

ERA Workshop on how to handle court proceedings invoking non-compliance with EU nature protection law – focus on species protection

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Overview of the EU Nature Law and Policy

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Plan of the presentation

Introduction - Overview of the EU Nature Protection Law

1. Objectives of the Birds and Habitats Directives
2. Scope of application of the Birds and Habitats Directives and linkages
3. The establishment of the Natura 2000 network
4. Environmental assessment of plans and projects



Self explanatory

INTRODUCTION

Overview of the EU Nature Protection Law



Self explanatory

General legal framework on EU Nature Protection Law

❖ Primary EU Law

- Legal basis of EU legislation on Nature Protection art. 192 TFEU (environment)
- Matter of shared competences between the EU and its Member States (except for the conservation of biological marine resources => exclusive EU competence)
- Subsidiarity: what is the best level of intervention?

❖ International conventions approved by the EU: primacy and obligation to implement

- ✓ Barcelona Convention (1976) for the Protection of the Marine Environment and the Coastal Region of the Mediterranean
- ✓ Bern Convention (1979) Conservation of European Wildlife and Natural Habitats
- ✓ Bonn Convention (1979) Conservation of Migratory Species
- ✓ UN Convention on Biological Diversity (1992)
- ✓ OSPAR convention on marine environment (1998)
- ✓ Alpine Convention (1991)
- ✓ AWEA on Migratory Waterbirds (1999)



Self explanatory

Overview of EU Nature Protection Framework

Habitats and species conservation

- Birds Directive 92/43 (several times amended to take account of the enlargement of the EU)
- Habitats Directive 79/409 (codified in 2009)

International Trade of Species

- Regulation (EC) 338/97 on the protection of species of wild fauna and flora by regulating trade ('CITES')
- Regulation (EC) 995/2010 on timber and timber products on the market and implementing Commission Regulation (EU) 607/2012

Ecosystem Protection

- Water Framework Directive 2000/60/EC
- Framework Directive on Marine Environment 2008/56/EC
- Proposal for a Soil Protection Directive (not adopted yet)

Invasive species

- Regulation (EC) 708/2007 on aquaculture
- Regulation (EU) 1143/2014 on the prevention and management of the introduction and spread of invasive alien species

Self explanatory

Cross-cutting legislation

❖ Impact assessment

- ✓ Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment)
- ✓ Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (Strategic Impact Assessment)

❖ Environmental liability and crime

- ✓ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage
- ✓ Directive 2008/99/EC on the protection of the environment through criminal law

- **Need to keep in mind all applicable EU legislation and their linkages when handling court proceeding**

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Self explanatory

I - Objectives of the Birds and Habitats Directives



Self explanatory

The Birds and Habitats directives: Cornerstones of EU legislation on nature protection

- The Habitats & Birds Directives form the cornerstone of EU's nature protection policy: support EU Strategy 2020 on Biodiversity (Targets 1 and 2)
- 2 pillars:
 - ✓ Natura 2000 network of protected sites throughout the EU
 - ✓ A strict protection regime of species.
- Need for coherence and to avoid transboundary threats: Natura 2000 is part of the EU's natural heritage!
- The Habitats Directive must be applied the same way in all Member States (duty of loyalty, Art. 4§3 TEU).
 - ✓ But implementation is particularly complex and technical...and sensitive!
 - ✓ Management and protection regimes are still to be in place



The EU has been committed to the protection of nature since the adoption of the Birds Directive in April 1979. It provides comprehensive protection to all wild bird species naturally occurring in the Union.

The Habitats Directive was adopted in 1992 to help maintain biodiversity. It protects over 1000 animals and plant species and over 200 types of habitat. It also established the EU-wide Natura 2000 network of protected areas.

General objectives of the Directives

Birds Directive 1979	Habitats Directive 1992
General objective : Protect <u>ALL</u> wild birds habitats and wild birds species (but not captive born birds). "It shall apply to birds, their eggs, nests and habitats" (see C-149/94, (Vergy case) Article 2 "Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level." => No regression (art. 13)	General objective : Conservation of natural habitats and wild fauna and flora Article 2.2 : "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." Different criteria to determine if conservation status is favourable for habitats and species (art. 1 (e) and (i), but rely on stability or increase of natural range and areas, as well as the specific structure and functions necessary for long-term maintenance => benchmark for conservation

The Birds Directive

Europe is home to more than 500 wild bird species. But at least 32 % of the EU's bird species are currently not in a good conservation status. The Birds Directive aims to protect all of the 500 wild bird species naturally occurring in the European Union.

