

# WRR

SCIENTIFIC COUNCIL FOR GOVERNMENT POLICY

## **THE HABITATS DIRECTIVE:**

### **A CASE OF CONTESTED EUROPEANIZATION**

*Mw. M. van Keulen*

---

**WEBPUBLICATIONS 30**

The Hague, June 2007

The Webpublications series comprises studies carried out as part of the activities of the WRR. Responsibility for the content and views expressed rests with the authors. A list of all Webpublications can be found on the WRR website ([www.wrr.nl](http://www.wrr.nl)).

## CONTENTS

1	Introduction.....	4
2	shaping and taking the habitats directive.....	6
2.1	Habitats: an introduction.....	6
2.2	A reconstruction .....	7
2.2.1	1988-1997: 'permissive consensus' .....	7
2.2.2	1997-2002: Controversy mobilised.....	9
2.2.3	2002 –today: 'Making up for the time lost'? .....	10
3	Diagnosis: what went wrong? .....	12
3.1	Administrative complexity and mismatch.....	12
3.2	Fragmented sectoral expertise .....	12
3.3	Uncertainty and controversy as to interpretation .....	13
3.4	Lack of communication and negative framing .....	14
4	A look across the border.....	16
5	Some lessons (not) learned .....	20
6	Conclusion .....	24

## 1 INTRODUCTION

The rapid deterioration of flora and fauna in the member states forms a driving force for European Union nature policy. The EU's *Wild Birds Directive* (79/409/EC) and the *Habitats Directive* (92/43/EC) establish one coherent ecological network, *Natura 2000*, to conserve and protect typical environments, or *habitats*, for wild flora and fauna and particular species of plants and animals. Originally, the Habitats Directive was a relatively technical policy dossier. From 1988 to 1992, it was discussed within an 'epistemic community' of policy experts, scientists and ecologists. This 'shaping' phase was characterised by a broad 'permissive consensus' at the national level. The 1994 deadline for national transposition passed without political-administrative action or interest - let alone any debate regarding its laudable nature conservation objectives. Only in the late 1990s did processes of national implementation create political, administrative and societal controversy within the member states. In the Netherlands, it turned out that, notwithstanding active involvement by the Dutch government in shaping the Habitats Directive, there was considerable 'misfit' between the Directive and existing national arrangements. In 1998, an NGO-initiated discussion around the protection of the habitat of the *korenwolf* generated a wave of public and media attention. This little hamster on the verge of extinction became a symbol for inadequate implementation of EU policies in the Netherlands. Pursued by legal and administrative action by interest groups and stakeholders, the Habitats Directive rapidly moved up the political and public agenda.

In retrospective, the issue has served as a catalyst for changes in both policy content and 'embedding' of the EU and its policies in the Netherlands. In terms of policy content, the Habitats Directive has initiated concrete changes in Dutch nature conservation, for example by activating and mobilising sub-national governments and NGO's in 'communities of practice' (Neven and Van Rijn 2004). The directive is also regarded as a key factor in the development of a new policy discourse around 'economy' and 'ecology' (Van der Zouwen and Van den Top 2002). For Dutch politics and administration, bad experiences with the Habitats directive have served to increase awareness of possible negative implications of EU-originating laws and policies. Thereby, this case-study has initiated a domestic debate about how to deal with increasing *Europeanisation* and interwovenness of policies and national and international actors, a discussion which carries on until today. At the same time, the directive is considered by many 'street-level' stakeholders as an example of undesired EU involvement into matters considered primarily a national or local competence. This negative framing has undisputedly contributed to the public 'ridiculisation' of the EU and its policies, which had its effects in the negative vote for the 2005 constitutional referendum.<sup>1</sup>

The aim of this paper is to analyse processes of domestic politicisation and societal embedding around the Habitats Directive in the Netherlands. In section 2, a reconstruction is presented of how the Habitats Directive was shaped at the EU-level and how this process became 'embedded' in Dutch democracy and society. The analysis in section 3 assesses the origins of problems of politico-administrative and public uncertainty and perceived problems of legitimacy with the Directive in the Netherlands. In sections 4 and 5 it is evaluated, on the basis of experiences in other member states, whether and how to prevent and remedy the resulting, deeper problems of compliance, legitimacy and acceptance which had their effects on to Dutch EU-policy for the years to come.

## **2 SHAPING AND TAKING THE HABITATS DIRECTIVE**

### **2.1 Habitats: an introduction**

Since the early 1980s, environmental NGO's such as WWF and Friends of the Earth actively lobbied DG Environment for new policies to support the 1979 *Wild Birds Directive*. The first Commission proposal for what became known as the *Habitats Directive* was issued in September 1988.<sup>2</sup> After four years of negotiations between government representatives at Council level and consultation of the European Parliament, political agreement was reached in October 1991, under Dutch EU Council Presidency.<sup>3</sup> There was broad support amongst national government delegations for legislation aiming to set and harmonise definitions, principles and legal obligations for nature conservation policy. Throughout the process, also the European Commission (DG ENV) has been very active in terms of policy initiative, legal action and funds management.

