari 1973.

*III. Feiten*

3.1. Het richtinggevend gedeelte van het ruimtelijk structuurplan Vlaanderen (hierna: RSV) bepaalt het volgende met betrekking tot de luchthaven van Deurne:

> "De luchthaven van Deurne heeft een regionale roeping met beperkte reikwijdte (stedelijk gebied en omgeving) en een specialisatie in een beperkte niche. Zij kan niet als poort op Vlaams niveau worden gedefinieerd omwille van:
>
> - haar regionale positie en geringe potentialiteiten om zich internationaal te positioneren, o.a. de onmiddellijke nabijheid van Zaventem (35 km);
> - het gebrek aan hoogwaardige ontsluitings- en verbindingsfunctie naar het betrokken stedelijk gebied en naar de andere stedelijke gebieden in Vlaanderen (openbaar vervoer, weg, spoor (HST-station));
> - de laagwaardige omgevingskwaliteiten ten aanzien van luchthavenactiviteiten;
> - de uiterst beperkte draagkracht van de ruimte vooral op milieuhygiënisch en ruimtelijk vlak.
>
> De luchthaven ligt midden in een sterk en dicht bebouwd stedelijk gebied. Bij uitbreiding wordt de ruimtelijke structuur van het stedelijk gebied

onherroepelijk aangetast. De inrichting van de luchthaven wordt vastgelegd in het afbakeningsplan voor het stedelijk gebied Antwerpen.

(...)

4.2.3. Optimaliseren van de regionale luchthavens Deurne en Oostende

Er wordt voor geopteerd de regionale rol van beide luchthavens te erkennen en deze rol te optimaliseren. Gelet op hun ligging in het centrum van de stedelijke gebieden is uitbreiding hierbuiten niet verantwoord noch gewenst.

De ontwikkelingsperspectieven voor Deurne kunnen bij optimalisering onder geen beding een uitbreiding van de luchthaven betekenen. De bestaande bouwvrije zone in het verlengde van de luchthaven moet blijven bestaan. Bij de afbakening moet vanuit de ruimtelijke visie op het stedelijk gebied Antwerpen worden afgewogen in hoeverre de regionale luchthaven van Deurne niet concurrentieel is met de ontwikkeling van het HST-station Antwerpen-Centraal. Beide vervoerswijzen mikken op dezelfde relaties op middellange afstand.

(...)".

Het bindend gedeelte bepaalt dat "(de) luchthavens van Oostende en Deurne (...) als luchthavengebied (worden) afgebakend binnen de afgebakende stedelijke gebieden".

3.2. Het gewestelijk ruimtelijk uitvoeringsplan (hierna: GRUP) "R11-omleiding luchthaven Antwerpen" moet het tijdig aanleggen van een obstakelvrije veiligheidszone (RESA, dit is Runway End Safety Area) aan de start- en landingsbaan, zoals verplicht gesteld door de International Civil Aviation Organisation (ICAO), mogelijk maken.

Het Vlaamse Gewest heeft een afwijking tot 2009 gekregen om deze infrastructuur te realiseren, recent nog verlengd tot 23 februari 2013.

Met het oog op het aanleggen van deze obstakelvrije zones, met behoud van de huidige startbaanlengte, voorziet het plan in het aanpassen van de Krijgsbaan R11, die het huidige luchthaventerrein ten oosten begrenst. De Krijgsbaan R11 wordt omgelegd, deels via een half ingegraven tunnel. De zone ten westen van het nieuwe tracé wordt herbestemd van agrarisch gebied naar luchthavengebied.

De verdere ontwikkeling van de luchthaven is als een apart deelplan opgenomen binnen de afbakening van het grootstedelijk gebied Antwerpen. Het afbakeningsproces van het "grootstedelijk gebied Antwerpen", van start gegaan in april 2003, heeft geleid tot het besluit van de Vlaamse regering van 19 juni 2009 houdende definitieve vaststelling van het gewestelijk ruimtelijk uitvoeringsplan "Afbakening grootstedelijk gebied Antwerpen". Naast het luchthavengebied voorziet dit deelplan op het luchthaventerrein zelf een stedelijk programma aan functies zoals KMO's en kantoren.

3.3. Vlakbij de luchthaven, ten oosten van de Krijgsbaan en net in het verlengde van de startbaan, ligt Fort III.

Het Fort van Borsbeek maakt deel uit van het Habitatrichtlijngebied "Historische fortengordels van Antwerpen als vleermuizenhabitat" met gebiedscode BE2100045, bij beschikking van de Europese Commissie van 7 december 2004 opgenomen in de lijst van gebieden van communautair belang voor de Atlantische biogeografische regio op grond van artikel 4 van richtlijn 92/43/EEG van de Raad van 21 mei 1992 inzake de instandhouding van de natuurlijke habitats en de wilde flora en fauna (hierna: de habitatrichtlijn).

3.4. Voor de opmaak van het GRUP "R11-omleiding luchthaven Antwerpen" is een plan-MER opgemaakt dat op 10 mei 2007 is goedgekeurd door de dienst MER. Dit plan-MER heeft de realisatie van de RESA onderzocht volgens drie varianten:

1. intunneling van de Krijgsbaan: hierbij wordt een tunnel gebouwd volgens het huidige tracé van de Krijgsbaan en loopt de RESA over deze tunnel;
2. omleiding van de Krijgsbaan rond de RESA: hierbij wordt de Krijgsbaan omgeleid rond de RESA en door een deel van Fort III;
3. gelifte RESA met half ingegraven tunnel. De kleine RESA van 90 x 90 kan daardoor gerealiseerd worden. In een latere fase, als de ICAO een grote RESA mogelijks verplicht, kunnen zowel de startbaan als de RESA aangelegd worden met een beperkte helling. De RESA zal daardoor gelift kunnen worden tot boven de ingegraven tunnel waarna de RESA terug zal dalen volgens een toelaatbare helling richting Fort III. Het fort wordt daardoor niet door de verkeersinfrastructuur doorsneden.

Op 8 juni 2007 beslist de Vlaamse regering variant 3 te selecteren.

3.5. Bij besluit van de Vlaamse regering van 21 mei 2008 wordt het ontwerp van GRUP "R11-omleiding luchthaven Antwerpen" voorlopig vastgesteld.

De toelichtingsnota bepaalt onder de hoofding "Verantwoording voor de opmaak van het gewestelijk ruimtelijk uitvoeringsplan" het volgende:

> "(...)
> Indien men de huidige situatie van de Krijgsbaan behoudt moet men de obstakelvrije zones binnen het luchthaventerrein leggen en dient men de startbaan minstens 160 meter in te korten voor de aanleg van de RESA met afmetingen 90 x 90 meter en 315 meter in te korten bij aanleg van een RESA van 150 x 240 meter. Het inkorten van de startbaan met die afstand betekent dat de grotere vliegtuigen (bijvoorbeeld VLM) slechts met beperkte lading en in

specifieke gunstige omstandigheden kunnen landen of opstijgen. Dit zou inhouden dat Antwerpen als regionale luchthaven niet kan blijven voortbestaan. Volgens het RSV dient de regionale rol van de luchthaven echter erkend en ondersteund te worden. Om die reden wordt een ruimtelijk uitvoeringsplan opgemaakt dat de aanleg van de obstakelvrije zones mogelijk maakt, met behoud van de huidige startbaanlengte. Op die manier kan men voldoen aan de huidige en toekomstige vereisten van de ICAO. De aanleg van de obstakelvrije zones vereist wel een aanpassing van de Krijgsbaan (R11). In het bijgevoegde planMER werden drie mogelijke scenario's onderzocht voor een dergelijke aanpassing. Mede op basis van de conclusies van het planMER is geopteerd om scenario 3 (liften van de landingsbaan en de RESA in combinatie met een omleiding en gedeeltelijke ondertunneling van de R11) op te nemen in het RUP.

Aangezien de luchthaven momenteel onder een uitzonderingsregime werkt en de aanleg van de obstakelvrije zone een hoge prioriteit heeft, wordt het ruimtelijk uitvoeringsplan voor de luchthaven in twee delen opgenomen. Via het RUP 'R11 - omleiding luchthaven Antwerpen' wordt de aanleg van de noodzakelijke obstakelvrije zones mogelijk gemaakt. Het RUP wordt beperkt tot de noodzakelijke bestemmingswijzigingen die hiervoor nodig zijn en de ruimtelijke vertaling van de milderende maatregelen die zijn voorgesteld in het planMER. De luchthaven zelf zal deel uitmaken van de afbakening van het grootstedelijk gebied Antwerpen. Aangezien de afbakening van het grootstedelijk gebied Antwerpen een omvangrijk uitvoeringsplan is met een complexe problematiek en een betrokkenheid van 21 gemeenten en twee provincies, wordt dit deel als een apart deelRUP in de afbakening opgenomen. De opsplitsing in twee RUP's garandeert een tijdige uitvoering van de door de ICAO verplichte obstakelvrije zones. Beide RUP's worden wel gelijktijdig voorbereid zodat een wederzijdse afstemming kan gebeuren van de ruimtelijke opties".

3.6. Het openbaar onderzoek wordt georganiseerd van 21 augustus 2008 tot 19 oktober 2008.

Op 19 september 2008 adviseert de gemeenteraad van de gemeente Borsbeek het voorlopig niet opportuun zijn van het vastleggen van de omleidingsweg in een GRUP.

Op 23 september 2008 brengt de gemeenteraad van de stad Mortsel ongunstig advies uit.

Op 25 september 2008 brengt de provincieraad van Antwerpen advies uit.

Op 13 januari 2009 heeft VLACORO het ontwerp van GRUP gunstig geadviseerd mits rekening gehouden wordt met een aantal opmerkingen.

Op 5 maart 2009 brengt de Raad van State, afdeling wetgeving, advies uit.

3.7. Bij besluit van de Vlaamse regering van 20 maart 2009 wordt het GRUP "R11- omleiding luchthaven Antwerpen" definitief vastgesteld.

Dit is het bestreden besluit.

De verordenende stedenbouwkundige voorschriften omvatten bepalingen met betrekking tot drie gebieden en één overdruk:

Artikel 0. Afbakeningslijn regionale luchthaven Antwerpen

Artikel 1. Luchthavengebied

Artikel 2. Gebied voor verkeers- en vervoersinfrastructuur

Artikel 3. Gebied voor ongelijkvloerse verkeers- en vervoersinfrastructuur (in overdruk)

Artikel 4. Nabestemming parkgebied

Het bestreden besluit is bij uittreksel gepubliceerd in het Belgisch Staatsblad van 3 april 2009.

*IV. Onderzoek van de vordering*

4. Overeenkomstig artikel 17, § 2 van de gecoördineerde wetten op de Raad van State kan slechts tot de schorsing van de tenuitvoerlegging worden besloten onder de dubbele voorwaarde dat ernstige middelen worden aangevoerd die de vernietiging van de aangevochten beslissing kunnen verantwoorden en dat de onmiddellijke tenuitvoerlegging van de beslissing een moeilijk te herstellen ernstig nadeel kan berokkenen.

(...)

(...)

*Beoordeling*

6.1.1. Artikel 6, leden 3 en 4 van de habitatrichtlijn luidt als volgt:

> "3. Voor elk plan of project dat niet direct verband houdt met of nodig is voor het beheer van het gebied, maar afzonderlijk of in combinatie met andere plannen of projecten significante gevolgen kan hebben voor zo'n gebied, wordt een passende beoordeling gemaakt van de gevolgen voor het gebied, rekening houdend met de instandhoudingsdoelstellingen van dat gebied. Gelet op de conclusies van de beoordeling van de gevolgen voor het gebied en onder voorbehoud van het bepaalde in lid 4, geven de bevoegde nationale instanties slechts toestemming voor dat plan of project nadat zij de zekerheid hebben verkregen dat het de natuurlijke kenmerken van het betrokken gebied niet zal aantasten en nadat zij in voorkomend geval inspraakmogelijkheden hebben geboden.
> 4. Indien een plan of project, ondanks negatieve conclusies van de beoordeling van de gevolgen voor het gebied, bij ontstentenis van alternatieve oplossingen, om dwingende redenen van groot openbaar belang, met inbegrip van redenen

van sociale of economische aard, toch moet worden gerealiseerd, neemt de Lid-Staat alle nodige compenserende maatregelen om te waarborgen dat de algehele samenhang van Natura 2000 bewaard blijft. De Lid-Staat stelt de Commissie op de hoogte van de genomen compenserende maatregelen.
Wanneer het betrokken gebied een gebied met een prioritair type natuurlijke habitat en/of een prioritaire soort is, kunnen alleen argumenten die verband houden met de menselijke gezondheid, de openbare veiligheid of met voor het milieu wezenlijke gunstige effecten dan wel, na advies van de Commissie, andere dwingende redenen van groot openbaar belang worden aangevoerd".

6.1.2. Artikel 6, lid 3 van de habitatrichtlijn is omgezet in het intern recht in artikel 36ter, §§ 3 en 4 van het decreet van 21 oktober 1997 betreffende het natuurbehoud en het natuurlijk milieu (hierna: het decreet natuurbehoud).

Artikel 36ter, §§ 3 en 4 van het decreet natuurbehoud luidde ten tijde van het nemen van het bestreden besluit als volgt:

"§ 3. Een vergunningsplichtige activiteit die, of een plan of programma dat, afzonderlijk of in combinatie met één of meerdere bestaande of voorgestelde activiteiten, plannen of programma's, een betekenisvolle aantasting van de natuurlijke kenmerken van een speciale beschermingszone kan veroorzaken, dient onderworpen te worden aan een passende beoordeling wat betreft de betekenisvolle effecten voor de speciale beschermingszone.

De verplichting tot het uitvoeren van een passende beoordeling geldt ook indien wegens het verstrijken van de lopende vergunning van de vergunningsplichtige activiteit een nieuwe vergunning moet worden aangevraagd.

De initiatiefnemer is verantwoordelijk voor het opstellen van de passende beoordeling.

Voor een plan of programma zoals gedefinieerd in artikel 4.1.1, § 1, 4°, van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid, alsook de wijziging ervan, waarvoor, gelet op het betekenisvolle effect op een speciale beschermingszone, een passende beoordeling is vereist, wordt overeenkomstig hoofdstuk II van titel IV van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid een plan-MER opgemaakt.

Indien een vergunningsplichtige activiteit overeenkomstig artikel 4.3.2 van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid onderworpen is aan de verplichting tot opmaak van een project-MER, wordt overeenkomstig hoofdstuk III van titel IV van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid een project-MER opgemaakt.

Bij de opmaak van het plan-MER of het project-MER zal de passende beoordeling worden geïntegreerd in respectievelijk het plan-MER of het project-MER, dat respectievelijk wordt opgesteld overeenkomstig hoofdstuk II of hoofdstuk III van titel IV van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid. De Vlaamse Regering kan nadere regels van integratie en herkenbaarheid van de passende beoordeling in het milieueffectrapport bepalen.

Indien een vergunningsplichtige activiteit of een plan of programma niet onderworpen is aan de verplichting tot milieu-effectrapportage overeenkomstig de wetgeving in uitvoering van de project-MERrichtlijn of de plan-MERrichtlijn, vraagt de administratieve overheid steeds het advies van de administratie bevoegd voor het natuurbehoud.

De Vlaamse regering kan nadere regels vaststellen in verband met de inhoud en de vorm van de passende beoordeling.

§ 4. De overheid die over een vergunningsaanvraag, een plan of programma moet beslissen, mag de vergunning slechts toestaan of het plan of programma slechts goedkeuren indien het plan of programma of de uitvoering van de activiteit geen betekenisvolle aantasting van de natuurlijke kenmerken van de betrokken speciale beschermingszone kan veroorzaken. De bevoegde overheid draagt er steeds zorg voor dat door het opleggen van voorwaarden er geen betekenisvolle aantasting van de natuurlijke kenmerken van een speciale beschermingszone kan ontstaan".

6.1.3. Artikel 2, 30•• van het decreet natuurbehoud definieert "betekenisvolle aantasting van de natuurlijke kenmerken van een speciale beschermingszone" als volgt:

"een aantasting die meetbare en aantoonbare gevolgen heeft voor de natuurlijke kenmerken van een speciale beschermingszone, in de mate er meetbare en aantoonbare gevolgen zijn voor de staat van instandhouding van de soort(en) of de habitat(s) waarvoor de betreffende speciale beschermingszone is aangewezen of voor de staat van instandhouding van de soort(en) vermeld in bijlage III van dit decreet voor zover voorkomend in de betreffende speciale beschermingszone".

6.1.4. Wat het begrip "passende beoordeling" betreft, schrijft noch artikel 6, lid 3 van de habitatrichtlijn, noch het decreet natuurbehoud voor volgens welke methode deze beoordeling moet worden uitgevoerd.

Het Hof van Justitie van de Europese Unie heeft reeds meerdere malen geoordeeld dat een dergelijke beoordeling inhoudt dat, op basis van de beste wetenschappelijke kennis ter zake, alle aspecten van het plan of het project die op zichzelf of in combinatie met andere plannen of projecten de instandhoudingsdoelstellingen van het betrokken gebied in gevaar kunnen brengen, moeten worden geïnventariseerd (onder meer: H.v.J., 4 maart 2010, C-241-08). Rekening houdend met de conclusies van de beoordeling van de gevolgen van het plan of project voor het betrokken gebied, mag de overheid dergelijk plan of project pas goedkeuren nadat zij zekerheid heeft verkregen dat het geen schadelijke gevolgen heeft voor de natuurlijke kenmerken van het betrokken gebied. De zekerheid dat het plan of project geen schadelijke gevolgen heeft voor de natuurlijke kenmerken van het betrokken gebied is voorhanden "wanneer er wetenschappelijk gezien redelijkerwijs geen twijfel bestaat dat er geen schadelijke gevolgen zijn" (onder meer: H.v.J., 7 september 2004, C-127-02).

6.2.1. Vlakbij de luchthaven Antwerpen, ten oosten van de Krijgsbaan en net in het verlengde van de startbaan, ligt Fort III.

Het Fort van Borsbeek maakt, zoals reeds gesteld, deel uit van het Habitatrichtlijngebied "Historische fortengordels van Antwerpen als vleermuizenhabitat" met gebiedscode BE2100045, bij beschikking van de Europese Commissie van 7 december 2004 opgenomen in de lijst van gebieden van communautair belang voor de Atlantische biogeografische regio op grond van artikel 4, leden 2 en 3 van de habitatrichtlijn.