Often migratory, wild bird species can only be protected by cooperating across borders. Urban sprawl and transport networks have fragmented and reduced their habitats, intensive agriculture, forestry, fisheries and the use of pesticides have diminished their food supplies, and hunting needed to be regulated in order not to damage populations. Concerned with their decline, Member States unanimously adopted the Directive 79/409/EEC in April 1979. It is the oldest piece of EU legislation on the environment and one of its cornerstones. Amended in 2009, it became the Directive 2009/147/EC PDF.

Habitat loss and degradation are the most serious threats to the conservation of wild birds. The Directive therefore places great emphasis on the protection of habitats for endangered and migratory species. It establishes a network of Special Protection Areas (SPAs) including all the most suitable territories for these species. Since 1994,

all SPAs are included in the Natura 2000 ecological network, set up under the Habitats Directive 92/43/EEC.

The Habitats Directive

The Habitats Directive ensures the conservation of a wide range of rare, threatened or endemic animal and plant species. Some 200 rare and characteristic habitat types are also targeted for conservation in their own right.

Adopted in 1992, the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora aims to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements. It forms the cornerstone of Europe's nature conservation policy with the Birds Directive and establishes the EU wide Natura 2000 ecological network of protected areas, safeguarded against potentially damaging developments.

The Birds and Habitats Directives have had to evolve to reflect successive enlargements of the European Union. We provide a summary of the changes made to the two directives in order to reflect the impact of enlargement. A consolidated version of the directive includes the latest versions of the annexes.

The Interpretation Manual of European Union Habitats - EUR28 aims to help clear any ambiguities in the interpretation of the Annex 1 of the directive by developing common definition for all habitat types.

General objectives of the Directives

Birds directive	Habitats directive
Take the requisite measures to attain this objective, that is to say maintain the population of birds at a level which correspond to scientific, ecological and cultural requirements (result-based obligation) Two main obligations: - Obligation to classify the Special Protection Areas (SPAs) where special conservation measures are taken (art. 4) - Obligation to establish a general system protection system for all species (art. 5)	Take the requisite measures to attain this objective, that is to say maintain the concerned species at a favourable conservation status (result-based obligation) Two main obligations: ✓ Obligation to classify Special Areas of conservation (SACs) where necessary conservation measures are taken (art. 6) ✓ Obligation to establish a strict protection regime of habitats and species (art. 6.2 and 12)



Two main obligations derive from both directives for the Member States:
 From the Birds Directive to classify the Special Protection Areas (SPAs) and to establish a general protection system for all species (together with derogations).
 From the Habitats Directive to classify Special Areas of Conservation (SACs) and to establish a strict protection regime for habitats and species.

The main difference between these pieces of legislations concerns the measurement of the obligations.

In Birds Directive there is the obligation to maintain the population of birds (no regression principle), whereas in the Habitats Directive, which is much more comprehensive providing for an overall protection of sites and species, the focus is on maintaining the favourable conservation status.

II – Scope of application of the Birds and Habitats Directives and linkages



Self explanatory

Scope rationae loci

Bird Directive	Habitats Directive
<i>Ratione loci</i> Article 1.1 : “This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies”	<i>Ratione loci</i> Article 1(b) and (c): - “<i>Natural habitats means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural</i>” - “<i>Natural habitat types of Community interest</i> » means those which are: ➤ in danger of disappearance in their natural range or ➤ have a small natural range following their regression or by reason of their intrinsically restricted area or ➤ present outstanding examples of typical characteristics of one or more of the nine following biogeographical regions

Self explanatory

Birds directive does not cover birds that are born in captivity.

III - The establishment of the Natura 2000 network



Self explanatory

What is the Natura 2000 network ?

- Article 3.1 of the Habitats Directive : " A coherent European ecological network of special areas of conservation shall be set up "
- Under the Birds and the Habitats directives, Member states have the obligation to classify two types of areas :
 - ✓ Special Protection Areas (SPAs)
 - ✓ Special Areas of Conservation (SACs)
- The Natura 2000 Network is a coordinated ecological network constituted by the SPAs and the SACs: coherence !
- The ecological coherence of the Natura 2000 network rests mainly on Member States' site selection procedures based on ecological criteria.