The Habitats Directive requires that national governments designate flora and fauna habitats within and around 'special areas of conservation' and prevent their deterioration by ensuring conservation. Annexes to the Directive list the types of habitats (I) and species (II) to be protected, to the extent that no measures may be carried out with potentially significant consequences and effects upon the ecosystem. The latter provision has become a source of rivalry, as it necessitates a continuous weighing of interests between, on the one hand, economic, infrastructural and/or societal relevance of 'measures' proposed,<sup>4</sup> and, on the other hand, nature conservation and species protection. Following interpretation by the European Court of Justice, strict conditions apply to proposals for private or public intervention in natural habitats to be legally accepted: there should be no other alternatives available, urgent reasons for public interest should be made explicit and the damage to nature should be physically or financially compensated.

The deadline for legal transposition of the Habitats Directive was June 1994, but no member state has met this deadline or that for proposing a set of sites (1998). Pressured by threats of legal action by the Commission,<sup>5</sup> since 1997, transposition and implementation in the member states have gradually been realised. Currently (mid-2006), the national lists of designed habitats are reviewed for designation by the European Commission. Final designation is expected for 2007.<sup>6</sup> Some 12% of the EU's land cover has been designated as sites of community interest. In the near future, plans will have to be developed on how to manage these habitats. At the EU level, a revision of the Habitats Directive to incorporate the latest ecological and scientific insights is prepared for 2007.

1988 (July)	DG 11 (ENV) issues proposal for a directive on habitats and flora/fauna
1990	First reading European Parliament
1991 (December)	Political agreement Council (Dutch Presidency)
1992 (Julye)	Directive published in the official journal
1994 (June)	Deadline transposition
2001	NL: Dutch government assigns Habitat areas
2002	NL: Habitats Directive transposed into 'Flora and fauna bill' (species protection)
2003	Commission DG ENV agrees upon Habitat areas
2004	NL: ECJ verdict for late transposition of the Habitats Directive provisions (C 441/03)
2005	NL: Habitats Directive transposed into 'Nature protection bill' (habitat sites)
2006	National lists reviewed by DG ENV
2007	Designation of sites, EU-level revision of the Directive foreseen

*Table 1: Timeline Habitats directive 92/43/EC*

## **2.2 A reconstruction**

### **2.2.1 1988-1997: 'permissive consensus'**

Interestingly, the goals and objectives of the Habitats Directive were initially widely supported by all actors involved in its shaping. This includes the majority of national government delegations, representatives of the EU institutions (Commission and Parliament) as well as 'green' NGO's organised at the EU level (WNF, Friends of the Earth). From the beginning, however, national governments did not seem inclined to act upon the legal obligations that the Directive set. In the Netherlands, up to 1997, political and administrative attention for the implications of the Directive was virtually absent. This is rather remarkable, taking into consideration the active role of Dutch negotiators during negotiations on the Directive at Council level. From 1988 to 1992, the Dutch government delegation at the EU-level actively promoted the so-called 'network approach', which had been central to national nature conservation policy since 1990 (Hoefnagel 2003, 82).

Dutch activism in the field can be understood in the particular domestic context and tradition of environmental and nature conservation policy (Van den Bosch 2005). The Netherlands is the most densely populated country in EU. Nature and environment objectives have to

compete with other potential use and exploitation of the scarce land for purposes of industry, housing, infrastructure, agriculture, tourism, water and environment. In addition, a large proportion of the country lies below sea level and the Rhine carries pollution from several countries within state borders. Responsibility for national nature policy lies with the Ministry of Agriculture, Nature and Food Quality (LNV) and its department for nature, scenic and landscape policies (*Directie Natuur*). However, the departments of Spatial Planning and Environment (VROM) and Transport and Water management (V&W) are also closely involved.<sup>7</sup> At the local and regional level, the sub-national government layers (*provinces, municipalities, water boards*) are often owner and manager of the land, fields, canals and roads which are to be designated and protected. It has been estimated that half of all Dutch municipalities are affected by species or habitats conservation related to either the Wild Birds or the Habitats Directive, for example by impact upon local designation plans (*'bestemmingsplannen'*). Sub-national governments cooperate with government agencies such as Staatsbosbeheer and Rijkswaterstaat. Also, private organisations and interest groups, both nationally organised (Stichting Natuur en Milieu, LTO, Waddenvereniging, Vogelbescherming) and locally (provincial environment federations; Das & Boom) have an agenda setting and mobilising role, representing a wealth of interests ((business and industry; construction and building companies; forest owners, nature conservationists).

The continuous competition for the use of scarce lands; this fragmented playing field and a traditionally consensual policy style explain the particularities of the 'Dutch approach' to nature and environment policy. This domestic pattern of environmental policy making is referred to as 'negotiated rule making' and a strive for comprehensive, long-term policy planning (Lieberink and Van der Zouwen 2004, 139). The advantage is that much is done in terms of consultation of stakeholders during the 'shaping' stages, in order to increase support for policy outcomes. The downside is that, once negotiated and in place, policy concepts and projects are relatively inflexible and rigid.

In terms of environment and nature policy, the Netherlands thus ranks as a highly regulated member state, which explains its activities at the EU-level trying to 'upload' national policy concepts (a form of 'regulatory competition', see Héritier *et.al.* 1996). Over the years, the Dutch government has established a reputation in the EU as a 'pioneer' or 'pace-setter' known for exporting domestic environmental policy solutions to the EU level (Lieberink 1997, Van der Zouwen and Van Tatenhove, 2002).