6.2.2. Door het vaststellen van de communautaire lijst op 7 december 2004 door de Europese Commissie ontstond op grond van artikel 4, lid 4 van de habitatrichtlijn de verplichting om "uiterlijk binnen zes jaar" over te gaan tot een definitieve aanwijzing van gebieden als speciale beschermingszone, vergezeld van "prioriteiten", "gelet op het belang van de gebieden voor het in een gunstige staat van instandhouding behouden of herstellen van een type natuurlijke habitat van bijlage I of van een soort van bijlage II (...)".

De Vlaamse regering heeft op 3 april 2009 het besluit goedgekeurd betreffende de aanwijzing van speciale beschermingszones en de vaststelling van instandhoudingsdoelstellingen. Bedoeld besluit strekt er in hoofdzaak toe om de procedure te bepalen voor het vaststellen van instandhoudingsdoelstellingen.

Voor het Habitatrichtlijngebied "Historische fortengordels van Antwerpen als vleermuizenhabitat" blijken nog geen instandhoudingsdoelstellingen te zijn vastgesteld.

Artikel 11, § 4 van het voormelde besluit van 3 april 2009 van de Vlaamse regering bepaalt dat "voor zover de instandhoudingsdoelstellingen voor een Europees te beschermen gebied nog niet definitief zijn vastgesteld, (...) de initiatiefnemer die er toe gehouden is een passende beoordeling op te maken in uitvoering van artikel 36ter, § 3 en volgende van het decreet, zich (richt) op de gegevens op basis waarvan de aanmelding van de speciale beschermingszone is gebeurd, aangevuld met de voorhanden zijnde wetenschappelijke gegevens".

6.3.1. Het wordt op het eerste gezicht niet betwist dat het plan niet direct verband houdt met of nodig is voor het beheer van het gebied als speciale beschermingszone en dat het significante gevolgen kan hebben voor, of een betekenisvolle aantasting van de natuurlijke kenmerken kan veroorzaken van, het betrokken gebied, zodat het, gelet op artikel 6, lid 3 van de habitatrichtlijn en artikel 36ter, § 3 van het decreet natuurbehoud moet worden onderworpen aan een passende beoordeling.

6.3.2. Overeenkomstig artikel 36ter, §3, vierde lid van het decreet natuurbehoud is de passende beoordeling in casu gebeurd in het kader van het plan-MER.

Deze beoordeling is opgenomen in het technisch deelrapport "fauna en flora".

Hierin staat onder meer het volgende te lezen:

"Barrièrewerking/versnippering

De weg die in alternatief 3 wordt aangelegd, is dicht bij Fort 3 gelegen. Het deel dat het dichtste bij het fort komt, wordt ingetunneld (250m). Op deze manier ontstaat er weliswaar een minder sterke barrière, doch, deze blijft wel deels aanwezig door de aanwezigheid van het grote stuk niet-ingetunnelde weg (705m).

Het risico op verkeersslachtoffers neemt toe door de aanleg van de weg dicht bij Fort 3. Hierbij neemt de kans toe dat vleermuizen meer het slachtoffer van het verkeer zullen worden wanneer ze uitvliegen, gezien de weg zich zo dicht bevindt bij hun verblijfplaats. De weg ligt namelijk veel dichter bij het Habitatrichtlijngebied van Fort 3 zelf dan in de referentiesituatie. Gezien er geen gegevens bestaan over de vliegroutes of het gebruik van het landschap door de vleermuispopulatie, kunnen moeilijk exacte uitspraken gedaan worden over de mate waarin er in praktijk kansen bestaan dat vleermuizen het slachtoffer van het verkeer zullen worden ter hoogte van de niet-ingetunnelde wegdelen. Op basis van expert judgement kunnen we er wel vanuit gaan dat deze nieuwe weg een betekenisvol negatief effect zal hebben op de vleermuizenpopulatie. De nodige milderende maatregelen moeten genomen worden.

Verstoring

(...)

Tijdens de werken zal er bijkomende geluidsverstoring in het plangebied optreden zowel overdag als 's nachts. Het beschouwde gebied is overdag reeds sterk geluidsverstoord. Tijdens de werken zal de geluidsverstoring wel aanzienlijk groter zijn, zowel overdag als 's nachts. Een verstoring van de vleermuizen tijdens het nachtelijke jagen zal bijvoorbeeld plaatsvinden. De nodige milderende maatregelen dringen zich op (...).

(...)

De verlichting van het niet-ingetunnelde weg staat dicht bij het fort. Bovendien was er geen verlichting op de Krijgsbaan aanwezig in de referentiesituatie en zal alternatief 3 dus aanzienlijk meer lichtverstoring veroorzaken. Denken we hierbij al zeker aan de verstoring van de vleermuizen wanneer ze uitvliegen vanaf hun verblijfplaats in het fort. Omdat er echter geen gegevens zijn over de vliegroutes van de vleermuizen en het gebruik van het landschap tussen de Krijgsbaan en het fort is het moeilijk een exacte inschatting te maken van de ernst van dit effect. Mits het nemen van de nodige maatregelen zal er geen betekenisvol effect veroorzaakt worden op het Habitatrichtlijngebied.

6.1.2.4 Milderende maatregelen

(...)

De milderende maatregelen die uitgevoerd moeten worden om de betekenisvolle negatieve effecten van alternatief 3(+) op het Habitatrichtlijngebied tegen te gaan, worden weergegeven in Tabel 12. Het gaat hier om algemene maatregelen die nog te specificeren en te nuanceren zijn wanneer de werkzaamheden in het kader van het voorliggende plan tot op projectniveau uitgewerkt zijn.

Tabel 12: Milderende maatregelen die noodzakelijk zijn om betekenisvolle negatieve effecten van alternatief 3(+) op het Habitatrichtlijngebied tegen te gaan

| |
|---|
| Beperken van de werken in tijdsduur |
| Stilleggen van de werken aan de weginfrastructuur in de winterperiode (oktober tot april) en uitvoeren van de weginfrastructuurwerken overdag of voorzien van werfafscherming indien de infrastructuurwerken geluids- en trillingsniveaus genereren die boven de achtergrondwaarden liggen |
| Uitvoeren van de weginfrastructuurwerken met de minst verstorende uitvoeringstechnieken |
| Voorzien van grondreflectors of aangepaste, minimale verlichting ter hoogte van de nieuwe weginfrastructuur |
| Uitvoeren van wegdek in geluidsarme wegverharding |
| Aanbrengen van bermvegetatie en/of aarden wal naast de nieuwe weginfrastructuur |
| Herinrichten van werfzones en restruimtes |
| Systematische monitoring van de overwinterende vleermuizenpopulatie en eventueel nemen van geluidsbeheersende maatregelen |

(...)

6.1.2.6 Gecumuleerde effecten

Door de aanleg van een nieuwe weginfrastructuur, de gewijzigde exploitatie en eventueel de aanleg van een bedrijventerrein, zullen gecumuleerde effecten op de omgeving optreden. Vooral het gecumuleerde effect van geluidsverstoring kan een belangrijke invloed hebben op de aanwezige vleermuizenpopulatie. Wat betreft de verstoringsgevoeligheid van deze dieren bestaan er echter geen kwantitatieve dosis-effectrelaties of drempelwaarden. Het absolute effect van de gecumuleerde geluidsverstoring is dus niet precies te bepalen. Het is wel belangrijk aan te geven dat er, voor alternatief 2(+) en 3(+), een zeker risico op het optreden van betekenisvolle negatieve effecten op de vleermuizen in Fort 3, bestaat. Dit risico is kleiner indien aan de milieuvergunningsvoorwaarden voor geluidsverstoring wordt voldaan. Het is evenwel noodzakelijk systematisch aan monitoring van de overwinterende vleermuizenpopulatie in het fort te gaan doen om op die manier te kunnen vaststellen of er betekenisvolle negatieve effecten optreden ten gevolge van het voorgestelde plan. Indien dit zo is, zullen bijkomende geluidsbeheersende maatregelen voor de luchthavenactiviteiten en het wegverkeer genomen moeten worden en/of zullen een bijkomende geluidsbeheersende maatregelen voor de overwinteringsplaatsen van de vleermuizen in het fort genomen moeten worden, zoals geluidsisolatie of het aanleggen van een geluidsberm.

(...)

8. Leemten in kennis

Een belangrijke leemte in de kennis is het gebrek aan gegevens over het habitat- en landschapsgebruik door de vleermuizen in het studiegebied. Het al dan niet voorkomen van jachtterritoria en paargebieden werd nog niet onderzocht. Verder zijn er nog nooit aan- en uitvliegroutes ter hoogte van Fort 3 bepaald en werd het gebruik van het landschap gesitueerd tussen de Krijgsbaan en Fort 3 niet in kaart gebracht. Er is duidelijk nood aan verder onderzoek.

Voor een heel aantal effecten ontbreekt daarnaast ook een wetenschappelijk onderbouwde dosis-effectrelatie. Hierbij kunnen we bijvoorbeeld denken aan de wijziging in geluidsniveaus. Eventuele effecten van luide geluiden die het gevolg zijn van menselijke activiteiten als verkeer en bouwactiviteiten op

vleermuizen zijn nog nooit grondig wetenschappelijk onderzocht. Verder bestaan er ook geen wetenschappelijke onderbouwde dosis-effectrelaties voor de effecten van licht op fauna en flora. Daardoor werden de effecten van geluid en licht vooral op basis van expert judgement ingeschat.

In de effectbeschrijving werd tenslotte zoveel mogelijk getracht een soortgerichte benadering te hanteren. Wegens de complexiteit van de biotische omgeving is dit echter niet altijd mogelijk. In het studiegebied komen namelijk verschillende habitats voor, dient men rekening te houden met interfererende verstoringsbronnen en spelen ook populatiefluctuaties een belangrijke rol. Om deze redenen is de evolutie van populaties moeilijk in te schatten en kunnen de effecten op soortniveau niet steeds bepaald worden".

6.3.3. Uit de hiervoor weergegeven beoordeling blijkt op het eerste gezicht dat op verschillende punten wetenschappelijk gezien geen zekerheid bestaat over het zich al dan niet voordoen van schadelijke effecten. De effecten van het plan blijken voornamelijk te zijn ingeschat op basis van "expert judgement". Zo worden er door de aanleg van de nieuwe weg volgens alternatief 3 betekenisvolle negatieve effecten verwacht ten aanzien van de vleermuizenpopulatie. Tevens bestaat er "een zeker risico" op het optreden van betekenisvolle negatieve gecumuleerde effecten van verstoring door geluid.

Volgens deze "passende beoordeling" dringen zich dan ook milderende maatregelen op. Deze zijn opgenomen in tabel 12.

Op het eerste gezicht lijken deze milderende maatregelen niet te kunnen worden betrokken op het als sterk negatief geëvalueerd effect van barrièrevorming en versnippering. Voorts wordt de inschatting van het gecumuleerd effect van verstoring door geluid gekoppeld aan een "systematische monitoring" van de overwinterende vleermuizenpopulatie in het fort om op die manier te kunnen vaststellen of er betekenisvolle negatieve effecten optreden ten gevolge van het voorgestelde plan en, indien dit zo is, aan het nemen van niet nader gepreciseerde bijkomende geluidsbeheersende maatregelen voor de luchthavenactiviteiten en het wegverkeer en/of bijkomende geluidsbeheersende maatregelen voor de overwinteringsplaatsen van de vleermuizen in het fort "zoals geluidsisolatie of het aanleggen van een geluidsberm".

6.3.4. Uit het voorgaande en bijzonderlijk gelet op de hogervermelde regel dat de overheid een plan pas mag goedkeuren wanneer zij, op basis van de beste wetenschappelijke kennis, na inventarisatie van alle aspecten van het plan die de instandhoudingsdoelstellingen van het betrokken gebied in gevaar kunnen brengen, op het ogenblik van de goedkeuring, de zekerheid heeft verkregen dat het geen schadelijke gevolgen heeft voor de natuurlijke kenmerken van het betrokken Habitatrichtlijngebied, lijkt te volgen dat de verwerende partij op basis van de

voorliggende beoordeling, geen goedkeuring aan het voorliggende plan had mogen verlenen.

Het derde onderdeel van het eerste middel is ernstig.

*B. Moeilijk te herstellen ernstig nadeel*

7. De verzoekende partijen zetten het moeilijk te herstellen ernstig nadeel als volgt uiteen:

> "72. De bestreden beslissing brengt de verzoekende partijen een moeilijk te herstellen en ernstig nadeel toe.
>
> 73. De eerste verzoekende partij is een bijzonder kleine gemeente. Met haar 3,9 km² is zij de kleinste gemeente van de provincie, en op drie na (Herstappe, Drogenbos en Mesen) de kleinste van het Vlaams Gewest. Het is een bijzonder dicht bevolkte gemeente. Met haar 2.629 inwoners per km² dient zij enkel de tweede verzoekende partij, de stad Mortsel te laten voorgaan als dichtst bevolkte gemeente van het Vlaams Gewest.
>
> Fort III, gelegen op de grens van de gemeenten Borsbeek en Mortsel, is thans bestemd als recreatiegebied. Het is het enige recreatiegebied op het grondgebied van de gemeente. Het is tevens het belangrijkste natuurgebied op haar grondgebied: naast dit gebied beschikt de gemeente enkel over twee parkgebieden en een kleine strook groengebied. Het fort is tevens de enige speciale beschermingszone op haar grondgebied. Het fort is tot slot één van de zes gebouwen in de gemeente Borsbeek die beschermd zijn als monument, en is ongetwijfeld het belangrijkste van die gebouwen.
>
> Het gehele fort, met inbegrip van het deel gelegen op het grondgebied van de stad Mortsel, is eigendom van de gemeente Borsbeek.
>
> In het ruimtelijk structuurplan van de gemeente wordt het fort geselecteerd als één van de drie belangrijkste natuurlijke elementen (...). Het fort wordt zonder meer beschouwd als het voornaamste structurerend element van de gemeente (...). Het gemeentelijk ruimtelijk structuurplan stelt dat deze historische site in de toekomst beter dient te worden geïntegreerd in de zogenaamde 'groene vinger' (...). Het stelt dat het dit fort zoveel mogelijk wil behouden, en daarom gekant is tegen de uitbreiding van de luchthaven (...). Het structuurplan wil landschappelijk uitgaan van het bestaande contrast tussen de omliggende open ruimte en het vlakke landschap en het beboste karakter van het fort (...). Het fort wordt beschouwd als ruimtelijke drager in de ruime omgeving (...).
>
> De gemeente dient thans als eigenaar van het fort reeds verschillende functies met elkaar te verzoenen. De belangrijke natuurfunctie als habitatrichtlijngebied dient zij te verzoenen met de monumentale waarde van het gebied en de functie van het gebied als het enige recreatiegebied binnen de gemeente én als huisvestigingsplaats van verschillende gemeenschapsvoorzieningen.
>
> Met de bestreden beslissing dient het fort nog een bijkomende functie te vervullen. Er dient met name een deel van het fort te worden omgevormd ten behoeve van de RESA.
>
> De weg zelf zal ook schade toebrengen aan het recreatieve karakter van het fort. De R11 is namelijk één van de drukste wegen van de regio zodat door de omlegging van deze weg tot vlak tegen het fort en de daarmee gepaard gaande geluidshinder het recreatieve gebruik van het fort zal worden gehinderd. Waar de R11 aan de zuidwestelijke zijde op dit ogenblik op ongeveer 315 meter

afstand van het fort ligt, komt die in de geplande situatie tot op ongeveer 55 meter. Er kan in de huidige situatie daadwerkelijk gewandeld worden bovenop de omwallingen van het fort, hetgeen na de aanleg van de weg aan de westelijke zijde nagenoeg onmogelijk (zal) zijn.

Door de aanleg van de omleidingsweg en de (korte) tunnel vervalt bovendien de huidige hoofdingang van Fort III. Het verkeer van en naar het fort, ten behoeve van de verschillende functies van dit fort, zal een andere weg moeten nemen, maar die is er niet. Het plan MER voorziet hiervoor een oplossing om een bestaande noordoostelijke toegang te maken, maar die is daartoe niet geschikt.

Ook de landschappelijke inpassing van het fort wordt beschadigd. Het fort is thans langs nagenoeg alle zijden omringd door open ruimte, op een kleine verbinding in noordoostelijke richting na. De bestreden beslissing maakt dat over een niet aanzienlijke afstand van 400 meter de R11 net naast de oostelijke grens van het fort zal lopen, waardoor de ligging van het fort in een open landschap, die door het gemeentelijk ruimtelijk structuurplan van groot belang werd beschouwd, in grote mate teniet wordt gedaan.

Dit is voor een gemeente als Borsbeek een ernstig nadeel.

(...)

74. Voor de tweede verzoekende partij heeft het fort eveneens zijn belang. Het fort is de enige speciale beschermingszone op haar grondgebied.

De stad Mortsel beschikt over slechts weinig open ruimte, wat haar tot de dichtstbevolkte gemeente van het Vlaams Gewest maakt. Het enige openruimtegebied op haar grondgebied is het agrarisch gebied ten zuiden van Fort III. Ook voor deze verzoekende partij heeft de ligging van het fort in een open landschap een bijzonder belang. Dit open karakter wordt teniet gedaan door de opname van de zone tussen het fort en de luchthaven in een luchthavengebied, en door de aanleg van een weg naast het fort.

75. Het plan-Mer erkent de landschappelijke impact van het plan.

Het stelt:

> ‘De aanleg van een RESA ten oosten van de luchthaven van Antwerpen heeft een aanzienlijke impact op de aanwezige landschappelijke, bouwkundige en archeologische waarden in het betrokken gebied. Deze impact is deels het gevolg van de aanleg van de RESA zelf, maar wordt in grote mate bepaald door de wijze waarop de Krijgsbaan wordt aangepast om de aanleg mogelijk te maken.
>
> Alternatief 2 bevat een omleiding rond de RESA en heeft hierdoor een aanzienlijke impact op de twee belangrijkste erfgoedwaarden in het gebied: Fort III en het beschermde dorpsgezicht rond de Heilige Geesthoeve. Het feit dat de omleiding door een gedeelte van het fort loopt, leidt tot een belangrijke negatieve impact. Doordat het tracé volledig op maaiveldniveau blijft is de impact op archeologische waarden beperkt. Alternatief 3 heeft gelijkaardige effecten als alternatief 2, zij het dat ze -door de beperktere omvang van de omleiding en het feit dat Fort III wordt ontzien- minder uitgesproken zijn. Het alternatief omvat echter ook het liften van de startbaan en de RESA. Hierdoor neemt de impact -zeker voor wat betreft het aspect landschap- aanzienlijk toe. Bovendien wordt een deel van het tracé in uitgraving gerealiseerd. Hierdoor is ook een aanzienlijk impact op archeologie mogelijk.’.