Natura 2000

Stretching over 18 % of the EU's land area and almost 6 % of its marine territory, it is the largest coordinated network of protected areas in the world. It offers a haven to Europe's most valuable and threatened species and habitats.

Natura 2000 is a network of core breeding and resting sites for rare and threatened species, and some rare natural habitat types which are protected in their own right. It stretches across all 28 EU countries, both on land and at sea. The aim of the network is to ensure the long-term survival of Europe's most valuable and threatened species and habitats, listed under both the Birds Directive and the Habitats Directive.

Natura 2000 is not a system of strict nature reserves from which all human activities would be excluded. While it includes strictly protected nature reserves, most of the land remains privately owned. The approach to conservation and sustainable use of the Natura 2000 areas is much wider, largely centered on people working with nature rather than against it. However, Member States must ensure that the sites are managed in a sustainable manner, both ecologically and economically.

On our pages, you will find more information about how the network was established, where the Natura 2000 sites are located, how they are managed and

how Member States can better protect nature by working together across Europe. The European Commission's biogeographical process provides a co-operation platform to stakeholders and managers of the Natura 2000 network. You can also read our guidance documents on the Natura 2000 network management, access its Communication Platform and find out about the Natura 2000 awards.

Definition of the SPAs

- Article 4.1 of the Bird Directives: “Member States shall **classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species (Annex I) in the geographical sea and land area where this Directive applies.**”
 - Classification of SPAs is subject to ornithological criteria: presence of birds listed in Annex I
 - States’ appreciation is limited both in terms of the number and surface of areas
- The selection of **sites is a purely scientific exercise** which does not take socio-economic considerations or particular regional or local circumstances into account.
 - No political discretion!



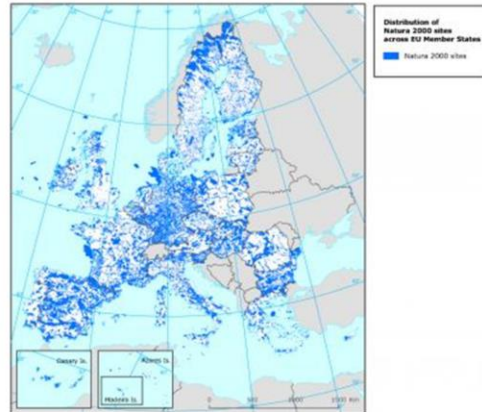
Special Protection Areas (SPAs) are strictly protected sites classified in accordance with Article 4 of the EC Birds Directive, which came into force in April 1979. They are classified for rare and vulnerable birds (as listed on Annex I of the Directive), and for regularly occurring migratory species. The European Commission's website hosts a full copy of the Directive 2009/147/EC on the conservation of wild birds (Birds Directive) (the codified version of Council Directive 79/409/EEC as amended), within which all the Articles and Annexes (including amendments) are given, along with useful interpretation information.

Member States designate Special Protection Areas (SPAs) according to scientific criteria such as ‘1% of the population of listed vulnerable species’ or ‘wetlands of international importance for migratory waterfowl’. While Member States may choose the most appropriate criteria, they must ensure that all the ‘most suitable territories’, both in number and surface area, are designated. Site specific data are transmitted to the Commission using Standard Data Forms.

Based on the information provided by the Member States, the European Commission determines if the designated sites are sufficient to form a coherent network for the protection of these vulnerable and migratory species. These sites then become an integral part of the Natura 2000 network.

Definition of the SACs

- Article 3.1 of the Habitats Directive : " A coherent European ecological network of **special areas of conservation** shall be set up "
- SACs are selected for hosting **species or habitats of Community importance**.
- ✓ A site is presumed to be of Community importance if it hosts the natural habitat types listed in Annex I and habitats of the species listed in Annex II.
- 9 biogeographical regions: : Alpine, Atlantic, Black Sea, Boreal, Continental, Macaronesian, Mediterranean, Pannonian and Steppic.