The Habitats Directive was no exception. The *National Ecological Network* (EHS), in which nature areas are connected through so-called ecological corridors was promoted during initial discussions at the EU level and has inspired the design of the EU-wide network *Natura*



2000. Reaching political agreement on the Directive was a priority for the Netherlands EU Council Presidency (1991). The Dutch delegation to the negotiations on the Habitats Directive was considered by their counterparts to be 'very influential' and 'powerful' (Van Rheenen et.al., 2005, 46-47).

At the same time, in The Hague, the fact that a new EU Habitats Directive was debated was more or less a 'fait accompli'. There is no evidence for any domestic political interest or parliamentary discussions on the Directive. Potential implications - more specifically: the two-year deadline for transposition into national legislation – were not at any moment or level assessed. This finding should be understood in the 'depoliticised' context of EU policy making up to the end of the 1990s. The process of shaping the Habitats Directive, as was the case with so many other policies, was restricted to a rather exclusive group of 'green' experts: scientists, nature policy makers and NGO's. At the time (early 1990s), provinces and municipalities were still largely unaware of the legal and administrative impact and requirements emanating from EU policy - let alone that EU policy was of concern to political parties or (groups of) citizens were aware of its implications. Experts claim that even the judiciary was not yet very knowledgeable as to the implications of 'direct effect' of EU directives, judged by the way the directive was (mis-)interpreted in the first court cases related to its obligations.

### 2.2.2 1997-2002: Controversy mobilised

In 1998, the Dutch government was condemned by the European Court of Justice for failing to assign sufficient sites as special conservation zones under the Birds Directive (C-3/96). This court case acted as a wake-up call for political and administrative actors. It turned out only then that there was considerable misfit between the Habitats Directive and existing policies and arrangements - for example in the field of species protection, a concept much more central to the Directive than to national nature policy (Kuindersma et.al. 2004, 57). In the same year, at the national level, a first court case was instigated by *Das en Boom* for the imminent extinction of a particular hamster species (*Cricetus cricetus*) listed in the annex to the Directive. Nationally and locally organised 'green' NGO's and interest groups (Waddenvereniging; Vogelbescherming; provincial environment federations and ad-hoc local groups) initiated legal and administrative procedures against alleged incorrect and late implementation of the Habitats Directive and misfit between new or proposed spatial plans or infrastructural interventions and its requirements.

NGO's have been particularly closely involved in the Habitats Directive. At the EU level, NGO's had a significant influence on the drafting of the Directive through input of scientific

expertise in expert groups and regular consultations with the Commission. Representatives of NGO's continue to be involved in monitoring and steering the implementation process, for example in the *EU Habitats Committee* of DG Environment and, at the national level, in various steering groups in close consultation with governments of the member states.

These organisations therefore claim to have a broad public base for their actions: in the Netherlands, the environmental and nature NGO's with over 500 members represent some 4 million contributors - one in four Dutch citizens. They can also benefit from considerable funds for financing expensive and long legal and administrative procedures in order to challenge spatial interventions with potential negative effects on flora and fauna. In 2004, after five years of legal battle, the European Court of Justice ruled upon a prejudicial question of the Raad van State regarding the request of two NGOs (*Waddenvereniging* and *Vogelbescherming*) that mechanical cockle fishing in Zeeland would fall under the scope of article 6 of the Habitats Directive (C-127/02).

It should also be noted that the legal channel is relatively accessible in the Netherlands and that the time span for rulings is short, for example compared to Belgium. The way to court is easily found by organisations and individuals and projects in progress may still be delayed or cancelled, instead of stakeholders having to fight against 'accomplished facts'. Apart from legal actions, however, also many procedures have been initiated at the *administrative* level by small, local groups of concerned citizens, driven either by green ideology or by 'not in my backyard'-concerns.

### 2.2.3 2002 –today: 'Making up for the time lost'?

In December 2002, the Commission referred the Netherlands to the Court of Justice due to alleged shortcomings to implement the Habitats Directive. The method of interpretation of its provisions (to implement by means of spatial administrative instruments (*Planologische KernBeslissingen*)) was ruled legally incorrect. Obviously, this was a painful finding for the Dutch government, considering that national spatial concepts had laid at the basis of the Directive. Within the government administration and amongst responsible politicians, the Habitats Directive became widely known as a '*disaster dossier*'. Serious political and administrative efforts for transposition and implementation proved cumbersome and time-consuming. Discussion on transposition of the provisions of the Directive into the Nature Conservation Bill (NBw 1998) took 5 years of debates for the bill to be finalised in parliament. The main concern was the division of competences between the central government and the provinces: who should be responsible for what? This controversy is illustrated by the fact that the central government signed a covenant with the provinces about nature conservation policy in which the Habitats Directive is not mentioned (Van der Zouwen and Tatenhove

2002, 14). At the same time, the designation of habitat sites was taken seriously. In May 2003, the Ministry of Agriculture, Nature and Fisheries (LNV) was the first member state government to submit a list of 141 habitats (730.000 hectare) to the Commission. This fore-runner action was important to the Commission, as now other member states could be convinced to act similarly.