(...)

78. Deze nadelen zijn niet enkel ernstig, zij zijn ook moeilijk te herstellen. Het betreft een grootschalig infrastructuurproject dat uitgevoerd wordt door een hogere overheid. Het is onwaarschijnlijk dat na uitvoering van het project een

gebeurlijke vernietiging van het RUP kan leiden tot het herstel van de omgeving in de vorige toestand".

8.1. In het gemeentelijk ruimtelijk structuurplan (hierna: GRS) van de eerste verzoekende partij wordt Fort III geselecteerd als één van de drie belangrijkste natuurlijke elementen binnen de gemeente Borsbeek. De eerste verzoekende partij wenst, luidens het richtinggevend deel van het GRS, het fort "maximaal te behouden". Tevens is zij, nog luidens het GRS, "geen voorstander van een verlenging van de startbaan van het Vliegveld van Deurne".

Onder punt 3.2 "Deelruimte 2: Groene vinger", punt 3.2.2 "Ontwikkelingsperspectieven" van het GRS valt te lezen wat volgt:

> "Omgeving Fort III
> Visie met betrekking tot de ruimtelijke en functionele relatie van het fort met de omgeving:
> Er wordt gestreefd naar een duidelijk ruimtelijke en functionele relatie tussen de ruime omgeving en de site van het fort. Landschappelijk wordt uitgegaan van het bestaande contrast tussen de omliggende open ruimte en vlakke landschap en het aanwezige bebost karakter van het fort. Dit bebost karakter wordt behouden in zoverre dat dit in overeenstemming kan gebracht worden met de geldende veiligheidsnormen voor de luchthaven van Deurne. Het Fort vormt bijgevolg een duidelijk en herkenbaar landschappelijk baken.
> (...)
> Indien een akkoord kan bekomen worden met de hogere overheden, zal de gemeente een 'masterplan' opstellen voor de site van het fortgebied. De gemeente kiest voor het behoud van de huidige activiteiten in het fort maar wil dit koppelen aan een duurzame en kwalitatieve inrichting. De gemeente wenst dit complex recreatief uit te bouwen in een natuurlijke omgeving. Zowel de natuuurwaarde (habitat, IVON) van het geheel, als het fortcomplex als beschermd monument en landschap noodzaakt de ontwerpers om zowel recreatie, natuur en het monumentale karakter van de site met elkaar in harmonie te brengen.
> (...)".

8.2. Het plan-MER, opgesteld naar aanleiding van het bestreden besluit, erkent tevens de landschappelijke impact van het plan:

> "De aanleg van een RESA ten oosten van de luchthaven van Antwerpen heeft een aanzienlijke impact op de aanwezige landschappelijke, bouwkundige en archeologische waarden in het betrokken gebied. Deze impact is deels het gevolg van de aanleg van de RESA zelf, maar wordt in grote mate bepaald door de wijze waarop de Krijgsbaan wordt aangepast om de aanleg mogelijk te maken.
> Alternatief 2 bevat een omleiding rond de RESA en heeft daardoor een aanzienlijke impact op de twee belangrijkste erfgoedwaarden in het gebied: Fort 3 en het beschermde dorpsgezicht rond de Heilige Geesthoeve. Het feit dat de omleiding door een gedeelte van het fort loopt, leidt tot een belangrijke

negatieve impact. Doordat het tracé volledig op maaiveldniveau blijft is de impact op archeologische waarden beperkt.

Alternatief 3 heeft gelijkaardige effecten als alternatief 2, zij het dat ze -door de beperktere omvang van de omleiding en het feit dat Fort 3 wordt ontzien- minder uitgesproken zijn. Het alternatief omvat echter ook het liften van de startbaan en de RESA. Daardoor neemt de impact -zeker voor wat betreft het aspect landschap- aanzienlijk toe. Bovendien wordt een deel van het tracé in uitgraving gerealiseerd. Daardoor is ook een aanzienlijk impact op archeologie mogelijk".

8.3. De eerste verzoekende partij maakt, in tegenstelling tot wat de verwerende partij voorhoudt, in haar uiteenzetting voldoende concreet aannemelijk dat haar fundamentele ruimtelijke beleidsopties, zoals vastgelegd in het GRS, dreigen te worden doorkruist door het bestreden GRUP. Gelet op de bijzondere waarde die het GRS het fort toedicht, de aard van de geplande werkzaamheden en de erkende landschappelijke impact van het bestreden GRUP, kan de tenuitvoerlegging van het bestreden besluit een moeilijk te herstellen ernstig nadeel inhouden voor de eerste verzoekende partij.

Gelet op die conclusie is het overbodig om te onderzoeken of aan die voorwaarde ook is voldaan in hoofde van de tweede verzoekende partij.

**BESLISSING**

**1. De Raad van State beveelt de schorsing van de tenuitvoerlegging van het besluit van 20 maart 2009 van de Vlaamse regering houdende definitieve vaststelling van het gewestelijk ruimtelijk uitvoeringsplan "R11-omleiding luchthaven Antwerpen".**

**2. Dit arrest dient te worden bekendgemaakt op dezelfde wijze als het geschorste besluit.**

Dit arrest is uitgesproken te Brussel, in openbare terechtzitting van dertien augustus 2010, door de Raad van State, Xe kamer, samengesteld uit:

| | |
|---|---|
| Roger Stevens, | kamervoorzitter, |
| Johan Bovin, | staatsraad, |
| Jan Clement, | staatsraad, |

bijgestaan door

| | |
|---|---|
| Tiny Temmerman, | griffier. |

**De griffier** **De voorzitter**

**Tiny Temmerman** **Roger Stevens**

# ECJ Judgment in case C-288/11P (Leipzig-Halle)

The Court of Justice of the European Union (CJEU) has confirmed that the financing of infrastructure projects is subject to the European State aid rules. The judgment concerns the financing of airport infrastructure, but the underlying legal point extends far beyond this sector. Repercussions can be expected for all companies that build, maintain and operate infrastructure with public support.

EU State aid law prohibits all funding, granted in any form whatsoever, that benefits a specific company or group of companies. These rules apply to both public and private entities. State aid may only be approved by the European Commission under certain circumstances, after notification by the Member State. If the State support that qualifies as State aid is handed out without approval by the Commission, the Commission will order the Member State to recover the aid from the companies that have benefitted.

The closing in of EU State aid law on infrastructure financing has been a gradual development over the last few years. The Commission has been slowly shifting its view. At first, the European State aid rules were deemed to be non applicable per-se, meaning, generally, infrastructure measures could be funded by EU Member States without State aid law being applicable. In recent years, however, not only have the use and operation of infrastructure been considered to constitute an economic activity (and therefore fall within the scope of the State aid regime) but the financing of infrastructure has also attracted the attention of the Commission.

In the case subject to the judgment decided by the CJEU yesterday (Case C-288/11P), a German airport had notified to the Commission of measures that included the financing of the construction of a new runway. The Commission considered that the financing of the runway did amount to State aid but it approved the measure eventually. The decision was appealed on the grounds that the financing of such infrastructure does not fall within the scope of the State aid rules.

The CJEU upheld the Commission's decision and the judgment of the General Court of the EU (see Case T- 443/08). The CJEU held that the construction of airport infrastructure is a precondition for the operation of an airport and is therefore interlinked in a way that warrants the application of the State aid rules to the financing of its construction, as well as to its use and operation. The judgment concerns airport infrastructure, but the underlying legal point extends well beyond the airport sector. It is relevant to all types of infrastructure where its operation can be considered to amount to an economic activity, such as, for example, the operation of ports or sports arenas.

The implications of this judgment for companies and government authorities are substantial, not only with respect to future projects, but also in relation to all projects that commenced within the last 10 years. As a result, public authorities, companies that have benefitted from public funding of infrastructure projects and their competitors, should review whether the financing of these infrastructure projects qualifies as State aid and, if so, how this situation could be remedied.

© 2013 McDermott Will & Emery

Retrieved from http://www.natlawreview.com/article/infrastructure-financing-does-fall-within-scope-european-union-state-aid-rules on 11 January 2013

# LECTURE 14

## Dredging the Westerschelde

26 March 2012

# Conclusies en adviezen

## WAT NODIG IS IN DE WESTERSCHELDE

1. **De commissie concludeert dat het nemen van voldoende maatregelen die leiden tot herstel van de estuariene natuur in de Westerschelde noodzakelijk en onvermijdelijk is.**
   De commissie heeft via verschillende invalshoeken onderbouwd dat natuurherstel in de Westerschelde nodig is. De natuurherstelmaatregelen staan vooral in verband met de achteruitgang van het gebied als gevolg van autonome ontwikkelingen en menselijk ingrijpen in het verleden. De natuurherstelmaatregelen hebben tot doel om een gezond estuarien systeem te realiseren. Zij moeten voldoen aan de Vogel- en Habitatrichtlijn en bijdragen aan de realisatie van de Natura 2000-doelstellingen. Nederland heeft zich verplicht deze doelen te realiseren.

2. **De commissie adviseert om op korte termijn een besluit te nemen over de in te zetten natuurherstelmaatregelen.**
   De commissie is van mening dat natuurherstelmaatregelen op korte termijn moeten worden genomen. Dat betekent dat binnen uiterlijk een jaar besloten moet worden of de Hertogin Hedwigepolder wordt ontpolderd, dan wel dat alternatieve maatregelen worden uitgevoerd. De uitvoering van de gekozen maatregel(en) dient naar het oordeel van de commissie in de periode 2010-2015 plaats te vinden. Dit tempo is niet alleen van belang om de Westerschelde in een goede staat van instandhouding te brengen. Ook de hieraan verbonden doelstellingen van toegankelijkheid en veiligheid lopen gevaar als niet tijdig tot actie wordt overgegaan. Tot slot is nu zeer vlotte besluitvorming nodig om een basis te creëren voor verbetering van de bestuurlijke en maatschappelijke verhoudingen in de regio. Ook biedt het de duidelijkheid die nodig is voor economische ontwikkeling van de regio.

3. **De commissie concludeert dat het besluit maatregelen moet bevatten die gelijk of gelijkwaardig zijn aan circa 300 ha 'ontpolderingen', als onderdeel van 600 ha natuurmaatregelen. Het gaat hierbij, gezien de eerder vastgestelde beleidsvoornemens om een eerste stap, waarna aanzienlijke additionele gebieden moeten worden gerealiseerd.**
De 600 hectare natuurmaatregelen die in het Schelde-estuarium worden voorgesteld, zijn vastgelegd in de Ontwikkelingsschets 2010 en het Verdrag tussen Nederland en Vlaanderen betreffende de uitvoering van de ontwikkelingsschets. Dit is een internationaalrechtelijk en politiek feit. Deze 600 hectare aan natuurherstelmaatregelen vormen – met de door Nederland zelf aangegeven noodzaak tot herstel – slechts een eerste stap op weg naar een gezond en dynamisch ecosysteem.

   De commissie acht het van belang dat de doelstellingen voor de Westerschelde integraal worden gerealiseerd. Een gezond estuarien systeem is weerbaar. Daarentegen kan een systeem dat zich in neergaande spiraal bevindt weinig tot niets verdragen. De commissie sluit op basis van juridisch onderzoek niet uit dat de Europese Commissie op grond van het voorzorgbeginsel een inbreukprocedure start voor de derde verdieping van de Westerschelde, indien niet tijdig concrete maatregelen worden genomen om de OS2010- en de Natura 2000-doelstellingen te realiseren. Als de natuurwaarden in de Westerschelde door de afgesproken maatregelen in een goede staat van instandhouding worden gebracht, kan Europa voldoende zekerheid worden geboden dat de Westerschelde er niet verder op achteruitgaat.

4. **De commissie concludeert dat gebieden met gecontroleerd gereduceerd getij een alternatief kunnen vormen voor ontpolderen.**
Ontpoldering is naar het oordeel van de commissie niet de enige maatregel die positieve natuurlijkheidseffecten heeft. Ook gebieden met gecontroleerd gereduceerd getij (GGG) dragen bij aan het herstel van de estuariene karakteristieken. Omdat een GGG-gebied minder bijdraagt aan het herstel, zal om een gelijkwaardig alternatief te vormen een aanzienlijk groter areaal nodig zijn dan bij ontpoldering.

## VRIJWILLIGE GRONDVERWERVING EN ONTEIGENING

5. **De commissie adviseert om in het geval van natuurherstelmaatregelen in de Westerschelde de benodigde gronden te verwerven op basis van onteigening.**
De commissie heeft zich verdiept in de politieke discussie en maatschappelijke verhoudingen en heeft zorgvuldig geluisterd naar de zorgen van diverse partijen in het gebied. Hoewel de commissie in algemene zin vindt dat streven naar vrijwillige grondverwerving een goede zaak is, komt zij in dit geval tot de conclusie dat onteigening de voorkeur verdient.

Er is al een lange periode van debat en onduidelijkheid achter de rug. Snelheid en duidelijkheid zijn nu geboden. Daarnaast biedt onteigening een betere positie aan pachters in het gebied. De commissie hecht daar grote waarde aan. Bovendien is de prijsvorming bij onteigening duidelijker; dat voorkomt een langdurig onderhandelingsproces. Wat betreft de Hertogin Hedwigepolder is bekend dat de enige eigenaar niet vrijwillig wil verkopen.

In het algemeen is de commissie van mening dat bestuurlijke discussies er niet toe mogen leiden dat vrijwilligheid van grondverwerving een principe wordt en dat daardoor bestaande wettelijke bevoegdheden opzij geschoven worden. In dat geval wordt vrijwillige grondverwerving tot doel verheven. In essentie is grondverwerving, al dan niet vrijwillig, een middel om het doel van bijvoorbeeld een gezond ecosysteem in de Westerschelde te realiseren. Het wettelijk instrument van onteigening dient daarom te allen tijde ter beschikking te blijven staan van de minister van LNV. Dit om prijsopdrijving te voorkomen en om in het uiterste geval het algemeen belang te kunnen laten prevaleren boven het individuele belang.

## HERTOGIN HEDWIGEPOLDER

**6. De commissie concludeert dat het ontpolderen van de Hertogin Hedwigepolder de best denkbare maatregel is.**

De commissie heeft alle alternatieven beoordeeld en gewaardeerd met behulp van een afwegingskader. Dit kader is uitgewerkt in vier aspecten: natuurlijkheid, draagvlak, realisatietijd en kosten. Ter vergelijking is ook de Hertogin Hedwigepolder gewaardeerd. Deze ontpoldering blijkt ten opzichte van de alternatieven als beste uit de bus te komen.

Daarnaast is de commissie van mening dat niet lichtvoetig kan worden omgesprongen met de verplichting, in een verdrag met Vlaanderen vastgelegd, om de Hertogin Hedwigepolder te ontpolderen. De commissie heeft zich ervan vergewist dat Vlaanderen een eventueel alternatief welwillend en serieus zal bekijken, maar dat uitsluitend de maatregelen in de Hertogin Hedwigepolder door Vlaanderen zullen worden betaald. Daarmee is de ontpoldering van de Hertogin Hedwigepolder voor Nederland een uiterst goedkope maatregel en iedere andere maatregel buitengewoon kostbaar.

Als de Hertogin Hedwigepolder wordt ontpolderd, dan adviseert de commissie te onderzoeken of de Gasdam – direct of op termijn, samenvallend met de gedeeltelijke vernieuwing – verwijderd kan worden.

## VIJF ALTERNATIEVEN

7. **De commissie concludeert dat er vijf kansrijke alternatieven zijn voor de ontpoldering van de Hertogin Hedwigepolder. In volgorde van afnemende kwaliteit zijn dat:**
   1. Grote ontpoldering Zimmermanpolder en een gedeelte van de Fredericapolder;
   2. Gecontroleerd gereduceerd getij in de Zimmermanpolder en de Fredericapolder (geen ontpoldering);
   3. Ontpoldering Molen- en Perkpolder, plus aanvullende maatregelen kreekherstel;
   4. Meerdere kleine ontpolderingen plus aanvullende maatregelen kreek herstel;
   5. Natuurherstel met gecontroleerd gereduceerd getij, plus aanvullende maatregelen kreekherstel (geen ontpoldering).

   De commissie heeft alle ideeën en suggesties voor natuurherstelmaatregelen beoordeeld. Er bleven in totaal 78 verschillende potentiële maatregelen over. Al deze maatregelen zijn gewaardeerd met het eerder genoemde afwegingskader. Uit deze waardering zijn bovengenoemde vijf kansrijke alternatieven naar voren gekomen. Bij alle kansrijke alternatieven die de commissie heeft gevonden, zal een aanzienlijke hoeveelheid (landbouw) grond moeten worden verworven. In alle gevallen meer dan bij de ontpoldering van de Hertogin Hedwigepolder.

   Indien één van de alternatieven wordt gekozen, is zorgvuldige afstemming met Vlaanderen en de Europese Commissie nodig. Het vereist een aanpassing van het Verdrag met Vlaanderen, waarvoor overeenstemming tussen beide landen noodzakelijk is. Daarnaast is – zeker indien niet voor ontpolderen wordt gekozen – afstemming wenselijk met de Europese Commissie. De Europese Commissie heeft overigens aangegeven welwillend te kijken naar eventuele alternatieven en de bijbehorende argumentatie.

8. **De commissie concludeert dat er geen reële alternatieven zijn voor de ontpoldering van de Hertogin Hedwigepolder buiten het gebied van de Westerschelde. Ook de aangeboden petities vormen geen reëel alternatief.**
   De commissie heeft onderstaande alternatieven buiten de Westerschelde zorgvuldig bestudeerd.
   1. Een zout Volkerak-Zoommeer met getijde;
   2. Getijde realiseren in het Grevelingenmeer;
   3. Getijde realiseren in het Haringvliet;
   4. Getijde realiseren in het Veerse meer;
   5. Oplossen zandhonger Oosterschelde;
   6. Herstellen van het Lauwersmeer estuarium;
   7. Herstelmaatregelen in het Eems-Dollard estuarium.

Geen van deze maatregelen is bruikbaar als alternatief voor ontpoldering van de Hertogin Hedwigepolder. In alle gevallen zijn de bestuurlijke en juridische maatregelen die nodig zijn om de alternatieven te laten voldoen aan de vereisten zo ingrijpend en complex, dat van een tijdige realisatie geen sprake zal kunnen zijn. Tevens draagt geen van de maatregelen bij aan het herstel van de natuurkwaliteit van de Westerschelde zelf.