Under the Habitats Directive

The choice of sites is based on scientific criteria specified in the directive, to ensure that the natural habitat types listed in the directive's Annex I and the habitats of the species listed in its Annex II are maintained or, where appropriate, restored to a favourable conservation status in their natural range.

Member States first carry out comprehensive assessments of each of the habitat types and species present on their territory. They then submit lists of **proposed Sites of Community Importance (pSCIs)**. Site specific data are transmitted to the Commission using [Standard Data Forms](#) and must include information such as the size and location of the site as well as the types of species and/or habitat found on this site and warranting its selection.

Based on the proposals provided by the Member States, scientific seminars are convened for each [biogeographical region](#) (Alpine, Atlantic, Black Sea, Boreal, Continental, Macaronesian, Mediterranean, Pannonian and Steppic).

Once the lists of **Sites of Community Importance (SCIs)** have been adopted, Member States must designate them as **Special Areas of Conservation (SACs)**, as soon as possible and within six years at most. They should give priority to those sites that are

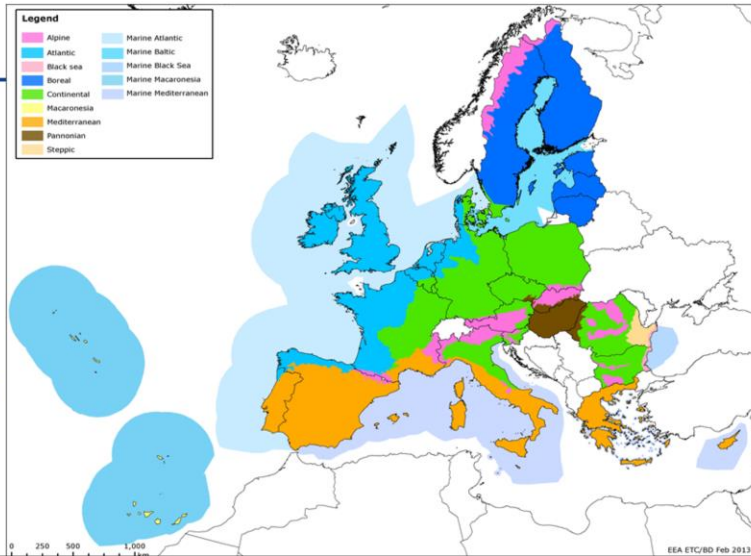
most threatened and/or most important for conservation and take the necessary management or restoration measures to ensure the favourable conservation status of sites during this period.

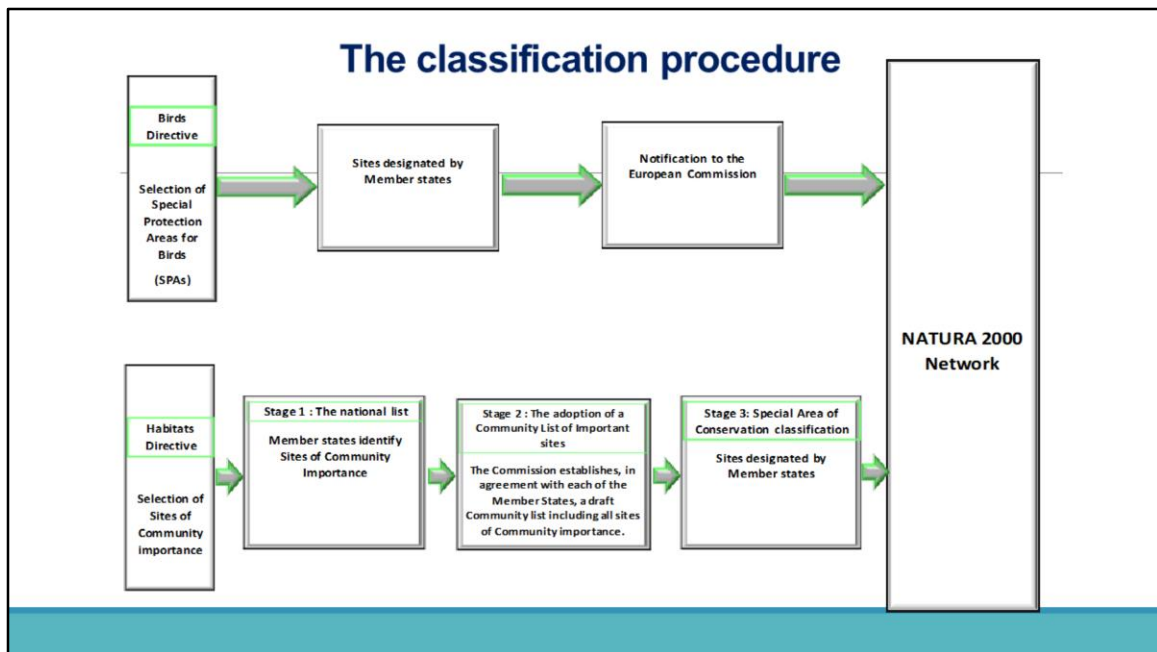
The Commission updates the Union SCI Lists every year to ensure that any new sites proposed by Member States have a legal status