The Habitats requirements are currently the subject of an astonishing pile of guidelines and policy briefs - an active communication and information policy in which the responsible ministry LNV has taken the lead. However, up till now, problems remain when it comes to 'organisational qualities': transfer of knowledge, communications and discussion on financing site management (IBO 2003, 16). This is clear at the regional and local level, where the subject matter continues to mobilise societal actions and debates, a very recent example being the case of deepening the Westerschelde.<sup>8</sup>

### **3 DIAGNOSIS: WHAT WENT WRONG?**

This section discusses four categories of causes and explanations for the serious problems experienced with the Habitats Directive in the Netherlands.

#### **3.1 Administrative complexity and mismatch**

To begin with, many problems experienced with the Habitats directive in the Netherlands can be explained by reference to specific politico-administrative factors. Again, (EU) policy making in the Dutch 'polder model' is a case of multi-level and multi-actor governance, prone to heavy political-administrative co-ordination. What is more, the legal and policy framework of nature conservation policy – species protection in particular - is judged by experts and academics as extremely complex (Kistenkas & Kuindersma 2004, 17). The horizontal and vertical fragmentation of decision-making explains the problems and delays for integrating the Directive into sectoral legislation and land use planning procedures (Hirsch Ballin and Senden 2005: 67).

A related problem is continuing administrative mismatch between the EU and the national level. In the Netherlands, nature and environment policy are administratively and legally separated. This conflicts with the situation in the EU, where the Commission's DG environment as well as numerous working groups under the Environment Council are primarily responsible for nature conservation policy. This implies that the first responsible ministry for nature policy making in The Hague, the Ministry of Agriculture, Nature policy and Food Quality,<sup>9</sup> needs to co-operate with the environment and spatial planning ministry for contacts with the EU field - not in the least to deliver Dutch positions in the Brussels arena of the Environment Council, where the Habitats Directive and successive legislation is decided.

#### **3.2 Fragmented sectoral expertise**

Both within the administration and 'on the ground', knowledge of legal consequences of policies; insights in political challenges in shaping and taking as well as expertise as regards ecological objectives and spatial planning are heavily dispersed. This problem of 'sectoralisation' of expertise and knowledge and resulting fragmentation of policy making plays a role both at the EU-level and at the national level. Experts within 'scientific communities' are to a large extent responsible for the shaping of nature policy. Subsequent management and enforcement is a task for other groups of stakeholders.

Late and incorrect implementation is largely due to insufficient political and administrative attention for EU (nature) policy in general. In the early 1990s, at the central government,

knowledge about what happened at the EU level and how to deal with the shaping and taking of EU legislation was still largely limited to a small circle of insiders: the departmental international relations divisions and the EU department within the Foreign Affairs Ministry. Certainly, the Dutch government delegation at the EU level was widely considered active and particularly knowledgeable negotiators, bringing considerable scientific expertise to the negotiating table (Van Rheenen 2005, 49). However, as there was no regular transfer of knowledge and experiences to policy makers concerned with 'national' policy domains, only a few policy makers at the departments of Nature, Environment and Spatial Planning realised the effects of the Habitats Directive. In the words of one respondent: 'it took until 1998 before realisation dawned at the Ministry that an EU directive has actually legal status'.

Dominance of a small group of expert officials within the government's Nature department has made that 'the process of weighing different interests at stake has not, or only late stage, been initiated' (SER, 2006, 6). In the words of another respondent: 'when it was possible, no-one cared', then a long learning curve has materialised until today'. This 'verkokering' has thereby ultimately, contributed to the negative framing of the directive (see below).

As transposition of the provisions of the Habitats Directive took so long, a process of gradual 'legalisation' of the policy making process took place (*'juridisering van de besluitvorming'*; Verschuuren and Van Wijmen 2002). NGO's and interest groups, closely involved in the shaping of the Directive realised the potential for enforcing nature policy at the level of the member states. National implementation was being enforced through court cases (SER 2006, 38). According to one respondent, the responsible legal institution (*Raad van State / afd. Bestuursrechtspraak*) has also experienced a steep learning curve when it comes to assessing the potential effects and impact of EU-originated legislation. Up until the 1990s, the potential direct effect of EU law was not sufficiently taken into consideration –the Court condemnation in 1998 constituted a breaking point.

### **3.3 Uncertainty and controversy as to interpretation**

According to some analysts, the Habitats Directive is a piece of legislation with 'low ambiguity' - i.e. it sets out in clear terms what is to be achieved and when (Laffan and O'Mahoney 2004, 4). However, in practice, in the member states, there has been substantive controversy over the interpretation of its different provisions. Again, green policy experts have shaped the Habitats Directive, but its effects are to be applied and managed at 'street-level' by ecologists and biologists - with differing perspectives on its potential biological and ecological effects. The Habitats Directive is sometimes called 'static' and 'conservative' (IBO 2003, 25). Or, in the words of one respondent: 'the dynamics of nature cannot be caught by law'.

Then, there was uncertainty as to the legal interpretation as to how to interpret definitions and key notions of the directive ('significant effects'; 'appropriate measures', 'urgent reasons', 'plans or projects') and their implications. Although NGO's had been very active in shaping the Directive, other stakeholders were only confronted with its provisions after the deadline for transposition. This led to the Directive being perceived as a threat to existing practices. Many farmers and forest owners in particular considered the requirements of the Habitats Directive as quite restrictive and static. The governments of the member states initially did little to ease this pain. Only after the implementation date had been expired, consultation processes were initiated. For example, only by persuasion with financial 'carrots', such as the EU-wide funding programmes LIFE, could regional actors in Denmark be convinced of supporting the Directive (Van Rheenen et.al. 2005, 47).