De commissie heeft tevens specifiek gekeken naar de twee petities die in december 2007 aan de Tweede Kamer zijn aangeboden:

1. Aanleg buitendijks schor (Gemeenteraad van Hulst);
2. Bodemverlaging Verdronken Land van Saeftinghe (Stichting De Levende Delta).

Beide alternatieven zijn onvoldoende sterk gebleken om als reëel alternatief voor ontpoldering van de Hertogin Hedwigepolder in aanmerking te komen.

## BESTUURLIJKE EN FINANCIËLE MAATREGELEN

9. **De commissie adviseert het Rijk zelf de benodigde besluiten te nemen over natuurherstelmaatregelen. Heldere kaders van het Rijk – ook over de verwerving van gronden – zijn nodig om snel vooruitgang te boeken en om in de regio te kunnen werken aan verbetering van de onderlinge verhoudingen.**
   Een duidelijke verdeling van verantwoordelijkheden is een voorwaarde om tot implementatie van natuurherstelmaatregelen te komen. De commissie is van mening dat het Rijk – verantwoordelijk voor Natura 2000 en de afspraken met verdragspartner Vlaanderen – de hoofdkeuzes moet maken en de daarvoor benodigde rijksinstrumenten moet inzetten. Zoals eerder aangegeven adviseert de commissie om voor de verwerving van gronden de beschikbare onteigeningsinstrumenten in te zetten.

10. **De commissie concludeert dat de bestuurlijke en maatschappelijke verhoudingen in het gebied moeten worden verbeterd. De commissie adviseert daarom dat op initiatief van de provincie Zeeland actief wordt gewerkt aan herstel van de goede verhoudingen.**
    De commissie constateert dat het de partijen in het gebied niet goed lukt om tot natuurherstelmaatregelen te komen. De commissie is van mening – net als de Deltacommissie (commissie Veerman) – dat het initiatief voor regionale maatregelen in de regio dient te liggen. Primair zijn dus de regionale bestuurders aan zet. Er moet een proces van gezamenlijke gebiedsontwikkeling op gang worden gebracht. Het is noodzakelijk om actief te zoeken naar kansen voor de lokale en regionale gemeenschappen om economisch mee te profiteren van de nieuwe natuurgebieden, zoals in de vorm van recreatie, wonen, en zilte landbouw.

**11. De commissie adviseert om alle activiteiten gericht op de opgaven van Natura 2000, die betrekking hebben op de verdieping van de Westerschelde en die voortkomen uit het advies van de Deltacommissie, te bundelen in een regionale uitvoeringsorganisatie. Deze uitvoeringsorganisatie dient als regionaal samenwerkingsverband te worden opgezet. De commissie adviseert om de financiële middelen die beschikbaar zijn voor de realisatie van het natuurherstel, onder te brengen in een Westerscheldefonds.**

Regionale ontwikkeling moet onder regionale regie tot stand komen. De commissie deelt ter zake de opvattingen van de commissie Veerman. Ook de commissie Veerman beveelt aan om met een regionale uitvoeringsorganisatie te werken. Deze organisatie moet zich richten op de opgaven van Natura 2000, de verdieping van de Westerschelde en de uitvoering van het advies van de Deltacommissie. De opdracht van de te starten regionale uitvoeringsorganisatie kan in de loop van de tijd worden uitgebreid met opdrachten met betrekking tot veiligheid, zoetwatervoorziening en versterking van de economische structuur, waaronder die van de landbouw.

De regionale uitvoeringsorganisatie dient te worden aangestuurd door een bestuurlijke stuurgroep met vertegenwoordigers van het Rijk, de provincie Zeeland en regionale partijen. De stuurgroep dient onder voorzitterschap te staan van een onafhankelijke, gezaghebbende persoon. De stuurgroep kan bijdragen aan het verbeteren van de bestuurlijke verhoudingen in de regio en tevens als gesprekspartner optreden voor de Task Force Verdieping van de Westerschelde in Vlaanderen.

Indien gekozen wordt voor ontpoldering van de Hertogin Hedwigepolder, adviseert de commissie om bovenop de al gereserveerde middelen een substantieel deel van het voordeel van de Vlaamse bijdrage in de kosten aan een fonds ter beschikking te stellen. Dit Westerscheldefonds wordt beheerd door de bestuurlijke stuurgroep. De commissie acht een bedrag van 25 miljoen euro een verantwoorde basis voor de start van het Westerscheldefonds.

## BR 2009/163, p. 825

Afdeling bestuursrechtspraak van de Raad van State (vz.)
28 juli 2009
nr. 200806565/3/R1, 200903364/2/R1, 200903365/2/R1, 200903367/2/R1 en 200903368/2/R1 *LJN* BJ4587
Mr. P.J.J. van Buuren
Met noot H.E. Woldendorp

m.nt. H.E. Woldendorp

### Essentie

***Verruiming Westerschelde en de gevolgen voor een Natura 2000-gebied:***

### Tekst

(…)

2 OVERWEGINGEN

**2.1.** Het oordeel van de voorzitter heeft een voorlopig karakter en is niet bindend in de bodemprocedure.

**2.2.** Het Tracébesluit voorziet in de verruiming van de vaargeul van de Westerschelde, waardoor de vaargeul blijvend wordt verdiept en waarbij tenminste vijf miljoen kubieke meter grond wordt verzet. Het betreft het gehele in Nederland gelegen traject dat zich uitstrekt over 66 kilometer, beginnende bij de Belgisch/Nederlandse grens en eindigend nabij Vlissingen. Voorts voorziet het Tracébesluit in infrastructurele hoofdmaatregelen en voorzieningen, in bijkomende infrastructurele maatregelen en voorzieningen en in aanvullende en mitigerende maatregelen.

*De vergunning krachtens artikel 19d, eerste lid, van de Nbw 1998 (nr. 200903367/2/R1)*

**2.3.** De vergunning ziet op de uitvoering van grondverzetwerkzaamheden ten behoeve van de verruiming van de Westerschelde, het onderhoud daarvan en het terugstorten van de hierbij vrijkomende baggerspecie (in totaal maximaal 66,2 miljoen mü bagger), voor een periode van vijf jaar nadat de minister in kennis is gesteld van de start van de werkzaamheden, doch uiterlijk tot 31 december 2014.

**2.4.** [verzoeker sub 1], de Vogelbescherming en ZMF en anderen betogen dat de minister van LNV de vergunning ten onrechte heeft verleend. Zij voeren in dit verband onder meer aan dat onvoldoende zekerheid bestaat over de effecten van deze verruiming op het Natura 2000-gebied Westerschelde & Saeftinghe. De Vogelbescherming voert voorts aan dat een afname van laagdynamisch gebied van 0,7 procent door de minister van LNV ten onrechte niet als een significant negatief effect wordt gezien, nu hiervoor een herstelopgave geldt. De Vogelbescherming betwijfelt voorts of deze afname kan worden tegengegaan door de voorgenomen stortstrategie en het zogenoemde flexibel storten.

**2.5.** De minister van LNV stelt zich op het standpunt dat als gevolg van de verruiming van de vaargeul de berekende oppervlakte laagdynamische ecotopen op korte termijn met ruim 40 hectare afneemt, hetgeen neerkomt op 0,7 procent van de totale oppervlakte laagdynamisch gebied in de Westerschelde. Volgens de minister kan dit op zich al als niet significant worden aangemerkt, en is daarnaast sprake van een tijdelijk effect, waarbij de effecten optreden aan de randen van de platen. Op de middellange termijn treden ten opzichte van het nulalternatief (niet verruimen) volgens de minister van LNV geen negatieve, maar positieve effecten op de oppervlakte laagdynamisch gebied op als gevolg van de wijze van storten, waarbij gestort zal worden op de plaatranden volgens de methode van 'flexibel storten'. Het systeem van flexibel storten is niet noodzakelijk in verband met de effecten van de verruiming van de vaargeul, maar wel met het oog op de negatieve autonome morfologische ontwikkeling en de negatieve staat van instandhouding van het Schelde–estuarium, aldus de minister van LNV.

**2.6.** In tabel 6–1 van het 'Hoofdrapport Passende Beoordeling: Verruiming vaargeul Beneden-Zeeschelde en Westerschelde' (hierna: het hoofdrapport passende beoordeling) van oktober 2007 zijn de effecten van de aanleg, aanwezigheid, onderhoud en het gebruik van het voorkeursalternatief voor de verruiming op de kwaliteit van habitattypen in de Westerschelde ten opzichte van het nulalternatief onderzocht. Op pagina 20 van het hoofdrapport passende beoordeling staat vermeld dat het flexibel storten onderdeel uitmaakt van het voorkeursalternatief.
Volgens voornoemde tabel 6–1 en de toelichting daarbij leidt de verruiming — uitgevoerd zoals bij deze tabel beschreven — tot een afname van de oppervlakte laagdynamisch gebied (habitattype 1130) met 43 hectare in 2010, hetgeen neerkomt op een afname van 0,7 procent. In de daaropvolgende periode tot 2015 wordt, afgaande op de gegevens in tabel 6–1,

vervolgens weer een toename van estuaria verwacht.

**2.6.1.** In de overwegingen bij het besluit heeft de minister van LNV bij de beoordelingscriteria onder meer vermeld dat een ingeschat effect van minder dan één procent als niet significant wordt beschouwd. Daarbij heeft hij echter, voor zover thans relevant, vermeld dat dit criterium niet wordt gehanteerd indien een hersteldoel of een verbeterdoel is geformuleerd. Uit de toelichting bij het ontwerpbesluit tot aanwijzing van de Westerschelde als Natura 2000-gebied blijkt dat habitattype 1130 (estuaria) zich in een zeer ongunstige landelijke staat van instandhouding bevindt en dat wordt gestreefd naar uitbreiding van de oppervlakte en verbetering van de kwaliteit. In tabel 3–1 van het hoofdrapport passende beoordeling is voorts weergegeven dat het relatieve belang van het habitattype groot is. Gelet op de zeer ongunstige landelijke staat van instandhouding van estuaria en op de hiervoor geformuleerde verbeteringsdoelen is de minister van LNV naar het voorlopig oordeel van de voorzitter afgeweken van voornoemde beoordelingscriteria voor de effecten op habitattypen door te concluderen dat een afname van 0,7 procent van de totale oppervlakte estuaria op zichzelf reeds als niet significant kan worden aangemerkt.
Voor zover de motivering voor deze afwijking zou moeten worden gevonden in de omstandigheid dat deze effecten zich voordoen op de randen van platen ziet de voorzitter voorshands niet in waarom aan deze omstandigheid belang zou toekomen bij de waardering van de effecten van de verruiming van de vaargeul op estuaria, gelet op de hiervoor beschreven verbeteringsdoelen die voor estuaria gelden.
Voor zover de motivering voor deze afwijking zou moeten worden gevonden in de omstandigheid dat het naar verwachting een tijdelijk effect betreft, overweegt de voorzitter dat deze verwachting is gebaseerd op verruiming van de vaargeul met gebruikmaking van het voorkeursalternatief. Indien het standpunt van de minister van LNV aldus moet worden begrepen, is bij de beoordeling van de vraag of verruiming van de vaargeul zal leiden tot significante effecten gewicht toegekend aan de in het voorkeursalternatief begrepen toepassing van de aangepaste strategie voor het storten van onderhoudsbaggerspecie, in combinatie met gebruikmaking van de methode van het flexibel storten, welke methode inhoudt dat het verspreiden van baggerspecie in de Westerschelde wordt bijgestuurd op basis van het zorgvuldig en frequent volgen van morfologische en ecologische ontwikkelingen om onvoorziene negatieve effecten tegen te gaan.

**2.6.2.** In haar toetsingsadvies over het ten behoeve van de verruiming van de Westerschelde opgestelde milieueffectrapport (hierna: het MER) heeft de Commissie voor de milieueffectrapportage (hierna: de Commissie mer) opgemerkt dat zij de onzekerheden in de morfologische voorspellingen als een belangrijk probleempunt ziet. Vooral bij de voorspellingen over de toekomstige situatie van de estuariene natuur ziet zij die onzekerheid als een belangrijk risico, gezien de slechte staat van instandhouding ervan. Volgens de Commissie mer zal uitgebreider onderzoek niet leiden tot andere uitkomsten of tot de zekerheid dat de natuurlijke kenmerken van het gebied niet zullen worden aangetast, gezien de complexiteit van de situatie.
ZMF en anderen hebben voorafgaand aan de zitting een verklaring ingediend van prof. dr. P.M.J. Herman, verbonden aan het Nederlands Instituut voor Ecologie en als hoogleraar estuariene ecologie verbonden aan de Radboud Universiteit Nijmegen. Hij licht hierin toe dat het risico op verdere verarming van het gebied in het MER wellicht te laag is ingeschat, omdat de gebruikte modellen een aantal interacties die slechts op middellange termijn (decennia) spelen bijna niet kunnen incorporeren. Uit een studie naar de voorspellende waarde van de gebruikte modellen is volgens Herman gebleken dat de modellen sommige trends goed kunnen reproduceren, maar dat andere ontwikkelingen worden gemist, ook op macroniveau. Prof. dr. P.M.J. Herman is van mening dat het nuttig is om door middel van flexibel storten de ingrepen aan te passen aan voortschrijdend inzicht, maar hij acht de onzekerheden over het effect van baggeren/ storten als geheel nog steeds groot.
Teneinde het inzicht in de hydrodynamische en morfologische condities rond de voorgestelde stortlocaties voor de aanleg- en onderhoudsbaggerspecie langs plaatranden te verfijnen is op dit punt nader onderzoek verricht, waarvan de resultaten zijn weergegeven in de ‘Nota Plaatrandstortingen’ (Waterbouwkundig laboratorium, Arcadis en Technum, oktober 2008). In deze nota wordt onder meer geconcludeerd dat de voorspelde toename met gebruikmaking van de voorgestelde stortstrategie weliswaar lager uitvalt dan de voorspellingen voor het MER en hoofdrapport passende beoordeling, maar dat deze binnen de bandbreedte ligt, zij het aan de onderkant daarvan. De voorzitter is van oordeel dat aannemelijk is dat de Nota Plaatrandstortingen een meer verfijnd beeld geeft van de effecten van de verruiming van de vaargeul dan het MER. Dit doet echter niet af aan de door de Commissie mer geconstateerde complexiteit van de situatie en de daarmee samenhangende onzekerheden in de morfologische voorspellingen, alsmede de door prof. dr. P.M.J. Herman geconstateerde onzekerheden in de gebruikte modellen. In de Nota Plaatrandstortingen is immers vermeld dat de gehanteerde methodologie in het verrichte determinatieonderzoek sterk vergelijkbaar is met die in het MER, waarbij met name door middel van numerieke modellering en expert judgement is ingegaan op de te verwachten morfologische veranderingen als gevolg van het uitvoeren van de plaatrandstortingen.

**2.6.2.1.** Volgens het deskundigenbericht dat is uitgebracht in de zaak betreffende het Tracébesluit, bij de Afdeling bekend onder nr. 200806565/1, welk deskundigenbericht ZMF en anderen als nader stuk hebben ingediend in de onderhavige zaak, illustreren de afwijkingen ten opzichte van de eerdere voorspellingen in feite de onzekerheden en de voortgaande inzichten in het systeem en de wijze waarop de baggerspecie gestort moet worden. Dit betekent niet dat nadelige effecten zullen optreden, maar evenmin kunnen ze op voorhand worden uitgesloten, zo staat in het deskundigenbericht vermeld.

De voorzitter betwijfelt dan ook of de onzekerheden die gepaard gaan met de verruiming van de vaargeul kunnen worden ondervangen door het systeem van flexibel storten.
Uit de stukken en het verhandelde ter zitting leidt de voorzitter af dat, gegeven de nog bestaande onzekerheden, rekening moet worden gehouden met de mogelijkheid dat de stortingen op de plaatranden niet zullen leiden tot de daarmee beoogde effecten. Dat betekent dat niet vaststaat dat het verlies aan oppervlakte laagdynamisch gebied (habitattype 1130) door het scheppen van nieuw laagdynamisch gebied zal kunnen worden opgevangen. Onder die omstandigheden kan naar voorlopig oordeel van de voorzitter niet met de vereiste mate van zekerheid worden gesteld dat de op korte termijn verwachte negatieve effecten van de verruiming van de vaargeul op estuaria op middellange termijn, maar ook op langere termijn, teniet kunnen worden gedaan door toepassing van het in het hoofdrapport passende beoordeling beschreven voorkeursalternatief voor verruiming van de vaargeul.

**2.6.3.** De conclusie is dat, gelet op de in 2.6.2. en 2.6.2.1. weergegeven onzekerheden met betrekking tot de effecten van de verruiming van de vaargeul en de onzekerheden ten aanzien van de mogelijkheid om negatieve effecten te voorkomen door toepassing van de aangepaste stortstrategie en het systeem van flexibel storten, de minister van LNV naar voorlopig oordeel van de voorzitter niet met voldoende zekerheid heeft kunnen concluderen dat de natuurlijke kenmerken van het gebied niet zullen worden aangetast.

**2.7.** Teneinde onomkeerbare gevolgen te voorkomen, ziet de voorzitter bij afweging van de betrokken belangen dan ook aanleiding tot schorsing van het besluit van de minister van LNV waarbij de voor de verruiming van de vaargeul vereiste vergunning krachtens artikel 19d van de Nbw 1998 is verleend.

*De overige uitvoeringsbesluiten en het Tracébesluit*

**2.8.** Nu de voorzitter het besluit tot verlening van een vergunning krachtens de Nbw 1998 zal schorsen, kunnen vooralsnog geen feitelijke werkzaamheden worden uitgevoerd ten behoeve van de verruiming van de vaargeul. Gelet hierop bestaat ten aanzien van de overige uitvoeringsbesluiten en het Tracébesluit geen aanleiding tot het treffen van een voorlopige voorziening. De hierop gerichte verzoeken dienen dan ook te worden afgewezen.

*Proceskosten*

**2.9.** De minister van LNV dient ten aanzien van [verzoeker sub 1], Vogelbescherming Nederland en ZMF en anderen op na te melden wijze in de proceskosten te worden veroordeeld. Het verzoek van Vogelbescherming Nederland tot vergoeding van de kosten van een deskundigenrapport komt niet voor inwilliging in aanmerking, aangezien dit stuk niet van betekenis is geweest voor de beslissing op het verzoek om het treffen van een voorlopige voorziening. Ten aanzien van ZMF en HZL bestaat geen aanleiding voor een proceskostenveroordeling.
In het sedert 1 juli 2009 geldende vierde lid van artikel 1:1 van de Algemene wet bestuursrecht (hierna: Awb) is bepaald dat de vermogensrechtelijke rechtsgevolgen van een handeling van een bestuursorgaan de rechtspersoon treffen waartoe het bestuursorgaan behoort. Tegelijk is het derde lid van artikel 8:75 van de Awb komen te vervallen. In verband hiermee is het niet meer nodig dat de voorzitter in geval hij het bestuursorgaan in de kosten veroordeelt, de rechtspersoon aanwijst die de kosten moet vergoeden. Welke rechtspersoon daartoe is gehouden, volgt thans rechtstreeks uit de wet.