Biogeographical regions

Within a biogeographical region, **solutions can be tailored to suit specific habitats**: focus on practical habitat management issues identified as a common priority

Available for each region: characteristic features, habitats and species of Community importance or access maps and the official lists of Sites of Community Importance (SCIs).





Two different tracks for the classification procedure.

As regards Habitats Directive, because it covers all sites and species & protects common heritage, it was important to have this dialogue between Member States and the Commission (1st and 2nd stage of the scheme).

The requirements under the Birds Directive are lower; only notification by Member States.

Classification of the SPAs : Transposition issues (1)

- The EUCJ has clarified the obligation to select and classify SPAs.
- ❖ **C355/90, Commission vs Spain (Santona marshes, case)**
 - Areas subject to certain ornithological criteria determined by the directive. SPAs network must not be limited to the classification of the ornithological sites.
 - Sites that have a “unique or at least particular importance for the relevant species” must be classified
- **States margin of appreciation is therefore limited both in terms if the number and surface area.**
Exclusion of an appropriate parts of the territory = breach of Law
 - SPAs where habitats or species of Community interest are found should also be classified as an SCA



Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds requires Member States to classify in particular the most suitable territories in number and size as special protection areas (SPAs) for the conservation of bird species mentioned in Annex I to the Directive, taking into account their protection requirements in the geographical sea and land area where this Directive applies. The Court of justice has confirmed that while the Member States have a certain margin of discretion in the choice of SPAs, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the Directive (see Case C-355/90 Commission v Spain). It follows that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Directive. Consequently, Member States are obliged to classify as SPAs all the sites which, applying ornithological criteria, appear to be the most suitable for conservation of the species in question (case C-3/96 Commission v. Netherlands).

Classification of the SPAs : Transposition issues (2)

- **Classification based on scientific criteria only => No political margin of appreciation!**
- ✓ Classification decisions to be based on ecological necessity considerations (C-374/98 Commission vs France (Basses-Corbières case) + C- 355/90 Commission vs Spain (Santona Marshes case)
- ✓ **No derogation other than on exceptional grounds which correspond to a general interest which is superior to the general interest represented by the ecological objective of the Directive.** Member States cannot evoke economic, social and cultural requirements in order to oppose the classification of a site of Community importance (C-371/98, 7 novembre 2000, The Queen & Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping (« Estuaire de Severn »), and C-57/89 Commission vs Germany (Leybucht)



The fact that a Member States may have classified sites as SPAs does not exempt it from the obligation to designate these sites as SACs.



While there are no specific provisions related to the declassification or redesignation of areas, some conclusions may still be drawn. Article 4 requires MS to designate special protection areas for bird conservation if such is necessary on the basis of scientific reasons, which first of all requires that the listed birds have their habitat in the area. In this regard, Article 4 also states that “Trends and variations in population levels shall be taken into account as a background for evaluations.” Consequently, if there is no scientific reason to protect the area – in a practical sense meaning that the area is no longer habitat for birds listed in Annex I of the Birds Directive – then MS should not keep the protection status. As all the measures shall be reported to the Commission, there is a chance to review such changes in protection status. Still, there is no specific procedure or measure which addresses declassification or redesignation of areas.

