



European Commission
Secretary-general Mr. F. Timmermans
Rue de la Loi 200
Bruxelles
Belgique

The Netherlands, January 6th 2016

Formal complaint on the proposed Unionlist of invasive alien species

On behalf of the Collective for the Responsible Pet Ownership, representing 20.000 private keepers of Pet animals, I herewith present to you a formal complaint on the Unionlist of invasive alien species as proposed by the European Commission under Regulation (EC) No 1143/2014. An objection against the Proposed Unionlist has already been adopted by a 76% majority the European Parliament (with less than 6 % in favour) on December 16th 2015, nevertheless the European Commission wants to ignore this objection representing the opinion of the majority of the European Citizens. This is considered to be an unacceptable attitude with high disregard to the fundamental principles of the European Union and its high standards for democracy.

The challenge of invasive alien species

Invasive species have always been around since man travelled the globe and therefore gave species a chance to rapidly disperse to other areas outside their natural habitat. In many cases these foreign species aren't capable to sustain themselves for any serious amount of time and numbers decline faster than is needed to sustain a viable population. Some however settle comfortably in their new habitat and can, but not always will, become a serious threat to native species. Examples show the serious danger of invasive species, like the enormous plague of cane toads in Australia. These huge amphibians were used to manage the numbers of pest species that invaded the sugarcane fields, becoming a far more serious problem than the species they were sent to eradicate.

The EU Member States are not immune to invasive species and legislation is needed to protect indigenous species of plants and animals as well as preserve habitats and human health. At this time, more and more species have a chance to become invasive in their own right, due to the intensive import and export of people, food and non-food products. Also changes in environmental conditions can make places more inviting to alien species. The depletion of endemic or indigenous species can also result in a niche for new species to fill, that can upset the balance needed to keep these places healthy and thriving.

It is therefore very reasonable to expect nations to start cooperating to halt the flow of problem species into their territory. The problem however is extremely complicated for many different reasons. First and foremost we cannot expect species to honour boundaries, put up by humans. In many cases these borders are only visible on maps and sometimes controlled by border patrols that won't inspect every bird, insect or plant pollen that crosses these imaginary lines. Secondly due to

the high level of international trade, which requires the transport of goods, more and more species can travel distances they normally won't dare to or simply cannot undertake. In the past, animals or plants were deliberately released in a, for those species, foreign habitat. Most of the time these species can't survive and are predated intensively or simply cannot survive climatological conditions.

Duty of diligence

Based on the risk alien species can pose, the Regulation on invasive alien species has been established and an Unionlist of alien invasive species of EU concern has been proposed by the European Commission. Notwithstanding the possible need for such a list, It should be ensured that the identification of invasive alien species of Union concern remains proportionate and focuses on species whose inclusion in the Union list would effectively prevent, minimize or mitigate the adverse impact of those species in a cost effective manner.

Where an institution of the European Union has a broad discretion, the review of the observance of guarantees conferred by the European Union's legal order in administrative procedures is of fundamental importance. Those guarantees include, in particular for the competent institution, the obligations to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision. Compliance with the duty of the Commission to gather, in a diligent manner, the factual elements necessary for the exercise of its broad discretion is all the more important because the exercise of that discretion is only subject to a limited judicial review of the merits, confined to examining whether a manifest error has been committed. Thus, the obligation for the competent institution to examine carefully and impartially all the relevant elements of the individual case is a necessary prerequisite to ascertain whether the elements of fact and of law on which the exercise of that broad discretion depends were present.

In that connection a scientific risk assessment should be carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures.

In the present case, the legal basis relied on by the Commission was article 4.3 of Regulation (EU) No 1143/2014 of the European Parliament and the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species. This article expressly requires all of the criteria of this article to be fulfilled, and to respect the criteria for the risk assessment as laid down in article 5.1 of this Regulation. The Commission is required to comply with this obligation.

The European Commission must therefore be held accountable for the species on the list and the consequences of putting them on there in the first place. Invasive alien species should only be considered to be of Union concern if the damage that they cause in affected Member States is so significant that it justifies the adoption of dedicated measures applicable across the Union, including in Member States that are not yet affected or are even unlikely to be affected. The current list, constructed for the purposes to protect the European Union from species that could be considered hazardous, however, is not based on research which takes these conditions into account to describe a species as invasive.

A methodology, as stated in article 5 section 3, of the Regulation should be developed to determine the invasive character of any species. At this moment such a methodology is not present and therefore the current list should be discarded. It is clearly the case that most if not all species on the current list, lack sufficient data to be introduced to this list because not all data comes to the conclusion that justifies their presence.