## 3 BESLISSING

De voorzitter van de Afdeling bestuursrechtspraak van de Raad van State:

**I.** schorst bij wijze van voorlopige voorziening het besluit van de minister van Landbouw, Natuur en Voedselkwaliteit van 1 april 2009, kenmerk DRZZ/2009-1236;

## Noot

**1.** De voorgenomen derde verdieping van de Schelde vindt plaats ten behoeve van de toegankelijkheid van de haven van Antwerpen in België voor de grootste containerschepen. Zij heeft al heel wat stof doen opwaaien, vooral vanwege de vraag of hiervoor langs de Schelde ontpoldering nodig is om eventuele gevolgen voor het Natura 2000-gebied dat de Schelde vrijwel geheel is, te ondervangen. In de Ontwikkelingsschets 2010 is de verdieping, evenals ontpoldering, opgenomen als een van de 'luiken' van een integrale gebiedsgerichte benadering. * [1] Het beleid is op drie pijlers gebaseerd: naast verbetering van de toegankelijkheid van de haven, zijn dat beveiliging tegen overstromingen en herstel van de natuurlijkheid van het estuarium. Nederland heeft hierover een Verdrag met Vlaanderen gesloten, waarin gedetailleerde verplichtingen zijn opgenomen, onder meer om de verschillende luiken gelijktijdig uit te voeren. Het luik natuurlijkheid omvat natuurherstelmaatregelen, meer concreet de ontpoldering van de Hedwigepolder in Nederland en de aansluitende Prosperpolder in België. Tijdpad en oppervlakte zijn in het Verdrag ook geregeld. Het Nederlandse parlement heeft met dit Verdrag ingestemd, maar realiseerde zich later dat de weerstand in Zeeland wel erg groot was. Daarom werd gekeken of Nederland zijn verplichtingen jegens Vlaanderen nog op andere wijze zou kunnen invullen, met name door alternatieve

natuurherstelmaatregelen in plaats van ontpoldering te nemen. Om dit te onderzoeken werd de zogenaamde Commissie Nijpels ingesteld. De Commissie adviseerde echter vast te blijven houden aan het voornemen om te ontpolderen en daarmee snel van start te gaan om verdere vertraging en aanhoudende onzekerheid te voorkomen.

2. Het gaat te ver om in een noot uitgebreid op deze zaak in te gaan. * [2] Voldoende is hier te memoreren dat het kabinet recentelijk tegen het advies van de Commissie Nijpels in toch besloten heeft af te zien van ontpoldering in verband met de grote maatschappelijke, bestuurlijke en politieke weerstand tegen deze maatregel. Er zullen vervangende natuurherstelmaatregelen worden genomen. Dit is het goed recht van de verantwoordelijke politici, maar de vraag was wel of men met dit besluit bij de nationale rechter en de Europese Commissie zou wegkomen. In het besluit om niet te ontpolderen is daarom een clausule opgenomen dat ontpoldering eventueel, als minst gewenste maatregel, toch nog in aanmerking kan komen als te nemen natuurherstelmaatregel, als alternatieven worden geblokkeerd en de derde verdieping op het spel wordt gezet. Al eerder was besloten dat de besluitvorming over de derde verdieping losgekoppeld kon worden van de besluitvorming over ontpoldering, waarmee die natuurmaatregel al in de lucht was komen te hangen. Het behoeft geen betoog dat Nederland met deze besluiten uitdrukkelijke en gedetailleerd uitgewerkte verdragsverplichtingen schendt. Nederland hoopt echter dat met Vlaanderen te praten valt over vervangende natuurherstelmaatregelen en een nieuwe planning daarvan om de derde verdieping toch zo snel mogelijk te kunnen realiseren.

3. Het behoeft evenmin betoog dat de kabinetsbesluiten de zorgvuldig uitgewerkte integrale gebiedsgerichte aanpak, waar bijvoorbeeld ook de natuurbeschermingsorganisaties achter stonden, onderuit hebben gehaald. Juist de integrale aanpak bood de beste waarborgen dat de vurig gewenste ontpoldering er nu eindelijk van zou komen, nadat ontpoldering in verband met de tweede verdieping wegens de grote weerstand ook al was afgeblazen. Nu dit andermaal gebeurde, kondigden de natuurbeschermingsorganisaties meteen aan dat zij er alles aan zouden doen om te voorkomen dat de derde verdieping zonder gelijktijdige ontpoldering doorgaat. Of zij een klacht bij de Europese Commissie hebben ingediend is mij niet bekend, maar de Commissie zit hoe dan ook op het vinkentouw en had de Nederlandse regering al vóór het besluit om af te zien van ontpolderen, laten weten dat zij zich ernstige zorgen maakte over de nieuwste ontwikkelingen en het uitblijven van een voortvarende uitvoering van de aangekondigde alternatieve natuurherstelmaatregelen ten behoeve van de tweede verdieping. Recentelijk is gebleken dat de Commissie inmiddels ook haar zorgen heeft uitgesproken over de ontwikkelingen rond de derde verdieping en het achterwege blijven van ontpoldering. In elk geval zijn de natuurbeschermingsorganisaties in beroep gegaan tegen de vier besluiten tot uitvoering van het Tracébesluit dat de derde verdieping mogelijk moet maken. Een van deze besluiten is een vergunning op grond van art. 19d NB-wet 1998.

4. De Voorzitter (vz.) van de Afdeling bestuursrechtspraak van de Raad van State (Afdeling) stond voor de lastige taak om zich een eerste oordeel te vormen over de vraag of de derde verdieping tot significante gevolgen kan leiden, die een passende beoordeling noodzakelijk maken. Uit de milieueffectrapportage met daarvan onderdeel uitmakende passende beoordeling was gebleken dat er niet gevreesd hoeft te worden voor dergelijke gevolgen en dat niets zich tegen de derde verdieping verzet. Er was echter wel sprake van kennisleemten, juist op het meest cruciale punt van de gevolgen voor laagdynamische natuurwaarden. Deze brachten de Commissie Nijpels tot de conclusie dat de natuurwaarden die risico's lopen, door begeleidende natuurherstelmaatregelen robuuster moeten worden gemaakt. Mochten zich onverhoopt toch meer gevolgen voordoen dan verwacht, dan zou de natuur in elk geval tegen een stootje kunnen. Momenteel is dat niet het geval, omdat de staat van instandhouding van het belangrijkste habitattype waarvoor het Natura 2000-gebied is aangewezen, te weten estuaria, zeer ongunstig is en het enige andere estuarium in Nederland, Eems-Dollard, er zeker niet beter voor staat en bovendien minder mogelijkheden voor verbetering van de situatie biedt. In dit verband rees nog de vraag of de natuurherstelmaatregelen juridisch gezien als mitigerende dan wel compenserende maatregelen moeten worden beschouwd. De positieve gevolgen van eerstbedoelde maatregelen, die van het project deel uitmaken, mogen in de passende beoordeling in het kader van de vergunningverlening worden meegerekend. Er moet echter, ondanks het per saldo uitblijven van significante gevolgen, wel een vergunning op grond van de NB-wet 1998 worden aangevraagd. Voor los van het project staande compenserende maatregelen die nodig zijn om nadelige gevolgen daarvan teniet te doen, mag dit juist niet, maar moet eerst zijn voldaan aan de andere voorwaarden van de habitattoets dat er geen alternatieven voor het project zijn en dat hiermee een dwingende reden van groot openbaar belang is gemoeid. De Commissie Nijpels oordeelde dat noch het een noch het ander het geval is. De natuurherstelmaatregelen worden zelfstandig, los van het project genomen, en houden daarmee niet direct verband. De maatregelen maken het mogelijk door versterking van de meest kwetsbare natuurwaarden in het Natura 2000-gebied tot het oordeel te komen dat de derde verdieping hiervoor, de onzekerheden en kennisleemten op dit punt in aanmerking genomen, niet tot aantasting van de natuurlijke kenmerken van het gebied kan leiden.

5. De vraag die in de uitspraak van de Vz. ABRvS eerst nog aan de orde komt, is heel basaal of de passende beoordeling juist, volledig en voldoende betrouwbaar is en of op basis daarvan terecht de conclusie is getrokken dat de derde verdieping niet zal leiden tot aantasting van de natuurlijke kenmerken van het Natura 2000-gebied. Hoewel de derde verdieping naar verwachting niet de gevolgen heeft die men misschien zou denken, zijn er blijkens de informatie die door de natuurbeschermingsorganisaties zijn voorgelegd, wel enige nadelige gevolgen te verwachten, in elk geval bestaat het risico dat deze zich voordoen. De vraag die in de uitspraak ook aan de orde komt, is in hoeverre nadelige gevolgen, hoe gering ook, überhaupt kunnen worden toegestaan, gezien de zeer ongunstige staat van instandhouding en de grote betekenis van het Natura 2000-gebied. Duidelijk is wel dat dit niet snel te streng kan worden bekeken. Zelfs een risico op gevolgen die een afname van laagdynamisch gebied van 0,7% kunnen meebrengen, zou volgens de Vz. ABRvS in eerste instantie al te veel

kunnen zijn, zelfs al zou dat een tijdelijk gevolg zijn zoals de Minister van LNV beweert. Dit ligt onder de in de praktijk als verwaarloosbaar gehanteerde grens van 1% in bijzondere gevallen. Normaal gesproken wordt zelfs een verslechtering tot 5% voor een soort of habitattype dat niet in een ongunstige staat van instandhouding verkeert, nog wel acceptabel gevonden. Dit oordeel zuigt de Vz. ABRvS overigens niet uit zijn duim, want de Minister van LNV heeft nota bene zelf al aangegeven dat het criterium van 1% niet gehanteerd kan worden als voor de soort of het habitattype in kwestie een verbeteropgave geldt en er onzekerheden en kennisleemten zijn. * [3] Dit lijkt mij overigens niet zo gek, want in feite gaat het ten opzichte van de gewenste situatie die na de verbetering moet zijn bereikt, om een groter verschil. Door van de eigen eerdere stellingname af te wijken, zadelt de Minister van LNV zichzelf wel met een onoverkomelijk motiveringsprobleem op.

**6.** Het is duidelijk dat Vlaanderen na de uitspraak van de Vz. ABRvS op zijn achterste benen staat. Wat de uitspraak bestuurlijk en politiek gezien voor gevolgen heeft, is moeilijk te voorspellen. Te hopen is dat de ABRvS in de bodemprocedure ook snel uitsluitsel geeft. Of die dan als zelfstandige natuurherstelmaatregelen, mitigerende maatregelen dan wel compenserende maatregelen moeten worden gezien en wat deze precies moeten inhouden, komt in een volgende rechtszaak ongetwijfeld weer aan de orde.

**7.** De Europese Commissie had zich in een eerder stadium al voorstander betoond van de integrale gebiedsgerichte aanpak van de Ontwikkelingsschets 2010. De voordelen van een integrale aanpak konden helaas niet in de praktijk blijken, terwijl de risico's van een geïsoleerd project inmiddels nu wel al zijn duidelijk geworden. Dat levert in elk geval rechtszaken op, die onzekerheid meebrengen en slechte verstandhoudingen. Ook het project dat in het geding is, heeft er geen baat bij dat het onder die omstandigheden wordt ‘doorgedrukt’, want de vertraging ligt op de loer, het risico van nog grotere complicaties daargelaten. De commotie in Vlaanderen is, voor zover mij bekend, dan ook niet zozeer gericht op de rechterlijke uitspraak, maar op de beslissingen van de Nederlandse regering om af te wijken van de zorgvuldig voorbereide integrale gebiedsgerichte aanpak waarover overeenstemming was bereikt. Hierdoor is de derde verdieping in de waagschaal gesteld en ten minste opnieuw vertraagd, terwijl dit niet zonder meer nodig was geweest indien de aanpak die in Ontwikkelingsschets 2010 is uitgestippeld, gevolgd zou zijn. Alleen al omdat de natuurbeschermingsorganisaties dan niet in beroep zouden zijn gegaan.

**8.** Wie het gelijk aan zijn zijde heeft over de ernst van de gevolgen van de derde verdieping voor de instandhoudingsdoelstellingen van het Natura 2000-gebied, de Minister van LNV dan wel appellanten, kan ik bij gebreke aan de hiervoor vereiste deskundigheid niet beoordelen. Het is altijd lastig indien wetenschappers hierover inhoudelijk in de clinch gaan, zoals in natuurbeschermingszaken schering en inslag is. Wel heeft het bevoegd gezag een beoordelingsvrijheid, die de rechter marginaal toetst. De zorgvuldige voorbereiding en motivering van het besluit mogen echter niet in het geding zijn. Daarom is het verstandig dat het bevoegd gezag eventuele bezwaren van appellanten niet te snel ter zijde legt maar serieus onderzoekt. Indien deze bezwaren na het nodige onderzoek en ampele overwegingen alsnog kunnen worden weerlegd, staat het besluit in de marginale toets een stuk sterker. Waarom dat de Minister van LNV in deze zaak niet is gelukt, kan ik op basis van de uitspraak niet nagaan. Wellicht dat zij inmiddels, onder druk van Vlaanderen, zo veel haast heeft gekregen dat ze voor inhoudelijke discussies geen tijd meer had. Zij week op een aantal punten ook van de eigen eerdere stellingnames af, zoals nog eens tot uitdrukking gebracht in het Verdrag.

**9.** De Minister van LNV heeft als argument ook nog aangevoerd dat zij positieve gevolgen verwacht van de verbeterde stortstrategie die zij wil gaan hanteren. De vraag, waarop de uitspraak echter nog geen antwoord geeft, is of deze gevolgen aan de derde verdieping mogen worden toegerekend. De verbeterde stortstrategie is toch al verplicht omdat zij ook de gevolgen van de onderhoudsbaggerwerkzaamheden om de vaargeul op de na de tweede verdieping gerealiseerde diepte te houden, kan beperken. In zoverre kan zij ook als een autonome ontwikkeling worden beschouwd en zou het uitgangspunt bij de beoordeling van de gevolgen van de derde verdieping eerder de situatie na de tweede verdieping inclusief de verbeterde stortstrategie moeten zijn. In dat geval kan het effect van de derde verdieping ook wel eens groter dan 0,7% blijken te zijn.

**10.** Het is voorts de vraag wat de in deze uitspraak gevolgde benadering voor de praktijk zal betekenen, als het om projecten gaat die geringe gevolgen kunnen hebben voor soorten en habitattypen in Natura 2000-gebieden die in een ongunstige staat van instandhouding verkeren, zeker als een verbeteropgave van de instandhoudingsdoelstellingen deel uitmaakt. Mag daar dan niks meer? Dat zou mij een te vergaande conclusie lijken. In navolging van de aanpak in het luchtkwaliteitsdossier en het waterkwaliteitsdossier zou ook gekozen kunnen worden voor een planmatige aanpak, waarbij natuurherstelmaatregelen een per saldo voordelige gevolgen hebben die de nadelige gevolgen ruimschoots overtreffen. Bij een integrale gebiedsgerichte aanpak die voldoende waarborgen biedt dat ook de natuurherstelmaatregelen worden uitgevoerd, moet dat denk ik wel kunnen, net zoals bij een ontoereikende lucht- of waterkwaliteit ook niet elke verdere verslechtering van de kwaliteit a priori moet worden afgewezen. Wel kan mijns inziens worden geconcludeerd dat Natura 2000-gebieden met soorten of habitattypen in een ongunstige staat van instandhouding, een actieve benadering vergen, om problemen voor te zijn indien om toestemming voor op zich gewenste projecten in dat gebied wordt gevraagd.

H.E. Woldendorp * [4]

---

*[1] Zie voor een uitgebreide beschouwing over de integrale gebiedsgerichte aanpak: H.E. Woldendorp, ‘Waar is de gek die de normen heeft vastgesteld? Het gebiedsgerichte natuurbeschermingsbeleid in het perspectief van een geïntegreerde gebiedsgerichte aanpak (1)’, BR 2009, p. 481–496. H.E. Woldendorp, ‘Waar is de gek die de normen heeft vastgesteld? Het gebiedsgerichte natuurbeschermingsbeleid in het perspectief van een geïntegreerde gebiedsgerichte aanpak (2)’, BR

2009, p. 541–554.

*[2] Zie voor een korte toelichting: H.E. Woldendorp, Dynamische natuur in een statische rechtsorde, 2009, p. 134–143; Voor uitgebreide juridische beschouwingen, met uitgebreide literatuurverwijzingen en documentatie, wordt verwezen naar: H.E. Woldendorp, Advies van het IMI over de juridische aspecten van de natuurmaatregelen in het Natura 2000-gebied Westerschelde & Saeftinge, bijlage 5 bij Wennen aan de Westerschelde, advies van de Commissie Natuurherstel Westerschelde: alternatieven voor ontpoldering Hertogin Hedwigepolder, oktober 2008. Zie: www.commissienatuurherstelwesterschelde.nl en http://provincie.zeeland.nl/milieu_natuur/westerschelde/nijpels/.

*[3] De uitspraak vormt een goede aanvulling op de eerdere jurisprudentie over de toepassing van het voorzorgbeginsel, zoals beschreven in H.E. Woldendorp, *Teksten en toelichting Wetgeving natuurbescherming, natuurbeschermingsaspecten van ruimtelijke ingrepen*, editie 2006–2007, Den Haag: Sdu Uitgevers 2006, ISBN 90 12 11619 8, p. 114–116, met checklist.

*[4] Drs. H.E. Woldendorp is jurist bij het Instituut voor Infrastructuur, Milieu en Innovatie te Brussel.

Copyright (C) Kluwer 2010

## BR 2010/44, p. 247

Afdeling bestuursrechtspraak van de Raad van State
13 januari 2010
nr. 200806565/1/R1, 200903364/1/R1, 200903365/1/R1 en 200903367/1/R1, *LJN* BK9010
Mr. P. van Dijk, mr. Th.G. Drupsteen en mr. J.A.W. Scholten-Hinloopen
Met noot H.E. Woldendorp

m.nt. H.E. Woldendorp

### Essentie

***Tracébesluit is niet aan te merken als een plan in de zin van art. 19j NB-wet 1998. Verruiming Westerschelde. Waterkwaliteit.***

### Tekst

(…)

2 OVERWEGINGEN

**2.1.** Het Tracébesluit voorziet, voor zover thans van belang, in de verruiming van de vaargeul van de Westerschelde, waardoor de vaargeul wordt verdiept en waarbij tenminste vijf miljoen kubieke meter grond wordt verzet. Het betreft het gehele in Nederland gelegen traject dat zich uitstrekt over 66 kilometer, beginnende bij de Belgisch/Nederlandse grens en eindigend nabij Vlissingen. Voorts voorziet het Tracébesluit in de mogelijkheid om de vaargeul gedurende vijf jaar op de benodigde diepte en breedte te houden.

**2.2.** [appellant sub 3] betoogt dat het Tracébesluit ten onrechte is genomen door de staatssecretaris, nu uit de Tracéwet volgt dat de minister van Verkeer en Waterstaat bevoegd is.

**2.2.1.** Ingevolge artikel 46, tweede lid, van de Grondwet, voor zover thans van belang, treedt een staatssecretaris in de gevallen waarin de minister het nodig acht en met inachtneming van diens aanwijzingen, in zijn plaats als minister op.
Ingevolge artikel 1, aanhef en onder j, van het besluit van de minister van Verkeer en Waterstaat van 28 maart 2007, nr. DAB/2007/809, voor zover thans van belang, is de staatssecretaris van Verkeer en Waterstaat onder meer belast met de uitvoering en de handhaving betreffende de aangelegenheden waarvan behartiging door de Minister van Verkeer en Waterstaat aan de Staatssecretaris wordt toevertrouwd.
De staatssecretaris heeft naar het oordeel van de Afdeling genoegzaam aannemelijk gemaakt dat de minister het vaststellen van het Tracébesluit aan hem heeft toevertrouwd. Het betoog van [appellant sub 3] dat het Tracébesluit onbevoegd is genomen, faalt.

**2.3.** [appellant sub 3] betoogt dat in het Tracébesluit ten onrechte geen acht is geslagen op de achteruitgang van de veiligheid voor de scheepvaart en voor het achterland die optreedt indien de Hedwigepolder wordt ontpolderd.

**2.3.1.** De Afdeling overweegt dat het Tracébesluit niet voorziet in ontpoldering van de Hedwigepolder. Eventuele gevolgen van ontpoldering van de Hedwigepolder kunnen dan ook niet leiden tot vernietiging van dat besluit.

**2.4.** [appellant sub 1] betoogt dat geen zekerheid bestaat dat uitvoering van het Tracébesluit niet leidt tot aantasting van de natuurlijke kenmerken van het Natura 2000-gebied Westerschelde & Saeftinghe. Hij vreest dat, indien toch een dergelijke aantasting optreedt, deze zal worden gecompenseerd door ontpoldering van de Everingepolder, waar zijn agrarisch bedrijf is gevestigd.

**2.4.1.** De staatssecretaris stelt zich op het standpunt dat uitvoering van het Tracébesluit niet leidt tot aantasting van natuurwaarden, zodat voor de verruiming van de vaargeul geen compensatie nodig is. Voorgenomen ontpoldering voor natuurherstel houdt volgens de staatssecretaris verband met de negatieve effecten van eerdere verruimingen van de Westerschelde.
Volgens de staatssecretaris blijkt uit het ten behoeve van de verruiming opgestelde milieueffectrapport dat de wijze waarop bij de voorziene verruiming bodemmateriaal wordt teruggestort, leidt tot ecologische winst. Daarbij is uitgegaan van een ‘worst case situatie’ die zich in de praktijk niet kan voordoen. In die situatie is er immers van uitgegaan dat al het bodemmateriaal dat vrijkomt bij de verdieping van de vaargeul van de Westerschelde, direct wordt teruggestort in andere delen van de Westerschelde. Volgens de staatssecretaris is de zekerheid dat ecologische winst wordt behaald, verder toegenomen met het nadien verrichte onderzoek naar de effecten van het geleidelijk terugstorten van bodemmateriaal, welke stortmethode aansluit op de omstandigheid dat in de praktijk

bodemmateriaal geleidelijk wordt weggenomen om elders te worden teruggestort.

**2.4.2.** De Afdeling stelt voorop dat het Tracébesluit niet is aan te merken als een plan in de zin van artikel 19j van de Nbw 1998, zodat de daarin gestelde eisen niet van toepassing zijn op de vaststelling van het Tracébesluit. De vraag of voor de uitvoering van het Tracébesluit een vergunning krachtens artikel 19d, eerste lid, van de Nbw 1998 kan worden verleend, komt in beginsel slechts aan de orde in een procedure omtrent die vergunning. Dat doet er niet aan af dat de staatssecretaris het Tracébesluit niet had mogen vaststellen, indien en voor zover hij op voorhand in redelijkheid had moeten inzien dat de Nbw 1998 aan de uitvoerbaarheid van het Tracébesluit in de weg staat. Tussen partijen is niet in geschil dat volgens de ten tijde van het bestreden besluit beschikbare rapporten geen significant negatieve effecten optreden als gevolg van de voorgenomen verruiming. Indien de voorgenomen verruiming geen significante negatieve effecten met zich brengt, noopt deze verruiming niet tot compensatie van natuurwaarden. Weliswaar waren de verwachte gevolgen van de verruiming van de vaargeul ten tijde van het vaststellen van het Tracébesluit nog niet in detail in kaart gebracht, maar de staatssecretaris heeft er op gewezen dat deze gevolgen vervolgens in detail zijn onderzocht, van welk onderzoek de resultaten onder meer zijn vervat in de Nota Plaatrandstortingen (Waterbouwkundig Laboratorium, oktober 2008). De resultaten van meer gedetailleerd onderzoek naar gevolgen van de verruiming op korte termijn zijn neergelegd in het addendum bij de Nota Plaatrandstortingen van december 2009. [appellant sub 1] heeft niet aannemelijk gemaakt dat de effecten van de voorgenomen verruiming dusdanig onzeker zijn dat de staatssecretaris, ondanks de mogelijkheid om nader onderzoek te verrichten naar deze effecten, op voorhand had moeten concluderen dat vanwege deze onzekerheid geen vergunning krachtens artikel 19d, eerste lid, van de Nbw 1998 zou kunnen worden verleend.
Het Tracébesluit voorziet niet in ontpoldering van de Everingepolder, zodat hetgeen dienaangaande is aangevoerd, niet kan leiden tot vernietiging van dat besluit. Overigens is niet gebleken van concrete plannen om de Everingepolder te ontpolderen.

**2.5.** [appellant sub 3] betoogt dat het Tracébesluit leidt tot hogere stroomsnelheden in de Westerschelde, met verminderde veiligheid voor de scheepvaart tot gevolg.

**2.5.1.** De staatssecretaris stelt zich op het standpunt dat uit het ten behoeve van het milieueffectrapport verrichte onderzoek blijkt dat geen sprake is van hogere stroomsnelheden die de veiligheid van het scheepvaartverkeer nadelig kunnen beïnvloeden.

**2.5.2.** In het Hoofdrapport Milieueffectrapport staat op pagina 59 dat als gevolg van de verruiming de snelheden in de geul in algemene zin zullen afnemen. [appellant sub 3] heeft niet aannemelijk gemaakt dat de verruiming desondanks zal leiden tot een dusdanige toename van de stroomsnelheden in de Westerschelde dat de veiligheid van de scheepvaart achteruit gaat.

**2.6.** [appellant sub 1] en [appellant sub 3] voeren aan dat het risico op overstroming als gevolg van de verruiming van de Westerschelde kan toenemen.

**2.6.1.** De staatssecretaris stelt zich op het standpunt dat uit de modelberekeningen van de te verwachten verhoging van de waterstand blijkt dat sprake zal zijn van een verwaarloosbare verandering ten opzichte van de huidige situatie, zodat geen toename van het risico op overstroming optreedt.

**2.6.2.** In het deskundigenbericht staat vermeld dat de als gevolg van de verruiming te verwachten verhoging van de waterstand tijdens hoogwater maximaal 2 centimeter bedraagt en tijdens laagwater maximaal 3 centimeter. [appellant sub 1] en [appellant sub 3] hebben niet aannemelijk gemaakt dat deze verwachting onjuist zou zijn. Gelet hierop geeft het aangevoerde geen aanleiding voor het oordeel dat de staatssecretaris zich niet in redelijkheid op het standpunt heeft kunnen stellen dat geen wezenlijke toename van het risico op overstroming optreedt.

**2.7.** [appellant sub 3] betoogt dat niet is uitgesloten dat uitvoering van het Tracébesluit leidt tot verslechtering van de waterkwaliteit. Volgens hem is onduidelijk hoe dit zich verhoudt tot de Vierde Nota Waterhuishouding en de Kaderrichtlijn Water (richtlijn nr. 2000/60/EG van het Europees Parlement en de Raad van Ministers van de Europese Gemeenschappen van 23 oktober 2000 tot vaststelling van een kader voor communautaire maatregelen betreffende het waterbeleid (*PbEG* L 327/1)).

**2.7.1.** De staatssecretaris stelt zich op het standpunt dat uit het ten behoeve van het milieueffectrapport verrichte onderzoek is gebleken dat de verruiming geen nadelige invloed op de waterkwaliteit heeft. Aan de wettelijke eisen wordt voldaan, aldus de staatssecretaris.

**2.7.2.** Op pagina 256 van het Hoofdrapport Milieueffectrapport staat ten aanzien van de waterkwaliteit dat altijd onverwachte verontreinigingen kunnen optreden als gevolg van ongevallen of calamiteiten. Door de huidige vergunde onderhoudsbaggerwerken kan men ervan uitgaan dat hier de nodige veiligheidsmaatregelen getroffen zijn, zodat dit effect als verwaarloosbaar is te beschouwen. Er worden volgens het Hoofdrapport Milieueffectrapport geen significante effecten van het project op de waterkwaliteit verwacht.
[appellant sub 3] heeft niet gemotiveerd aangegeven waarom, hoewel de verruiming volgens het Hoofdrapport Milieueffectrapport geen significante effecten heeft op de waterkwaliteit, de Vierde Nota Waterhuishouding en de Kaderrichtlijn Water niettemin aan de verruiming van de vaargeul in de weg zouden staan.

**2.8.** NVZ voert aan dat bij de vaststelling van het Tracébesluit onvoldoende belang is gehecht aan de omstandigheid dat als gevolg van de verruiming van de Westerschelde de zandwinning ter plaatse wordt afgebouwd. Verder is de invloed van de

verruiming op het morfologisch systeem onvoldoende onderzocht.

2.8.1. De staatssecretaris stelt zich op het standpunt dat weliswaar een beleidsvoornemen bestaat tot afbouw van zandwinning in de Westerschelde, maar dat dit voornemen geen gevolg is van de voorgenomen verruiming van de Westerschelde. Volgens de staatssecretaris is vastgesteld dat in de huidige situatie het grootschalig storten in het westelijk deel van de Westerschelde leidt tot versterking van de export van zand naar het mondingsgebied. Dit wordt negatief beoordeeld. Daarom zijn de verschillende alternatieven hierop uitgebreid onderzocht. Uit modelonderzoek dat is uitgevoerd ten behoeve van het milieueffectrapport is gebleken dat de verruiming onafhankelijk van de zandwinning kan worden uitgevoerd, zij het dat de stortcapaciteit dan wel beperkter is, aldus de staatssecretaris.

2.8.2. Op pagina 60 van het Milieueffectrapport Verruiming vaargeul Beneden-Zeeschelde en Westerschelde, Basisrapport Morfologie van 21 september 2007 staat dat tussen 1990 en 2005 sprake is geweest van een toename van export van zand vanuit de Westerschelde, welke export het gevolg lijkt te zijn geweest van het grotere stortvolume in het westen. Op pagina 130 van dit rapport staat dat, als gevolg van de voorgenomen stortstrategie bij de verruiming, waarbij sprake is van een grotere spreiding van baggerspecie, vermindering van zandverlies over de zeewaartse rand van de Westerschelde verwacht wordt. NVZ heeft niet aannemelijk gemaakt dat deze verwachting niet gerechtvaardigd zou zijn. In zoverre leidt de verruiming niet tot een afname van de mogelijkheden voor zandwinning in de Westerschelde.
In het deskundigenbericht staat dat, hoewel het Tracébesluit en het voornemen tot afbouw van zandwinning los van elkaar gezien worden, er wel een relatie bestaat tussen de verruiming en zandwinning, nu door zandwinning zand uit het estuarium wordt weggenomen, terwijl bodemmateriaal dat vrijkomt bij verruiming van de vaargeul in het estuarium wordt teruggestort. Hoewel niet is uitgesloten dat meer zand zou kunnen worden gewonnen, indien meer bodemmateriaal in het estuarium zou worden gestort, bestaat geen aanleiding voor het oordeel dat de staatssecretaris zich niet in redelijkheid op het standpunt heeft kunnen stellen dat de verruiming van de Westerschelde niet leidt tot een ernstige afname van mogelijkheden voor zandwinning. Het bestaande voornemen om zandwinning in de Westerschelde af te bouwen, is geen onderdeel van de voorliggende besluiten.
Gelet op het voorgaande geeft het aangevoerde geen aanleiding voor het oordeel dat de staatssecretaris bij zijn besluitvorming onvoldoende belang heeft toegekend aan de mogelijkheden om zand te winnen in de Westerschelde.

2.9. [appellant sub 1] voert aan dat in de maatschappelijke kosten-batenanalyse onvoldoende aandacht is besteed aan de gevolgen van de verruiming voor visserij, toerisme en landbouw.

2.9.1. De staatssecretaris stelt zich op het standpunt dat uit het onderzoek in het kader van het milieueffectrapport geen belangrijke effecten voor de sectoren visserij, recreatie en landbouw naar voren zijn gekomen, zodat deze terecht slechts zijdelings zijn meegenomen in de maatschappelijke kosten-batenanalyse.

2.9.2. Ten behoeve van het milieueffectrapport zijn onder meer de effecten van de verruiming van de vaargeul op bodem- en ruimtegebruik, recreatieve attractiviteit en visserij bezien. De verruiming heeft volgens de tabel op pagina 53 van het Hoofdrapport Milieueffectrapport van oktober 2007 ten aanzien van deze aspecten geen significante effecten. [appellant sub 1] heeft niet aannemelijk gemaakt dat het rapport op deze punten onjuist zou zijn. Derhalve bestaat geen aanleiding voor het oordeel dat de staatssecretaris zich niet in redelijkheid op het standpunt heeft kunnen stellen dat de effecten van de verruiming op de sectoren visserij, recreatie en landbouw slechts zijdelings behoefden te worden meegenomen in de maatschappelijke kosten-batenanalyse.

2.10. De conclusie is dat hetgeen [appellant sub 1], NVZ en [appellant sub 3] hebben aangevoerd geen aanleiding geeft voor het oordeel dat de staatssecretaris het Tracébesluit niet in redelijkheid heeft kunnen vaststellen.

2.11. [appellant sub 3] voert aan dat het verruimen van de vaargeul zal leiden tot hogere stroomsnelheden en daarmee tot een toename van het slibtransport, hetgeen mogelijk leidt tot het dichtslibben van zijn haventje en de aansluitende ontwateringsgeul. Voorts betoogt hij dat aanvoer van slib de natuurwaarden van het Verdronken Land van Saeftinghe zal aantasten en dat betwijfeld kan worden of voldaan wordt aan de waterkwaliteitseisen.

2.11.1. De staatssecretaris stelt zich op het standpunt dat geen aanleiding bestaat voor de vrees van [appellant sub 3] voor transport van bodemmateriaal. Volgens de staatssecretaris vertonen stroomsnelheden volgens de uitgevoerde berekeningen slechts verwaarloosbare veranderingen.

2.11.2. Ten behoeve van de voorgenomen verruiming van de vaargeul van de Westerschelde is onder meer onderzoek verricht naar de effecten hiervan op de slibdynamiek in de Westerschelde. In het Hoofdrapport Milieueffectrapport van oktober 2007 is beschreven dat deze effecten gering zijn. Gezien de zeer kleine veranderingen in de slibconcentraties in de Westerschelde worden ook geen veranderingen in de jaarlijkse aanslibbing in de havens verwacht, zo staat beschreven op pagina 146 van het Hoofdrapport Milieueffectrapport.
[appellant sub 3] heeft niet aannemelijk gemaakt dat niettemin een reëel risico bestaat op hogere stroomsnelheden die leiden tot het dichtslibben van zijn haventje en de daarop aansluitende ontwateringsgeul. Mocht in de praktijk niettemin blijken dat [appellant sub 3] als gevolg van de uitvoering van het Tracébesluit schade ondervindt die redelijkerwijs niet of niet geheel te zijner laste behoort te blijven, dan voorziet artikel 6 van het Tracébesluit in een regeling voor vergoeding van dergelijke schade.

**2.11.3.** De Afdeling is in 2.7.2. reeds ingegaan op het betoog van [appellant sub 3] dat de waterkwaliteit in de Westerschelde zal verslechteren. Geen aanleiding bestaat om hierover in andere zin te oordelen in het kader van zijn beroep tegen de ontgrondingsvergunning. De gestelde aantasting van natuurwaarden als gevolg van de verruiming van de vaargeul is eveneens aan de orde gekomen bij het Tracébesluit.

**2.11.4.** Gelet op het voorgaande ziet de Afdeling in hetgeen [appellant sub 3] heeft aangevoerd, geen aanleiding voor het oordeel dat bij afweging van alle betrokken belangen de ontgrondingsvergunning niet in redelijkheid had kunnen worden verleend. In het aangevoerde wordt evenmin aanleiding gevonden voor het oordeel dat het bestreden besluit anderszins is voorbereid of genomen in strijd met het recht.

**2.12.** [appellant sub 3] voert aan dat het verruimen van de vaargeul mogelijk leidt tot het dichtslibben van zijn haventje en de aansluitende ontwateringsgeul. Voorts betoogt hij dat aanvoer van slib de natuurwaarden van het Land van Saeftinghe zal aantasten en dat betwijfeld kan worden of voldaan wordt aan de waterkwaliteitseisen.

**2.12.1.** Ingevolge artikel 3, eerste lid, van de Wbr, voor zover thans van belang, kan weigering van een vergunning slechts geschieden ter bescherming van waterstaatswerken en ter verzekering van het doelmatig en veilig gebruik van die werken, met inbegrip van het belang van verruiming of wijziging anderszins van die werken.
Ingevolge het tweede lid van dat artikel kunnen de in het eerste lid bedoelde besluiten mede strekken ter bescherming van aan de waterstaatswerken verbonden belangen van andere dan waterstaatkundige aard, doch enkel voor zover daarin niet is voorzien door bij of krachtens een andere wet gestelde bepalingen.

**2.12.2.** De Afdeling is in 2.7.2. reeds ingegaan op het betoog van [appellant sub 3] dat de waterkwaliteit in de Westerschelde zal verslechteren. Geen aanleiding bestaat om hierover in andere zin te oordelen in het kader van zijn beroep tegen de vergunning krachtens de Wbr.
De Afdeling stelt vast dat de overige bezwaren van [appellant sub 3] geen betrekking hebben op weigeringsgronden die zijn genoemd in artikel 3, eerste lid, van de Wbr. Deze bezwaren zijn reeds gewogen in andere procedures.
Gelet op artikel 3 van de Wbr heeft de staatssecretaris in hetgeen [appellant sub 3] heeft aangevoerd, terecht geen aanleiding gezien om de gevraagde vergunning te weigeren.
Het beroep is ongegrond.

**2.13.** [appellant sub 3] betoogt dat de verruiming van de vaargeul leidt tot extra aanvoer van slib, waardoor de natuurwaarden van het Verdronken Land van Saeftinghe worden aangetast en dat betwijfeld kan worden of voldaan wordt aan de waterkwaliteitseisen. Voorts voert hij aan dat het verruimen van de vaargeul mogelijk leidt tot het dichtslibben van zijn haventje en de aansluitende ontwateringsgeul.

**2.13.1.** De minister stelt zich op het standpunt dat het milieueffectrapport en de passende beoordeling tot de conclusie leiden dat het project de natuurlijke kenmerken van het Schelde-estuarium niet zal aantasten.

**2.13.2.** Ingevolge artikel 1, aanhef en onder n, van de Nbw 1998 wordt in deze wet en de daarop rustende bepalingen onder Natura 2000-gebied verstaan:
1° gebied dat is aangewezen op grond van artikel 10a, eerste lid,
(…), of
3° gebied dat voorkomt op de lijst van gebieden van communautair belang, bedoeld in artikel 4, tweede lid, van richtlijn 92/43/EEG.
Bij besluit van 24 maart 2000 is het gebied Westerschelde, waarvan het Verdronken Land van Saeftinghe onderdeel uitmaakt, aangewezen als speciale beschermingszone als bedoeld in artikel 4 van richtlijn 79/409/EEG van de Raad van de Europese Gemeenschappen van 2 april 1979 inzake het behoud van de vogelstand (*Pb* L 103). Ingevolge artikel 60a, vierde lid, van de Nbw 1998 gelden de besluiten van de minister van LNV houdende de aanwijzing van gebieden ter uitvoering van richtlijn 79/409/EEG als besluiten als bedoeld in artikel 10a. In zoverre voldoet het gebied derhalve aan de omschrijving van een Natura 2000-gebied in de Nbw 1998.
Ten tijde van het bestreden besluit was de Westerschelde nog niet, ter uitvoering van richtlijn 92/43/EEG van de Raad van de Europese Gemeenschappen van 21 mei 1992 inzake de instandhouding van de natuurlijke habitats en de wilde flora en fauna (*Pb* L 206; hierna: de Habitatrichtlijn), aangewezen in de zin van artikel 10a van de Nbw 1998. Het gebied was wel aangemeld als speciale beschermingszone als bedoeld in de Habitatrichtlijn. Bij beschikking van 7 december 2004 is dit gebied geplaatst op de lijst van gebieden van communautair belang voor de Atlantische biogeografische regio. Ook in zoverre voldoet het gebied derhalve aan de omschrijving van een Natura 2000-gebied in de Nbw 1998.
Ingevolge artikel 19d, eerste lid, van de Nbw 1998, voor zover thans van belang, is het verboden om zonder vergunning, of in strijd met aan die vergunning verbonden voorschriften of beperkingen, van de minister van LNV, projecten of andere handelingen te realiseren onderscheidenlijk te verrichten die gelet op de instandhoudingsdoelstelling de kwaliteit van de natuurlijke habitats en de habitats van soorten in een Natura 2000-gebied kunnen verslechteren of een significant verstorend effect kunnen hebben op de soorten waarvoor het gebied is aangewezen. Zodanige projecten of andere handelingen zijn in ieder geval projecten of handelingen die de natuurlijke kenmerken van het desbetreffende gebied kunnen aantasten.
Ingevolge artikel 19f, eerste lid, van de Nbw 1998, maakt de initiatiefnemer voor nieuwe projecten of andere handelingen waarover de minister een besluit op een aanvraag voor een vergunning als bedoeld in artikel 19d, eerste lid, neemt, en die niet direct verband houden met of nodig zijn voor het beheer van een Natura 2000-gebied

maar die afzonderlijk of in combinatie met andere projecten of plannen significante gevolgen kunnen hebben voor het desbetreffende gebied, alvorens de minister van LNV een besluit neemt, een passende beoordeling van de gevolgen voor het gebied waarbij rekening wordt gehouden met de instandhoudingsdoelstelling van dat gebied. Ingevolge artikel 19g, eerste lid, van de Nbw 1998, kan, indien een passende beoordeling is voorgeschreven op grond van artikel 19f, eerste lid, een vergunning als bedoeld in artikel 19d, eerste lid, slechts worden verleend indien de minister zich op grond van de passende beoordeling ervan heeft verzekerd dat de natuurlijke kenmerken van het gebied niet zullen worden aangetast.

**2.13.3.** In het deskundigenbericht staat over de gevolgen van de verruiming van de vaargeul voor het slibtransport in relatie tot de gevolgen voor het Verdronken Land van Saeftinghe dat volgens het Hoofdrapport Milieueffectrapport geen significante effecten op onder meer het slibtransport optreden. [appellant sub 3] heeft niet aannemelijk gemaakt dat niettemin aanleiding bestaat te verwachten dat de verruiming van de vaargeul zodanig slibtransport tot gevolg heeft dat daardoor natuurwaarden in het Verdronken Land van Saeftinghe worden aangetast.
Zoals de Afdeling heeft overwogen in 2.7.2. worden volgens het Hoofdrapport Milieueffectrapport voorts geen significante effecten van de verruiming van de vaargeul op de waterkwaliteit verwacht. [appellant sub 3] heeft niet aannemelijk gemaakt dat verruiming van de vaargeul leidt tot een achteruitgang van de waterkwaliteit die aantasting van de natuurlijke kenmerken van de Westerschelde met zich brengt.
[appellant sub 3] heeft ook voor het overige niet aannemelijk gemaakt dat zijn haventje en de aansluitende ontwateringsgeul worden getroffen door het besluit tot verlening van een vergunning krachtens artikel 19d, eerste lid, van de Nbw 1998. De weging van deze belangen heeft plaatsgevonden in andere procedures. Het beroep geeft in zoverre dan ook geen aanleiding tot vernietiging van dit besluit.

**2.13.4.** Gelet op het voorgaande ziet de Afdeling in hetgeen [appellant sub 3] heeft aangevoerd, geen aanleiding voor het oordeel dat de minister zich niet in redelijkheid op het standpunt heeft kunnen stellen dat de natuurlijke kenmerken van het Natura 2000-gebied Westerschelde & Saeftinghe niet zullen worden aangetast.
Het beroep is ongegrond.

**2.14.** Voor een proceskostenveroordeling bestaat geen aanleiding.

**3.** De Afdeling bestuursrechtspraak van de Raad van State verklaart de beroepen ongegrond.

## Noot

**1.** Met deze uitspraak van de Afdeling bestuursrechtspraak van de Raad van State (ABRvS) is weer een nieuwe episode in de slag om de Westerschelde beëindigd. In dit tijdschrift is hier al vaker aandacht aan besteed. * [1] Deze keer gaat het opnieuw om het Tracébesluit dat ten behoeve van de derde verdieping is genomen, alsmede de ter uitvoering van dat besluit genomen besluiten tot verlening van vergunningen op grond van de Wet beheer rijkswaterstaatswerken, de Ontgrondingenwet en de Natuurbeschermingswet 1998 (NB-wet 1998). De Voorzitter (vz.) van de ABRvS had in deze zaak al een geruchtmakende uitspraak gedaan, die ook in dit tijdschrift is gepubliceerd en geannoteerd. * [2]

**2.** Het gezelschap van appellanten is sinds de uitspraak van de Voorzitter aardig uitgedund, want er is sindsdien heel wat gebeurd. De kranten hebben er wekenlang over volgestaan. Het gaat in de hoofdzaak nu alleen nog om de eigenaar van de Hedwigepolder die op de nominatie staat onteigend te worden, een boer uit de omgeving die vreest als het tegenzit ten behoeve van ontpoldering ook onteigend te kunnen worden en de Nederlandse Vereniging van Zandwinners, die in deze zaak overigens, net als de anderen, niet als Winnaars uit de bus komen. Nadat het kabinet besloten had over te gaan tot ontpoldering van de Hedwigepolder, hebben de natuurbeschermingsorganisaties op 18 december 2009 besloten hun verzet tegen de verdieping te staken. Zij hadden destijds nog wel om de voorlopige voorziening gevraagd die leidde tot de uitspraak van de Voorzitter, maar nadien is het kabinet, mede onder invloed van die uitspraak, bijgedraaid en teruggekomen op zijn eerdere beslissing om niet te ontpolderen. Er zijn hierdoor in deze zaak heel wat discussiepunten over de natuurbeschermingsaspecten van de derde verdieping afgevallen, waarschijnlijk ook een hele opluchting voor de ABRvS die zich nu verder niet meer in detail over de vergunning op grond van de NB-wet 1998 hoefde uit te laten. De overgebleven appellanten hadden nu juist op dit punt niet alles uit de kast gehaald en hier waarschijnlijk ook wel kansen laten liggen.

**3.** Door deze uitspraak kan de derde verdieping van de Westerschelde in elk geval doorgaan. Voor de haven van Antwerpen is deze uitspraak daarom helemáál een hele opluchting. De verdieping is nu door de flessenhals in de besluitvorming heen en het zal de haven minder uitmaken hoe het nu met het natuurherstel, met name de ontpoldering, verdergaat. Het verbaast mij dan ook dat ik over deze definitieve uitspraak in de pers heel wat minder heb vernomen dan over de voorlopige uitspraak van de Voorzitter. Goed nieuws is géén nieuws!

**4.** In deze noot ga ik alleen in op de natuurbeschermingsaspecten van de uitspraak. Hoewel er niet meer zo veel aan de hand is, zijn deze toch niet oninteressant.

**5.** Zo is het opmerken waard, maar dat staat los van de uitspraak, dat de toestemming voor de onderhoudsbaggerwerkzaamheden in de vergunning op grond van de NB-wet 1998 beperkt is tot een duur van vijf jaar, uiterlijk tot 1 januari 2015. Na die tijd moet opnieuw toestemming voor de voortzetting worden verleend. De (hydro) morfologische en andere omstandigheden zijn dermate ingewikkeld, dat het moeilijk is in een passende beoordeling van de

natuurbeschermingsaspecten heel ver vooruit te kijken. Dat is inmiddels ook wel gebleken, want ter gelegenheid van deze vergunning wordt een nieuwe verbeterde stortstrategie voorgesteld, waardoor de gevolgen van de voortzetting van de onderhoudsbaggerwerkzaamheden en de verdieping voor het Natura 2000-gebied in vergelijking met de eerdere werkzaamheden naar verwachting veel beperkter zullen zijn. De tijdelijkheid van de vergunning is interessant in verband met de discussie over de regeling van het bestaand gebruik * [3] en het eveneens in dit nummer opgenomen en geannoteerde arrest van Hof van Justitie van de Europese Gemeenschappen in de zaak Papenburg (zie verder die noot).

**6.** Een interessant detail is overweging 2.4.2. 'De Afdeling stelt voorop dat het Tracébesluit niet is aan te merken als een plan in de zin van artikel 19j van de Nbw 1998, zodat de daarin gestelde eisen niet van toepassing zijn op de vaststelling van het Tracébesluit. De vraag of voor de uitvoering van het Tracébesluit een vergunning krachtens artikel 19d, eerste lid, van de Nbw 1998 kan worden verleend, komt in beginsel slechts aan de orde in een procedure omtrent die vergunning. Dat doet er niet aan af dat de staatssecretaris het Tracébesluit niet had mogen vaststellen, indien en voor zover hij op voorhand in redelijkheid had moeten inzien dat de Nbw 1998 aan de uitvoerbaarheid van het Tracébesluit in de weg staat.'

**7.** Tijdens de milieueffectrapportage en de passende beoordeling is gebleken dat de derde verdieping geen gevolgen heeft voor het Natura 2000-gebied, niet alleen voor de rivier niet, maar ook niet voor de aangrenzende slikken schorren, met name het Verdronken Land van Saeftinghe. Er zijn weliswaar enkele kennisleemten, maar deze zijn blijkens het milieueffectrapport en de passende beoordeling volgens de Staatssecretaris van V&W en de Minister van LNV niet zodanig dat geen toestemming kan worden verleend. Volgens hen zal het project de natuurlijke kenmerken van het Schelde-estuarium niet aantasten. De appellanten hebben volgens de ABRvS kort gezegd niet aannemelijk gemaakt dat de verruiming van de vaargeul leidt tot een aantasting van de natuurlijke kenmerken van de Westerschelde. Er is in het kader van de Tracéwet geen reden om op voorhand te concluderen dat vanwege onzekerheden geen vergunning krachtens art. 19d lid 1 NB-wet 1998 kan worden verleend en evenmin zijn er doorslaggevende bezwaren tegen die vergunning zelf.

**8.** Zoals gezegd, na de aftocht van de natuurbeschermingsorganisaties komen een heleboel bezwaren die op natuurbescherming betrekking hebben, niet meer aan de orde. Daarom kijk ik nog even terug naar wat eerdere publicaties die ik ook in dit tijdschrift heb gepubliceerd. * [4]

**9.** Mijn bezwaar tegen de verleende vergunning op grond van de NB-wet 1998 was allereerst dat het moeilijk leek een verlossende uitspraak doen over de aanvaardbaarheid van de gevolgen van de derde verdieping. Het ecosysteem is reeds dermate zwaar verstoord dat het Natura 2000-gebied in een zeer ongunstige staat van instandhouding verkeert. Hierdoor tekenen de gevolgen zich ten opzichte van een gunstige staat van instandhouding niet zo duidelijk af en is evenmin duidelijk wat de gevolgen voor natuurherstelmaatregelen zijn. De Voorzitter deed onder deze omstandigheden dan ook al moeilijk over een verslechtering met 0,7%. Omdat de natuurherstelmaatregelen vooral uit een verbeterde stortstrategie en ontpoldering bestaan en de derde verdieping deze maatregelen niet in de weg lijkt te staan, kan ik me voorstellen dat de ABRvS nu niet meer moeilijk over de toestemming hoeft te doen. In de situatie waarop het advies van de commissie-Nijpels betrekking had, was daarentegen nog geen sprake van ontpoldering. Mijn conclusie ten behoeve van dat advies was destijds daarom nog dat de kennisleemten en daarmee samenhangende risico's zonder ontpoldering niet aanvaardbaar waren en dat onvoldoende zekerheid was verkregen dat geen aantasting van de natuurlijke kenmerken van het Natura 2000-gebied zou optreden. Nu naast de verbetering van de stortstrategie ook de ontpoldering in beginsel doorgaat, zal de natuur zodanig robuust worden dat de onzekerheden waarmee de kennisleemten gepaard gaan, aanvaardbaar worden. Hierbij is van groot belang dat voor zover nu kan worden ingeschat, helemaal geen nadelige gevolgen zullen optreden. * [5] Dit is op zich in lijn met het advies. In hoeverre en hoe zwaar dergelijke overwegingen bij de ABRvS in haar uitspraak hebben meegewogen is, afgaande op de uitspraak zelf, moeilijk te zeggen, zelfs niet of zij nu nog aan de orde waren. Ik krijg de indruk dat het allemaal niet meer aan de orde was nu de natuurbeschermingsorganisaties waren afgehaakt. De ABRvS hoeft hierdoor alleen in te gaan op de argumenten die naar voren zijn gebracht en gaat uiteraard niet zelf allemaal mogelijke vragen bedenken en vervolgens weer beantwoorden omdat wij als lezers wellicht het antwoord op die vragen graag zouden willen weten.

**10.** Als ander bezwaar had ik genoemd dat de positieve gevolgen van de verbeterde stortstrategie ten onrechte aan de derde verdieping waren toegerekend, terwijl deze verbeterde stortstrategie ook zonder derde verdieping al verplicht zou zijn voor de voortzetting van de onderhoudsbaggerwerkzaamheden om de Schelde op de diepte te houden die de rivier na de tweede verdieping gekregen had. Zij was dan ook eerder een autonome ontwikkeling waarvan de positieve gevolgen niet mochten worden meegenomen in het besluit inzake toestemming voor de derde verdieping. Hoe dit verder ook zij, dit punt kwam in deze zaak niet aan de orde.

**11.** Omdat Nederland bij vernietiging van de toestemmingsbesluiten voor de derde verdieping in een heel lastig parket zou zijn gekomen en de staat van instandhouding niet zozeer van deze verdieping afhangt maar veeleer van een natuurinvestering in de vorm van ontpoldering, is het goed dat de ABRvS nu duidelijkheid heeft geschapen dat de derde verdieping kan doorgaan. Het is overigens nog zeker geen gelopen race dat ook de ontpoldering kan worden doorgezet, want belanghebbenden zullen zich daar uit alle macht tegen te weer stellen. Op de achtergrond houdt de Europese Commissie een oogje in het zeil om in te grijpen zodra er een kink in de kabel komt. Het laatste woord is hierover waarschijnlijk nog lang niet gesproken. Via de Westerschelde zal nog letterlijk heel wat water in de zee stromen vooraleer het zover is.

H.E. Woldendorp * [6]

*[1] H.E. Woldendorp, 'Waar is de gek die de normen heeft vastgesteld?; Het gebiedsgerichte natuurbeschermingsbeleid in het perspectief van een geïntegreerde gebiedsgerichte aanpak (2)', BR 2009, p. 541–554, met name par. 11.

*[2] ABRvS (vz.) 28 juli 2009, BR 2009, p. 828-831 (m.nt. H.E. Woldendorp).

*[3] H.E. Woldendorp, 'Bestaand gebruik, Natura 2000 en de Crisis- en herstelwet', BR 2010, p. 14–24.