A few cases from the European Court of Justice (ECJ) may shed further light on declassification and redesignation under the Birds Directive. The C-57/89 (EC Commission vs. Germany) is a landmark decision of the ECJ for the Birds Directive. In the area subject to dispute – the Ostfriesische Wattenmeer, a wetland of international importance under the Ramsar Convention – Germany designated a protected area. Some years later in the areas of Rysumer Nacken, Germany disposed

of dredged material from the Ems, and in Leybucht, a bay of some 2800 hectares within the Wattenmeer, Germany decided in 1985 to increase the existing dike in the area. Both actions allegedly had a harmful effect on the habitat protected under the Birds Directive, but Germany claimed they were necessary to mitigate flooding and protect coastal structures. The Commission initiated an infringement case against Germany.

The Court stated that although MS have a certain discretion with regard to the choice of the territories which are most suitable for special protection areas, they do not have the same discretion in modifying or reducing the extent of the areas, since they have themselves acknowledged in their declarations that those areas contain the most suitable environment for the species listed in annex I of the Birds Directive. It follows that the power of MS to reduce the extent of a special protection area 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 the Directive. In this case, the Court held that the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dike works and the strengthening of coastal structures as long as those measures are confined to a strict minimum and involve only the smallest necessary reduction of the special protection area. Some details are clarified in Case C-44/95 ('Lappel Bank') about the margin of discretion of the MS to modify or reduced habitat protected under the Birds Directive, which the Court rules is very narrow. This is a preliminary ruling case, in a legal dispute between Regina v Secretary of State for the Environment ex parte Royal Society for the Protection of Birds. The essence of the ruling is that "...a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive" (paragraph 42).

Conservation measures in SPAs and SACs

Conservation measures for SPAs	Conservation measures for SACs
Article 5.1 Birds directive : "The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat" No definition of the special conservation measures ! Requires preventive measures (e.g. prohibitions) + pro-active management measures (e.g. pruning, water level controls, acquisition of lands...) ❖ Case C-355/90 Marismas de Santonas case (1993): ✓ The protection regime of the SPAs cannot be limited to mere prohibitions. ✓ Positive conservation measures must be taken, where necessary,	Article 6.1 Habitats directive : "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." Member states can choose between management plans or types of measures. ✓ Interesting debate about the legal nature of contractual arrangements concluded for conservation purposes ➤ Member state margin of appreciation is governed by the result-based obligation: determines the type of management that is required.

Self-explanatory.

-Appropriate management plans are complicated in their implementation because they pre-suppose clear and concrete conservation objectives and are designed for specific areas.

Case Law on the conservation measures

- Birds Directive:
 - ✓ Case C-374/98 Com. V France “Basses Corbières” (point 26): “where a given area fulfils the criteria for classification as an SPA, it must be made the subject of special conservation measures capable of ensuring, in particular, the survival and reproduction of the bird species mentioned in Annex I ” + C-117/00, Commission vs Irlande
- Habitats Directive:
 - ✓ Case C-117/03 “Dragaggi”: minimal protection status applies to sites not yet in the list of SCI
 - ✓ Case C-404/09 “Alto Sil”: obligation to avoid the perturbation of species even outside the ZAC



Further clarifications of the “conservation measures” through the lens of the relevant CJEU case law.

Conservation measures : Transposition issues (1)

- C-374/98, Commission vs Italy : “a faithful transposition becomes particularly important in a case such as that of Directive 79/409 in which the management of the common heritage is entrusted to the Member States in their respective territories”
- C-6/04, Commission vs the UK : “Under the third paragraph of Article 249 EC, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods for implementing the directive in question in domestic law. However, in accordance with settled case-law, while the transposition of a directive into domestic law does not necessarily require that the content of the directive be incorporated formally and verbatim in express, specific legislation and, depending on its content, a general legal context may be adequate for the purpose, that is **on condition that that context does indeed guarantee the full application of the directive in a sufficiently clear and precise manner**”



Self explanatory

Conservation regimes : Transposition issues (2)

- Commission vs France (Basses Corbières) : “According to the settled case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive”
- C-75/01, Commission vs Luxembourg: mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations arising under the EC Treaty”



The first case refers to the “circulaires” (administrative circulars), which was mainly used by France for the implementation of the Natura 2000 Network at the very beginning.

IV- Appropriate impact assessment of plans and projects



Self explanatory

Appropriate impact assessment : in few words ...

- Potentially damaging projects must undergo an appropriate assessment. Such projects can be implemented only if they not adversely impact the integrity of a Natura 2000 site.
- The procedure applies to plans or projects that:
 - