



STICHTING Het Nationale park  
De Hoge veluwe

European Commission  
Mr Dr N. Notaro  
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ONDERWERP:  
Fitness Check

Dear Mr Notaro,

First of all I would like to thank you for your kind words during the Conference in Brussels, on 20 October 2015, in the framework of the Fitness Check of the EU Nature Legislation. Your ongoing efforts to elucidate the intention of the Birds and Habitats Directive, and the room for flexibility in both Directives, to the EU Member States is well-known and receives a warm welcome.

During our discussions in Brussels you replied that (summarized in my own words) change will not occur without real proposals. My presentation held a rough outline for change, however time was too short to elaborate on this. Therefore I herewith send you my further thoughts. It also concerns a number of draft proposals to keep the EU Birds and Habitats Directive fit for the future.

In brief: in my view the Birds and Habitats Directive should enforce more flexibility in relation to nature conservation and should also pay more respect to the rights of landowners to protect biodiversity in the long term. This is possible without doing any harm to the existing level of protection to birds, habitats and species. It is both useful and valuable to reflect on this, as it would help governments, the public, and landowners to adhere to the Birds and Habitats Directive in a better way.

Of course, change may be led by soft law, like guidance's, notes, guidelines, best practices, etc. These documents may focus on clear principles, which detail the practical application of the Directives, emphasize a better consideration of socio-economic requirements, and stress the real consultation of landowners and land managers. Also the current financial support may be (re)considered, like rural development funds or new Natura 2000 funds, etc., to provide a broader financial base for a better integration of the goals and aims of the Directives and enabling landowners and land managers to absorb long-



term or permanent loss of income due to restrictions imposed by Natura 2000 obligations. According to my knowledge just a few of us would deny the need for more flexibility in the Directives, which is required in the light of the experiences made and the changing circumstances. Consequently, flexibility which meets the societal and economic needs. However, is it possible to implement this flexibility without any change of the wording of the Directives? Soft law will not, or hardly, change the case law of the European Court of Justice ("ECJ"), which case law leaves no room for more flexibility and is based on the wording of the Directives. For example, reference is made to the case law of the ECJ in *T.C. Briels and Others*, dd. 15 May 2014 (C-521/12), which is discussed in more detail below.

In my opinion some clarification of the Birds and Habitats Directive is advisable. Again, without doing any harm to the existing level of protection to birds, habitats and species. This results in suggestions which can be used to elucidate the Birds and Habitats Directive to the Member States, or even better, from a legal point of view and for reasons of consistency among the Member States, to refresh the Birds and Habitats Directive, which are presented below, in bold, accompanied by a brief explanation.

## Habitats Directive

### Article 6 paragraph 3

*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, **or only after having ascertained that the integrity of the site has been completely remedied by compensatory measures visible and in force, and, if appropriate, after having obtained the opinion of the general public. In ascertaining that the plan or project will not adversely affect the integrity of the site concerned, the assessment takes account of the knowledge and experience of the owner of the site.***

*"or only after having ascertained that the integrity of the site has been completely remedied by compensatory measures visible and in force"*

Currently, the authorisation criterion laid down in the second sentence of Article 6 paragraph 3 of the Habitats Directive enforces the negative interpretation of the precautionary principle. I.e. Article 6 (3) prevents plans or projects that will adversely affect the integrity of the site concerned. The Hoge Veluwe National Park advocates to emphasize also the so-called positive





interpretation of the precautionary principle. This means to encourage people to invest in nature rehabilitation prior to the authorization of a project or plan which affects the integrity of the site concerned. For example: the creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected side. The new and equal habitat must be realized and working prior to the authorization of the competent national authorities. This results in a "win-win"-situation for both nature and projects/plans. The proposed wording also addresses the fear of the ECJ that it is highly difficult to forecast compensatory measures with any degree of certainty and that those measures will be visible only several years in the future (see: *ECJ 15 May 2014, C-521/12, para 32, T.C. Briels and Others*). This "win-win"-situation has also been advocated by the Dutch government in its evaluation study to support the fitness check of the Birds and Habitats Directive. More flexibility in the EU Birds and Habitats Directive would be very important in the Dutch legislative process of nature conservation. Very recently a new Nature Conservation Act (*Wet natuurbescherming*) has been adopted in the Netherlands, which lacks the required room for flexibility for landowners referring to the strict (interpretation of the) EU Birds and Habitats Directive.

*"In ascertaining that the plan or project will not adversely affect the integrity of the site concerned, the assessment takes account of the knowledge and experience of the owner of the site"*

In daily life the appropriate assessment required pursuant to Article 6 (3) of the Habitats Directive, which requires certainty about the effect of the works, often results into ad hoc comprehensive academic desk studies, frequently filled up with reasoned assumptions. This is also the effect of the case law of the ECJ, which requires that the assessment carried out under Article 6 (3) "cannot have *lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned*" (*ECJ 15 May 2014, C-521/12, para 27, T.C. Briels and Others*). The findings of the landowner, who has full knowledge about the effects of nature management on the site, are often ignored and found unimportant. Whereas the landowner does not start from reasoned assumptions, but starts from his own experience, which may give even more certainty. Scientific proof is not always much stronger; it is subject to reconsideration any time. Nature is a living organism. In my view the knowledge and experience of the owner of the site should be observed as well in order to make the required assessment really 'appropriate'. That will boost the preservation and improvement of nature conservation and biodiversity. Furthermore, to embed the knowledge and experience of the landowner in Article 6 (3) of the Habitats Directive does recognize his cooperation and his essential role in the actual implementation of the Habitats Directive which, additionally, concerns his property. Taking into account the knowledge and experience of the landowner will also help in case that there is no scientific evidence as required by the ECJ.



## Birds Directive

### Article 9 paragraph 1

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

(a) - in the interests of public health and safety, **or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;**

- in the interests of air safety,

- to prevent serious damage to crops, livestock, forests, fisheries and water,

- for the protection of flora and fauna;

[..]

The reasons for derogation in the Birds and Habitats Directive are not consistent. De Hoge Veluwe National Park sees no convincing reason to uphold this distinction. It gives reason to circumvent the Birds Directive by 'mitigating' measures. For that reason the Park argues to bring Article 9 of the Birds Directive into line with Article 16 of the Habitats Directive. This has also been put forward by the Dutch government.

Through these proposals I hope to contribute to a balanced Birds and Habitats Directive, which is 'fit for future' and that may rely on a strong support of individual landowners who are, ultimately, the corner stone for a successful implementation of both Directives.

This letter is, of course, open to discussion and further elaboration. Therefore I look forward to meet again and discuss this in more detail. If you would appreciate, De Hoge Veluwe National Park is a wonderful place to reflect on topics like this, where you are more than welcome.

Yours sincerely,

Seger E. baron van Voorst tot Voorst  
Managing Director