In addition, the European Commission is accused of only increasing miscommunication and uncertainty. The Commission thereby points at the member states, which would be responsible for implementation of Community law. But governments and NGO's complain that Individual advice requests from member states to the Commission are not made public. There can thus be no question of a potential 'learning effect' between member states and the development of best practices in implementation (Neven and Kistenkast 2003, 36).

### **3.4 Lack of communication and negative framing**

Discussion on the Habitats Directive has for a long time been restricted to a small number of stakeholders and framed as a technical policy debate. Amongst these stakeholders (government officials and policy makers, green NGO's and ecologists) the directive was little controversial. The policy debate, in which NGO's played an important pusher role directed at the European Commission, was primarily focused on how to designate and finance EU-wide ecological structures. The consequences for site management and species protection 'on the ground' were not taken into consideration. The consequences of the directive were not discussed with stakeholders at the regional and local levels and the 'multi-level' character of nature policy was for long underestimated (Van der Zouwen and Van Tatenhove 2002, 7).

With the societal actions described since the 1998s, the debate spread to the public sphere. Other stakeholders – private sector; sub-national governments and NGO's – 'awoke' as to the consequences of the issue. In particular the *korenwolf*- case instigated a wave of public and media attention. Against those citizens with warm feelings for nature conservation, represented by the NGO's as described in the above, others felt more directly negatively threatened by the otherwise laudable objectives of ecological preservation as building

projects and infrastructural measures were delayed and uncertainty entailed considerable administrative and legal costs for the private sector. Thereby, the issue touched upon the dilemma between 'ecology' and 'economy' as essentially contrasting value sets.

There are two potential explanations why the subject matter of the Habitats Directive is so appealing. First, the potential of the issue of nature and species conservation to be graphically displayed, for example by using colour maps of the country and the location of designated sites (see annex) is obviously very appealing to policy makers and politicians. The impact of policy can thus easily be illustrated.

Second, it is also rather easy to paint an appealing picture of 'cute' animals being endangered by human intervention, or, in contrast, of the waste of financial resources spent on their preservation of a handful of animals. Both have been the focus of media contribution across the spectrum: from popular media (*Telegraaf*) up to serious television shows (*Buitenhof*), and a serious number of parliamentary questions. This is the context by which, in the Netherlands, the *korenwolf* gained national fame and so did *zeggekorfslak* and the *rugstreepad*.

The slogans 'Red de Korenwolf' (1998) and 'Nederland op slot' (2002) are prominent examples of this rather provocative framing by both sides of the spectrum. This has also contributed to the rapid 'ridiculisation' of the Habitats Directive. This is rather striking, taking into consideration the broad consensus and downright support amongst member state governments for the Habitats directive in 1992. Aggravated by lack of information and communication by these same governments, however, the public image of this issue has become that of downright irritation and (perhaps) fear for meddling of Brussels technocrats in those matters concerned of predominantly local and regional concern. In 2003, Belgian MEP Dirk Sterckx explicitly related to these concerns when he stated in a speech to his Flemish constituency that 'we should see that the protection of biodiversity is not used as an argument to unnecessarily affect the economic, societal and cultural life in our region'.

#### 4 A LOOK ACROSS THE BORDER

In the case of the Habitats Directive, instead of political controversy on its goals and objectives, it seems thus rather the *process* of embedding – instead of policy contents - which constitute the main source of uncertainty and legitimacy problems. This brings up the question to what extent these or related challenges have been experienced in other member states; if so, how these have been remedied and, finally: whether these cases learn us if and how problems of uncertainty, embedding and legitimacy in the Netherlands could have been prevented (for example by means of a more careful ‘embedding’ policy from the side of the national government).

A look across the border shows that virtually all member states have experienced delays or problems with implementation and application of the Habitats Directive. But problem causes, diagnoses and remedies differ due to national differences in scale and character of nature policies and politico-administrative particularities (Hirsch Ballin & Senden, 2005, 67). For example, as to state-specific particularities as to the contents, the case of **Finland** stands out. Here, the Habitats Directive and more specifically the annexes had to be supplemented with references to arctic species and habitats. Once the list of sites was proposed by the government, some 1250 appeals of ca. 5000 appellants (site owners and managers as well as nature organisations) were received by the Supreme Administrative Court for either to withdraw or add sites to the list.

On 11 September 2001, the Court found that **France** had not put forward enough sites for the protection of species and habitats mentioned in the EU’s Habitats Directive (case C-220/99). Site proposals are still insufficient for dozens of habitats and species: types of forests and peatlands, as well as certain fish and plant species. In France, there have been many societal protests against the designation of sites, in which parliament was scarcely involved as this was done by means of Decree, accounted for the delay in implementation. Note that, in the Netherlands, although the implementation process was particularly cumbersome, site designation was particularly successful, to the extent that the Dutch regained their fore-runner position in the EU.