An invasive species has to be able to settle on the long term in habitat conditions that can sustain its needs, while in the meantime have such an aggressive character (behavioural or in numbers) that indigenous species suffer its presence and can even go extinct. Most species on the list are only “risk” species only under very specific circumstances. These circumstances include the right type of habitat, the right and sufficient availability of food, the correct climate conditions and so on. Questions can be asked when looking at the proposed list, why the decision has been made in consideration of a plant or animal when the risk factor is so very low? Furthermore most if not all research is dated and wasn't conducted in close connection to the criteria of the Regulation. More research is simply needed to validate the current species list.

Principle of proportionality

Even if all data suggests a species is or will be a threat, the principle of proportionality should still be taken into account. The principle of proportionality, which is among the general principles of EU law and is referred to in Article 5(4) TEU, requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. Thus, the restriction of article 7 of the Regulation on invasive alien species should never exceed what's appropriate and necessary in order to prevent, minimize and mitigate the adverse impact on biodiversity of the introduction and spread of invasive alien species within the Union.

When these considerations are applied on the method of listing species on the Unionlist, there should be a direct link between the restrictions (to intentionally bring the species into the EU, keep, breed and transport them, to placed on the market, to use or exchange the, to permitted to reproduce, grown or cultivated them, or released into the environment) and the risk of damage that it causes in Member States that is so significant that it justifies the adoption of dedicated measures applicable across the Union which is proven by scientific evidence. The measure to restrict the release of the species considered in the wild seems appropriate but the other restrictions can only be considered to fulfill the requirements if research proves there's a link between the introduction of the species and the restricting measures. This research should always be accurate and take into account all elements influencing the risk of introduction of alien species in the EU environment.

The restrictions of article 7 should therefore be limited to those Member States where a species poses a serious risk and cannot be extended to any Member State where there's no risk of a species becoming invasive or crossing boundaries to other Member States where it can be invasive. Article 12 of the Regulation provides for a sufficient legal basis to prevent alien species to be traded and kept in Member States where they pose a high risk of becoming invasive.

In the case of for example the *Eichhornia crassipes*, it's reasonable to think this plant might become a problem in a limited number of Member States where habitat is readily available and climate conditions are subtropical so this plant can survive for more than a single generation. Countries in Northern Europe will never face an invasive problem. Nevertheless they now are confronted with a restriction with a severe economical impact.

Exceptions must therefore be made in regard to countries where these species can never become an invasive threat because of the biogeographically characteristics. Those countries must be obligated, and by means of Codes of conduct under the Council of Europe have already been obligated, to regulate all aspects of keeping and trading these species to ensures that they'll never arrive on potential invasive ground.

Species that could become a threat for the Union or various countries within the Union should provoke much needed cooperation and research between nations to ensure the eradication of that invasive problem, but no species can be placed on any proposed list until all criteria of article 4 section 3 and article 5 section 1 are met.

Examples of disproportionate and even cruel restrictions

Most mammals and birds on the proposed Unionlist have been introduced intentionally decades ago.

The Indian mongoose was introduced as a biocontrol agent to control rats in cane fields in Croatia in 1910. It was never introduced in the EU in any other way.

The Ruddy duck has been introduced in the environment in the United Kingdom in the 1940s by Sir Peter Scott, the great conservationist. Around 95% of the feral European population occurs in the UK. This species is only invasive in Spain where it hybridizes with the White-headed duck. There's no invasive risk in any other EU-Member State. It should be kept in mind very clearly that in Spain, the White-headed duck was almost brought to extinction by habitat destruction and hunting. The influence of the Ruddy duck is almost absent as since 1984, in an effort to save the White-headed duck, the Spanish have only shot 65 hybrid ducklings. Only 159 Ruddy ducks were shot. This is in sharp contrast with the many thousands of Ruddy ducks that have been killed in the UK only for the purposes of preventing hybridization with the White-headed duck in Spain.

The Raccoon has been released in Germany during the first half of the 20th century for hunting purposes and escapes from fur farms after these were bombed in the 2nd world war. The last introduction occurred at the end of the 2nd world war, when they were released by the US army. 80 years after the first population has been established in Germany there's still no proof whatsoever of any negative impact on the environment. The diseases it is supposed to spread have never in 80 years been found in any human in the EU and the influence of the species on birds has only been mentioned in Russia for a bird species that doesn't even occur in the EU.

If after 80 years no serious impact whatsoever can be found, how on earth can this species be considered a species causing damage which is so significant that it justifies the adoption of dedicated measures applicable across the Union?