*[4] Zie naast de eerdergenoemde publicaties ook: Advies Commissie Natuurherstel Westerschelde: alternatieven voor ontpoldering Hertogin Hedwigepolder, *Wennen aan de Westerschelde*, oktober 2008. Zie: www.commissienatuurherstelwesterschelde.nl. De juridische aspecten van de problematiek worden uitgebreid behandeld in bijlage V: H.E. Woldendorp, *Advies van het IMI over de juridische aspecten van de natuurmaatregelen in het Natura 2000-gebied Westerschelde & Saeftinge*; opgesteld ten behoeve van de advisering door de commissie-Nijpels na consultatie van Chris Backes en ambtenaren van DG Milieu van de Europese Commissie.

*[5] H.E. Woldendorp, *Teksten en toelichting Wetgeving natuurbescherming, natuurbeschermingsaspecten van ruimtelijke ingrepen*, editie 2006–2007, Den Haag: Sdu Uitgevers 2006, ISBN 9012116198, met name hoofdstuk 4 Onderzoeksverplichtingen, par. 4.4 Omgaan met onzekerheden.

*[6] Drs. H.E. Woldendorp is jurist bij het Instituut voor Infrastructuur, Milieu en Innovatie te Brussel.

Copyright (C) Kluwer 2010

JUDGMENT OF THE COURT (Second Chamber)

14 January 2010

(Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Decision of the Member State concerned to give its agreement to the draft list of sites of Community importance drawn up by the Commission – Interests and points of view which must be taken into account)

In Case C-226/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Oldenburg (Germany), made by decision of 13 May 2008, received at the Court on 26 May 2008, in the proceedings

**Stadt Papenburg**

v

**Bundesrepublik Deutschland,**

(…)

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(3), 4(2) and 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368) ('the Habitats Directive').

2 The reference was made in the course of proceedings between Stadt Papenburg (the municipality of Papenburg) and Bundesrepublik Deutschland (the Federal Republic of Germany), concerning the agreement that that State intends to give to the draft list of sites of Community importance ('SCIs') drawn up by the Commission of the European Communities and including a site on the river Ems downriver from that municipality's local authority area.

### Legal context

*Community law*

3 Article 2(3) of the Habitats Directive is worded as follows:

'Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

4 According to Article 3(1) of the Habitats Directive, 'a coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and

habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.

5 Article 4(1) and (2) of that directive provides:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. …

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. …

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the nine biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of [SCIs] drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the [SCIs] in their territory.

The list of sites selected as [SCIs] … shall be adopted by the Commission in accordance with the procedure laid down in Article 21.'

6 Annex III to the Habitats Directive states in Stage 2, entitled 'Assessment of the Community importance of the sites included on the national lists':

'1. All the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as [SCIs].

2. The assessment of the Community importance of other sites on Member States' lists, i.e. their contribution to maintaining or re-establishing, at a favourable conservation status, a natural habitat in Annex I or a species in Annex II and/or to the coherence of Natura 2000 will take account of the following criteria:

(a) relative value of the site at national level;

(b) geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

(c) total area of the site;

(d) number of natural habitat types in Annex I and species in Annex II present on the site;

(e) global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic or unique aspect of its features and the way they are combined.'

7 Article 6(2), (3) and (4) of the Habitats Directive provides:

'2. 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.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

*National law*

8 Article 28(2) of the Basic Law (Grundgesetz) is worded as follows:

'Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by law, associations of municipalities shall also have the right to administrative autonomy according to the laws. The guarantee of administrative autonomy shall extend to the basic elements of financial autonomy; these basic elements shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.'

9 The referring court interprets that provision as meaning that the administrative autonomy which is constitutionally guaranteed to the municipalities grants them a right to have their interests taken into account where measures going beyond the level of the municipal territory have a lasting effect on their development or cause lasting interference with plans which are sufficiently concrete and established. That also applies to measures implemented outside the municipal territory, in so far as the municipality is clearly and particularly affected.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

10 Papenburg is a port town in Lower Saxony on the river Ems, where there is a shipyard.

11 In order to enable ships with a draught of 7.3 metres to navigate between the shipyard and the North Sea, the Ems must be deepened by means of 'required dredging

operations'. By a decision of 31 May 1994 of the Wasser und Schifffahrtsdirektion Nordwest (Waterways and Navigation Directorate for the North-West Region), Stadt Papenburg, Landkreis Emsland (the district of Emsland) and the Wasser und Schifffahrtsamt Emden (Emden Waterways and Navigation Office) were granted permission to dredge that river, where required. That decision is definitive and means, in accordance with German law, that future 'required dredging operations' are considered to have been granted permission.

12 On 17 February 2006, the Federal Republic of Germany indicated to the Commission that parts of the Ems situated downriver from Stadt Papenburg's local authority area, under the description 'Unterems und Außenems' (Lower Ems and Outer Ems), could be accepted as a possible SCI within the meaning of the Habitats Directive.

13 The Commission included those parts of the Ems in its draft list of SCIs. It requested the Federal Republic of Germany to give its agreement thereto, pursuant to the first subparagraph of Article 4(2) of the Habitats Directive.

14 On 20 February 2008, Stadt Papenburg brought an action before the Verwaltungsgericht Oldenburg (Administrative Court, Oldenburg) seeking to prevent the Federal Republic of Germany from giving its agreement. It claimed that an agreement on the part of that Member State would amount to a breach of the administrative autonomy which it has under German constitutional law.

15 According to Stadt Papenburg, as a seaport with a shipyard its planning and investments and its economic development depend on the Ems remaining navigable for large seagoing ships. It fears that, if the Lower Ems and Outer Ems were included in the list of SCIs, the dredging operations required for that purpose would in future, and in every case, have to undergo the assessment provided for in Article 6(3) and (4) of the Habitats Directive.

16 The Federal Republic of Germany contends that the action should be dismissed. It is of the opinion that to take into account the interests asserted by Stadt Papenburg when deciding whether to give the agreement at issue in the main proceedings would contravene Community law. Under the first subparagraph of Article 4(2) of the Habitats Directive, the Member State is permitted to take the decision whether to give agreement only on the basis of nature conservation criteria.

17 By order of 31 March 2008, which has become definitive, the Verwaltungsgericht Oldenburg granted Stadt Papenburg interim relief and prohibited the Federal Republic of Germany from giving its agreement until judgment has been delivered in the main proceedings.

18 In those circumstances, the Verwaltungsgericht Oldenburg decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does the first subparagraph of Article 4(2) of [the Habitats Directive] allow a Member State to refuse to agree to the Commission's draft list of [SCIs], in relation to one or more sites, on grounds other than nature conservation?

(2) If Question 1 is answered in the affirmative: Do those grounds include the interests of municipalities and associations of municipalities, in particular their plans, planning intentions and other interests with regard to the further development of their area?

(3) If Questions 1 and 2 are answered in the affirmative: Do the third recital in the preamble to [the Habitats Directive], Article 2(3) of the directive or other

provisions of Community law even require that such grounds be taken into account by the Member States and the Commission when giving agreement and establishing the list of [SCIs]?

(4) If Question 3 is answered in the affirmative: Would it be possible – under Community law – for a municipality which is affected by the inclusion of a particular site in the list to claim in legal proceedings after final adoption of the list that the list infringes Community law, because its interests were not, or not sufficiently, taken into account?

(5) Must ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of [the Habitats Directive], undergo an assessment of their implications pursuant to Article 6(3) or (4) of the directive where they are continued after inclusion of the site in the list of [SCIs]?'

**The request to have the oral procedure reopened**

19 By document lodged at the Court Registry on 17 September 2009, Stadt Papenburg requested the Court to order that the oral procedure be reopened, pursuant to Article 61 of the Rules of Procedure.

20 In support of its request, Stadt Papenburg states that the Advocate General, in her Opinion, expressed the answer that she proposes the Court should give to the fifth question on the basis of a description of the facts which in such as to mislead the Court. In particular, Stadt Papenburg states that, contrary to what the Advocate General suggests, the approval of the Wasser- und Schifffahrstsdirektion Nordwest of 31 May 1994 by which Stadt Papenburg, Landkreis Emsland and the Wasser- und Schifffahrtsamt Emden were granted permission to dredge the Ems where required is not the first such decision concerning the navigability of the river Ems. Furthermore, the Ems cannot be considered to be a river which naturally enables ships with a draught of 6.3 metres to be navigated. Such a situation is the result of previously authorised dredging operations. Finally, Stadt Papenburg also disputes the arguments raised by the Advocate General in support of her reply to the first question referred.

21 The Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 37, and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 31).

22 In the present case, it is evident that Stadt Papenburg is contending, in essence, first, that certain facts underlying the Advocate General's assessment are incorrect, and, second, that the view expressed by the Advocate General concerning the interpretation of the first subparagraph of Article 4(2) of the Habitats Directive is incorrect.

23 As regards the first point, it should be noted that, under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, the latter is empowered only to give rulings on the interpretation or the validity of a Community provision on the basis of the facts which the national court puts before it (see, inter alia, Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 31); those facts, in conjunction with the legal material provided by the referring court, are to enable the Court to give a

useful answer to the questions submitted to it (see, to that effect, inter alia, Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 28).

24 The order for reference contains all the information necessary to enable the Court to give a useful answer to the questions submitted to it and, in particular, to the first question.

25 With regard to the second point, suffice it to state that Stadt Papenburg's request contains nothing to indicate that it would be useful or necessary to reopen the oral procedure.

26 Therefore, the Court, after hearing the Advocate General, holds that there is no need to order that the oral procedure be reopened.

**The questions referred for a preliminary ruling**

*The first question*

27 The first subparagraph of Article 4(2) of the Habitats Directive provides that, on the basis of the criteria set out in Annex III (Stage 2) to that directive, the Commission is to establish, in agreement with each Member State, a draft list, drawn from the Member States' lists, of SCIs for each of the biogeographical regions referred to in Article 1(c)(iii) of the directive.

28 Annex III to the Habitats Directive, which relates to the criteria for selecting sites eligible for identification as SCIs and designation as special areas of conservation, lists, so far as concerns Stage 2 in that annex, criteria for assessing the Community importance of the sites included on the national lists.

29 Those assessment criteria were defined on the basis of the objective of conserving the natural habitats or the wild fauna and flora listed respectively in Annex I or Annex II to the Habitats Directive, and of the objective of coherence of Natura 2000, namely the European ecological network of special areas of conservation which is provided for in Article 3(1) of the Habitats Directive.

30 It follows that the first subparagraph of Article 4(2) of the Habitats Directive, as such, does not provide for requirements other than those relating to the conservation of natural habitats and wild fauna and flora or to the setting up of the Natura 2000 network to be taken into account when the Commission, in agreement with each of the Member States, draws up a draft list of SCIs.

31 If, in the phase of the classification procedure that is governed by the first subparagraph of Article 4(2) of the Habitats Directive, the Member States were permitted to refuse to give their agreement on grounds other than environmental protection, the achievement of the objective referred to in Article 3(1) of the Habitats Directive would be put in danger, namely the setting up of the Natura 2000 network, which is composed of sites hosting the natural habitat types listed in Annex I to the directive and habitats of the species listed in Annex II and which must enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

32 That would, in particular, be the case were the Member States able to refuse to give their agreement on the basis of economic, social and cultural grounds and regional and local characteristics as referred to in Article 2(3) of the Habitats Directive, a provision which, moreover, as was stated by the Advocate General in point 38 of her Opinion,

does not constitute an autonomous derogation from the general system of protection put in place by that directive.

33 The answer to the first question is therefore that the first subparagraph of Article 4(2) of the Habitats Directive must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of SCIs drawn up by the Commission.

*The second, third and fourth questions*

34 In the light of the answer given to the first question, it is not necessary to reply to the second, third and fourth questions.

*The fifth question*

35 By its fifth question, the referring court asks, in essence, whether ongoing maintenance works in respect of the navigable channel of the estuary at issue in the main proceedings, which are not directly connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they are likely to have a significant effect on the site concerned, undergo an assessment of their implications for the site pursuant to Article 6(3) and (4) of the Habitats Directive where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of Article 4(2) of that directive.

36 Under the first sentence of Article 6(3) of the Habitats Directive, a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications for the site (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 22).

37 Therefore, it is necessary, first, to assess whether the dredging works at issue in the main proceedings are covered by the concept of 'plan' or 'project' referred to in the first sentence of Article 6(3) of the Habitats Directive.

38 It should be recalled that the Court, after noting that the Habitats Directive does not define the terms 'plan' and 'project', has stated that the definition of 'project' in the second indent of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) is relevant to defining the concept of 'plan' or 'project' as provided for in the Habitats Directive (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 23, 24 and 26).

39 An activity consisting of dredging works in respect of a navigable channel may be covered by the concept of 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337, which refers to 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

40 Therefore, such an activity may be considered to be covered by the concept of 'project' in Article 6(3) of the Habitats Directive.

41 Next, the fact that that activity has been definitively authorised under national law before the expiry of the time-limit for transposition of the Habitats Directive does not constitute, in itself, an obstacle to regarding it, at the time of each intervention in the navigable channel, as a distinct project for the purposes of the Habitats Directive.

42 If it were otherwise, those dredging works in respect of the channel concerned, which are not directly connected with or necessary to the management of the site, would, in so far as they are likely to have a significant effect on the latter, automatically be excluded from any prior assessment of their implications for that site within the meaning of Article 6(3) of the Habitats Directive, and from the procedure provided for in Article 6(4).

43 Furthermore, the objective of the conservation of natural habitats and of wild fauna and flora pursued by the Habitats Directive would be at risk of not being fully achieved.

44 Contrary to what Stadt Papenburg and the Commission claim, no reason based on the principle of legal certainty or the principle of protection of legitimate expectations precludes the dredging works at issue in the main proceedings, although they have been permanently authorised under national law, from being subject to the procedure provided for in Article 6(3) and (4) of the Habitats Directive as distinct and successive projects.

45 With regard to the principle of legal certainty, this requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80). The Habitats Directive fulfils those requirements with regard to the situation in the main proceedings.

46 With regard to the principle of the protection of legitimate expectations, it follows from settled case-law that a new rule applies immediately to the future effects of a situation which arose under the old rule and that the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules (see, inter alia, Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraphs 50 and 55).

47 Finally, if, having regard in particular to the regularity or nature of the maintenance works at issue in the main proceedings or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, those maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.

48 In that case, as such a project has been authorised before the expiry of the time-limit for transposing the Habitats Directive, it would not be subject to the requirements relating to the procedure for prior assessment of the implications of the project for the site concerned, set out in that directive (see, to that effect, Case C-209/04 *Commission* v *Austria* [2006] ECR I-2755, paragraphs 53 to 62).

49 Nevertheless, if the site concerned were, pursuant to the third subparagraph of Article 4(2) of the Habitats Directive, included in the list adopted by the Commission of sites chosen as SCIs, the implementation of such a project would be covered by Article 6(2) of that directive, a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 37 and 38, and Case C-117/03 *Dragaggiand Others* [2005] ECR I-167, paragraph 25). Before the Commission adopts that list, in so far as such a site is already included in a national list transmitted to the Commission for the purpose of being included in the Community list, it must not, by virtue of Article 4(1) of the Habitats Directive, be subject to interventions which risk

seriously compromising its ecological characteristics (Case C-244/05 *Bund Naturschutzin Bayern and Others* [2006] ECR I-8445, paragraphs 44 and 47).

50 In the light of the above, the answer to the fifth question is that Article 6(3) and (4) of the Habitats Directive must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of Article 4(2) of that directive.

51 If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.

**Costs**

(…)

On those grounds, the Court (Second Chamber) hereby rules:

1. **The first subparagraph of Article 4(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006, must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of sites of Community importance drawn up by the European Commission.**

2. **Article 6(3) and (4) of Directive 92/43, as amended by Directive 2006/105, must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing Directive 92/43, as amended by Directive 2006/105, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of sites of Community importance pursuant to the third subparagraph of Article 4(2) of that directive.**

   **If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of Directive 92/43, as amended by Directive 2006/105.**

# LECTURE 15

## Legal analysis: a case and a judgment

29 March 2012

# SPM4422
# Case: Import prohibition of fur
# Winter 2012

**Introduction**
In China and Korea many fur farms exist. On these farms foxes, minks, rabbits, raccoon dogs and other animals are held in small outdoor wire cages without any possibility to shelter from rain and sunshine. Furthermore the animals are beaten and knocked down by the workers. Many animals are still alive when skinned. After skinning some of them keep living for ten minutes. There are no penalties for abusing animals in these countries.

State Secretary Hans Bleker, who has animal protection in his portfolio, is severely shocked by this. The recent trend in fur collars on jackets even caused an increase of the import of raccoon dog fur from China and Korea. The State Secretary now wants to prohibit the direct and indirect (via another EU Member State) import of all fur from China and Korea. The cabinet has no principle objections to fur for clothing, nor to fur farms (reflected in the position of the Netherlands as one of the largest fur exporters). To keep the supply of raccoon dog fur at the same level, the State Secretary wants the government to build a raccoon dog farm. On this farm the highest standards of animal protection will be applied. First of all the raccoon dogs will be held in small groups and their large accommodation will be equipped with possibilities to shelter and special toys. Secondly the animals will be anaesthetized and killed before skinning. The building of the raccoon dog farm will cost 4 to 6 million euros. Some building companies already showed interest in the contract. The commercial exploitation of the farm will be done by Friendly Fur BV, the company that won the award for the most animal friendly fur farm in the Netherlands. The entire exploitation risk is on Friendly Fur BV.

The State Secretary wants to build the farm near an uncultivated piece of land next to a residential area of Delft. On the farm about 20.000 raccoon dogs will be present. Both the breeding as the killing and skinning will take place on the farm. Every day trucks will arrive and leave for the skins, animal food, offal, manure, etc.

**An assignment you may get in the future**
You are a civil servant for the Ministry of Economic Affairs, Agriculture and Innovation. The State Secretary asks you to write a draft report about his plans from a European law perspective. In this report you will address:

- The rules on free movement of goods. Address all relevant aspects, including the possible grounds of justification.
- The rules on public procurement. Address all relevant aspects. Is public procurement needed? Which procedure(s) can the State Secretary choose? The State Secretary would like to know whether the building costs will make any difference.

- The rules on state aid. Could a problem arise regarding state aid?
- Environmental impact assessment. Is it likely that an EIA has to be done?

The State Secretary will appreciate the use of relevant case law for your draft report.

**Preparation for the lecture**
During the 15th lecture this case will be dealt with. You are asked to write down your core notions regarding the questions mentioned above in advance.