Explanations for national problems have been found in differing nature *conservation traditions* between the member states. Perhaps rather paradoxically, as environment and nature policy was less developed in member states in the South and East of the EU, there was no question of misfit and new EU-originating provisions could relatively easy be transposed. However, here the assessment of projects turns out to be problematic. In January 2005, the Commission decided to refer Spain to the Court for failure to assess the effects of sand



extraction and beach regeneration along the Mediterranean coast. The sites in question host endangered species such as the sea turtle and are proposed as Natura 2000 sites under the Habitats Directive. According to the Commission, Spanish authorities have failed to assess the effects of the projects concerned on these sites, violating the Habitats Directive as well as the Environment Impact Assessment Directive. Through a similar virtual lack of existing nature policy, the **new member states** score relatively well in this respect. On the other hand, problems have been related to economic performance of regions and member states. Economic laggards have problems with the obligation to mobilise a high administrative capacity in order to respect the Directives' provisions.

A second set of problem diagnoses is related to particular constitutional or administrative structures. In federal member states, such as **Germany, Austria, Italy** and **Belgium**, implementation delays have been due to competing competences and conflict between different government layers which point at each other when it comes to taking responsibility for implementation and management of nature policies. As described in the above, in the Netherlands, similar debates have dominated the parliamentary discussions on the distribution of competencies between sub-national governments and the central level. NL was finally condemned by ECJ for non compliance as formal process was held up by length of internal legislative process. This delay, combined with strict interpretation and lack of integration with spatial planning policies at the sub-national level accounted for the Habitat Directive held responsible for obstructing / frustrating planned infrastructural works.

Also differing 'embedding' practices account for variation. In the **United Kingdom** and **Sweden**, consistent with the emergence of the 'governance' paradigm, rather positive experiences with public participation and stakeholder involvement have been developed with a pro-active information policy from the agencies responsible for implementation ('English Nature, RSPB'). It seems also that in the UK, there is relatively more attention for bottom-up processes and social dynamics, for example by informal contacts, regular consultation and dialogue with concerned citizens and stakeholders (Neven et.al. 2005: 35, Jordan & Fairbrass 2002). In Sweden, an intermediary depoliticised organisation ensures flexibility to deal with lack of clarity and uncertainty and bridge-building between policymakers. This orchestrates policy implementation as an iterative process (learning) which creates support (Alterra, 110).

The case of the UK is often quoted in analyses of all that went wrong with the Habitats Directive in the Netherlands. On the one hand, the long-standing Dutch tradition of regular consultation between stakeholders explained inflexibility and thereby implementation delays. But analysts point at a changing Dutch administrative culture moving away from 'taking care

of towards 'taking care' (Hermans et.al. 2004). The case of the cockle fisheries in the Wadden sea is a successful example of these emerging bottom-up practices, which acknowledge expertise and interdependence. The process of process of integrating Natura 2000 requirements into local planning (Neven and Van Rijn 2003) has been delegated to the level of local governments which have become 'ambassadors' for public support (*draagvlak*) for nature conservation.



## 5 SOME LESSONS (NOT) LEARNED

In many member states, the Habitats Directive still features prominently in lists of cumbersome EU interventions in the field of environment and nature policy. As such, it is preceded by the Wild Birds Directive, which dates back to 1979 and has experienced similar implementation delays, and is followed by the struggle around implementation of the Nitrate Directive (91/676/EC) and more recently the Air Quality Directive. There are two striking similarities in these cases. First, in all cases, the Dutch government was particularly active during the 'shaping' process at the EU level. Second, potential consequences at the national level were realised in a rather late stage (Rood et.al. 2005, SER 2006). Paradoxically, a fore-runner position in the negotiations may thus lead to a kind of 'false confidence' within the national government in the alleged degree of fit with existing arrangements. This has led to the emergence of a 'credibility gap' for the Dutch government when it comes to delivering results in terms of EU legislation (Van den Top en Van der Zouwen 2000).

Over time, a number of remedies have been suggested to prevent and fix these and related implementation problems in the field of environmental and nature policy (see for example Liefferink and Van der Zouwen 2004, SER 2006). Overseeing the analysis in the above, it is perhaps not surprising that the majority of these solutions proposed focus on the politico-administrative dimension.

To begin with, there is a consistent call for *active input* into the EU policy-making process in the 'shaping' phases, for more political steering as to the priorities and for applying regular impact assessments on new EU policy proposals. As a small member state, the Netherlands is and will remain dependent on international rules and legislation in the field of nature conservation and environment. A strategy of 'taking the lead', by actively initiating policies on the basis of national experiences and 'best practices' could consequently prevent surprises in the 'taking' phases of EU legislation (Voermans and Steunenberg 2005, Clingendael 2005, see also Raad van State 2005 and SER 2006). The Netherlands has a reputation for pioneering in the field. However, living up to these expectations should not lead to surprises once policies have to be implemented on the ground. In the past few years, therefore, active input of the Dutch government delegation at Council level is directed at including explicit allowances in the text of individual directives to implement by means of voluntary agreements (Liefferink and Van der Zouwen 2004).