The species in these examples don't belong on the Unionlist of invasive alien species of Union concern. Any restriction is disproportionate and the eradication of the Raccoon and the Ruddy duck is nothing but cruel. The Javan mongoose has not spread outside Croatia any measure on Union level is completely unnecessary.

Precautionary principle

One of the considerations of the Regulations concerns the listing of possibly invasive species that are not yet present in the Union:

Recital 15 states:

“Prevention is generally more environmentally desirable and cost-effective than reaction after the fact, and should be prioritized. Therefore, priority should be given to the listing of invasive alien species that are not yet present in the Union or are at an early stage of invasion and of invasive alien species that are likely to have the most significant adverse impact. As new invasive alien species can be introduced continuously into the Union and alien species present are spreading and expanding their range, it is necessary to ensure that the Union list is constantly reviewed and kept up-to-date.”

This type of listing means an application of the precautionary principle. The precautionary principle can be applied but only if, after research that fulfills all the requirements of the duty of diligence have been met and the result is inconclusive but nevertheless there's a real risk of serious consequences for the objective. And even then the principle of proportionality should always be respected.

So, for each species that is listed based on the precautionary principle, there should be scientific evidence the criteria of article 4(3) will be met. A species cannot be listed on the mere fact that it could be introduced and might be able to form a population and could be invasive. There should always be sufficient scientific evidence that there's a real risk the species is introduced into the environment and that it will have a very significant adverse impact which cannot be prevented by any other means than the application of all restrictions of article 7 of the Regulation.

The principle of legal certainty and the principle of protection of legitimate expectation

If economic risks are taken into account, and they should be, based on article 4(6) of the Regulation, the consequences for people and companies that rely on species listed for their income should be considered.

Codes of conduct on invasive alien species have already been established with all stakeholders under the Convention on Conservation of European Wildlife and Natural Habitats. As the EU is Member of the Council of Europe, these Codes of conducts should therefore be considered to be part of the EU legislation. Stakeholders have made a great effort fulfilling the obligations of the Codes of conduct and therewith preventing any further introduction of alien species into the environment of the Member States of the Council of Europe, amongst which all Member States of the EU.

The principle of legal certainty and the principle of protection of legitimate expectation should have been respected by the European Commission and all these Codes of conduct and their results in minimizing the risk of introduction of alien species into the EU-environment should have been taken into account when applying the articles 4.3 and 5.1 of the Regulation. The livelihood of people that have invested so much while fulfilling the requirements of the Codes of conduct should be protected. The entire existence of the Codes of conduct has however been disregarded by the European Commission. Research on the results of these codes is completely absent although this profound change in conduct, with a determining influence on introduction pathways, should have and must be taken into account.

Finally, it's unreasonable to think that the two year transition period is sufficient for any company to stop their current production, importation, breeding and transportation of species or products thereof without severe loss in revenue and can therefore not stay healthy and probably go out of business cause the time period and additional costs for changing the primary species to a secondary one is far too time consuming and expensive. For many companies, this two year transition period doesn't even apply because in case of for example nurseries there's no commercial stock. In an economy struggling to rise above a recession, this legislation is neither advisable or reasonable without compensation.

Conclusion

For the moment, the problems and inconsistencies of the process leading up to the development of the list are more a threat to the democratic process than the species on the list are likely to become the invasive nightmare the Union fears.

The fact that the European Parliament has adopted with a 76,7% majority the objection of Members of Parliament Pavel Poc and Renate Sommer, should be respected as it reflects the opinion of the EU citizens. The EU citizens must be respected if the EU wants to remain a legitimate and democratic entity.

For many of the species listed on the proposed Unionlist, the criteria of the duty of diligence, the principle of proportionality, the principle of legal certainty, the principle of protection of legitimate expectation and the criteria for the application of the precautionary principle have not been met.

Furthermore, there's no coherent basis for the application of the criteria of article 4(3) and the risk assessment of article 5(1) because there's a lack of uniform information on the species concerned.

I would strongly recommend the European Commission to withdraw the proposed Unionlist and only present a new list after diligent consideration and certainty that all criteria of the Regulation and principles of EU law have been met. Any appeal on the Unionlist to be void is now very likely and should be seriously considered if the current proposed Unionlist is accepted.

This formal complaint will be send to the European Council and the European Ombudsman in order to assure it will be seriously considered.

Sincerely,

On behalf of the Collective for the Responsible Pet Ownership

A handwritten signature in blue ink, appearing to read 'E. Philippi-Gho', is written in a cursive style.

E. Philippi-Gho LLM

Advisor on EU-law and animal welfare, species protection and nature conservation legislation