Second, a lesson learned from the case of the Habitats Directive is that currently, once difficulties in implementation are expected, generally, recognition is actively sought, for example by contacting the European Commission. However, in the field of nature policy, there is still an inherent conflict between the EU's and the domestic policy style. If

implementation is too little and too late, problems tend to be tough as a result of the relatively rigid tradition of long-term comprehensive strategies in the field of environmental policy and a consensual policy culture in the Netherlands, which makes policies agreed difficult to change (Lieverink and van der Zouwen, 2004, 149).

Third, a political 'reality check' on the European ambitions of the Dutch government is widely recommended. If it is decided that a particular policy idea merits full political and administrative attention and capacity to be initiated or supported, follow-up throughout the policy chain should be better ensured than when its initiation was in the hands of a small policy-making elite. In this respect, the Habitats Directive was a bad example of sectoral, or even: technical legislation in the field of ecology, with nonetheless large implications for other stakeholders in spatial planning and nature management. The fact that these consequences went for long unnoticed has contributed to the politico-administrative uncertainty and ultimately, also to the negative framing of the issue.

In this process of initiating and mobilising a national debate on (the impact of) international and EU-level policy proposals, as well as in considering and differentiating between potentially conflicting values and interests lies a central task for the national government. The choices and alternatives are insufficiently depicted and visualised (SER 2006, 7). the same time, as intermediate between sub- and supra national governments and 'taker' and 'shaper' of EU legislation (Hoefnagel 2002, 88), it is clear that the national government has a difficult position in this respect.

Then, much has been said about the presumed lack of timely, consistent and pro-active communication about the effects of the Habitats Directive, both from the side of the government as from the side of the European Commission. The latter is accused of having taken rather long to act upon its responsibilities as 'guardian of the treaties'. The first of a large number of time-consuming court cases were only initiated at the end of the 1990s. This has increased uncertainties for sub-national governments, site owners and private parties which and to what extent measures and projects would fall under the range of the directive. At the same time, the national government would have only increased this uncertainty by not communicating and informing stakeholders on how to deal with its implications 'on the ground'. This void was ultimately filled with individual mobilising actions by NGO's and groups of engaged citizens, which accounted for the wake-up call referred to in the above.

It should be stressed that overseeing the problems experienced with the Habitats Directive, time has done a lot in this respect. In the past decade *awareness* of EU policies and their implications has spread gradually throughout the central government. Representatives of

provinces and municipalities are now very active in influencing the making and taking of new EU policies both in Brussels and in the capitals. The experiences with the Habitats Directive have in this respect effectively contributed as a catalyst. When it comes to societal side of the discussions, in the Netherlands and in other member states, such as the UK, the Birds and Habitats Directives were the first instances of gradual *Europeanization* of a formerly national policy area, that of nature policy, which have done a lot in terms of societal mobilisation. Indirectly, the Habitats Directive has generated politicisation of pressure and interest groups and the creation of new political opportunity structures which have helped to 'embed' European nature rules into the national and sub-national policy context (Jordan 2002, 149). On the one hand, in terms of the broad tension between 'ecology' and 'economy', recent studies emphasize how the latter still is the dominant value-frame. As a result of the prominence and dominance of provinces and municipalities in decision-making, groups of interested and/or concerned citizens still lack the administrative power to effectively influence the results of politico-administrative decision making (Van den Bosch 2005).

On the other hand, both at the EU level and within member states, there is now much more attention for processes of multi-level and multi-actor 'governance' and the potential for trans-national interest coalitions in influencing policy processes. As a result of the devastating experiences with the Habitats Directive, international best-practices of bottom-up implementation have been 'learned' and are now gradually applied in the Netherlands. In local experiences, there is now a different discourse and playing rules, from top-down towards interaction, integration and embedding. Improving the image of Habitats Directive will have to be sought in social justification and legitimisation of the choice upon which ideological foundation the nature policy should be implemented by deliberation with stakeholders in particular at a regional level. It has also been argued that the Habitats Directive has actually confronted the national government with its more general search for a way to deal with decentralised agencies and governance practices. Currently, there is a tension between, on the one hand, a prevailing trend of 'steering at a distance', which implies a rather loose stance of the national government and regional and local actors are encouraged to take the lead. This obviously creates a different dynamics as to the question how to create social support and to ensure democratic legitimacy for policies. On the other hand, national government has a prime responsibility as the gate keeper for international policy making and the legal addressant of EU commitments (Neven and Kistenkast 2003, 35).



## 6 CONCLUSION

Both within the small insiders' circle of green experts and at the political level within the member states, the 1988 Commission proposal to lay down principles of nature conservation policy in the EU's member states in a binding directive were not contentious at all. Actions in the 'shaping' and 'taking' phases of the Habitats Directive therefore focused on *'how'-questions*, concerned with transposition, implementation, administration and enforcement of its provisions. This process of administrative dealings in the years after 1992 probably constituted a key source of uncertainty and legitimacy problems in the member states. Considering the Dutch reputation in the EU (an active leader regarding environmental policy) the appearance of serious policy misfit came as a complete surprise for Dutch policy makers. Due to a long prevailing 'permissive consensus' surrounding the EU in the Netherlands, national politics and administration long suffered from a striking lack of awareness of the possible effects and consequences of EU policies agreed upon in Brussels. In combination with the (false) belief that policy and institutional adaptation to the Directive would not be necessary, the government did not actively take up its task of informing and communicating stakeholders about the issue of the Habitat Directive. For those groups of stakeholders not involved in the 'shaping' stages - i.e. those outside the small circle of 'insiders' (green NGOs and experts at central government level) - the final Directive was a particularly nasty surprise. High administrative uncertainty over the issue increased uncertainty at street level - a process which ultimately resulted in much legal and administrative upheaval. The bad example of the Habitats Directive in the end contributed to a particularly negative framing of EU related requirements in general, a political mood which has been picked up by the general public and reflected in the 2005 referendum campaign on the Constitutional Treaty. It can therefore be safely concluded that the effects of the Habitats Directive range beyond flora and fauna to the more general EU-related political climate in the Netherlands.





## REFERENCES

- Backes, C. (1995), Implementatie van de Habitatrichtlijn in het Nederlandse recht, in: *Milieu en Recht*, p 216-221
- Bastmeijer, C. et.al. (2001), *Europees en internationaal natuurbeschermingsrecht in Nederland*, Den Haag: Boom
- Bosch, F. van den (2005), *Natuur in beleidsprocessen*, WOT studies, Wageningen: WOT
- Bouwma, I.M. et.al. (2004), Implementatie van EU natuurbeleid en –fondsen in Nederland, Achtergronddocument bij *Natuurbalans 2004*, Wageningen: Natuurplanbureau
- Hermans, B., J. Dekker and K. van Koppen (2004), Natuur van en voor de burger, in: *Landwerk*, nr 4
- Hoefnagel, F. (2003), EG Vogelrichtlijn 1979, in: J. Bouma et.al. (2003), *Milieubeleid in een veranderende context*, WRR Werkdocumenten, Den Haag: SDU
- Interdepartementaal Beleidsonderzoek (2003), *Nederland op slot? De Europese en Nederlandse natuurbeschermingswetgeving nader bezien*, Den Haag: SDU
- Jordan, A. (2002), Biodiversity Policy: the Birds and Habitats Directives, in: *Europeanisation of Environmental Policy*, London: Palgrave McMillan
- Keulen, M. van (2006), *Going Europe or Going Dutch, How the Dutch Government Shapes European Union Policy*, Amsterdam: Amsterdam University Press
- Kuindersma, W., F.H. Kistenkas & R.C. van Apeldoorn (2004), *De transformatie van Nederlands natuurbeleid door Europees recht: een analyse van de gevolgen van de implementatie van de Vogel- en Habitatrichtlijn op het Nederlandse natuurbeleid*, Wageningen: Planbureaustudies nr. 8
- Kistenkas, F. and W. Kuindersma (2004), Europees en nationaal natuurbeschermingsrecht, ontwikkelingen in jurisprudentie, regelgeving en beleid, in: *Planbureau rapport 21*, Wageningen: Natuurplanbureau
- Laffan, B. and J. O'Mahoney (2004), Misfit, politicisation and Europeanisation: The Implementation of the Habitats Directive in Ireland, Working Paper, Dublin: University College
- Liefferink, D. and Zouwen, M. van der (2004), The Netherlands: The Advantages of being Mr Average? In: Jordan, A. and D. Liefferink, *Environmental policy in Europe*, London: Routledge
- Liefferink, D. (1997), The Netherlands: A Net Exporter of Environmental Policy Concepts, in: M.S. Andersen and D. Liefferink (eds), *European Environmental Policy: the Pioneers*, Manchester: MUP, p. 210-250.
- Neven, M. en F. Kistenkas (2003), *Streken Vergeleken, Hoofdpijnen imago, implementatie, interpretatie en integratie Natura 20*

## NOTES

---

<sup>1</sup> See for example 'Fijnstof is in Dordt de nieuwe korenwolf', in: De Volkskrant, 28 april 2005.

<sup>2</sup> COM (88)381. An amended proposal was issued in 1990 (COM (90)59). The naming came from the fact that the proposals summed up not only species but also types of habitats.

<sup>3</sup> OJ L206 22.07.1992, p. 7-50

<sup>4</sup> The European Court of Justice has in successive case law gradually extended the scope of 'measures' to include existing or long-planned activities, projects and plans.

<sup>5</sup> Art 226 EC gives the Commission powers to take legal action against a member state that is not respecting legal obligations. Where the Court of Justice finds proof of infringement, the offending Member State is required to take necessary measures. Art 228 EC gives the Commission powers to act against a member state that does not comply with a judgement of the Court. It may ask the Court to impose a financial penalty on the Member State concerned.

<sup>6</sup> Over 87% of these areas also fall under the scope of the Wild Birds Directive.

<sup>7</sup> Note that at the EU-level, nature conservation is part of environmental policy, shaped by the Commission's DG Environment and set in the Environment Council. This administrative mismatch between the national and the EU level constitutes a source of co-ordination problems.

<sup>8</sup> In order to conserve natural values in this particular habitat, some 600 hectare of farmland in Zeeland will have to be expropriated, a drastic measure which has initiated a storm of protests. See for example parliamentary questions d.d. 19 Mei 2006, 'onvrijwillige onteigening a.g.v ontpoldering Westerschelde'.

<sup>9</sup> It has been argued that the traditionally strong ties of the Ministry of LNV with agricultural interests has not facilitated the 'mind shift' to nature policy (Hoefnagel 2002, 91).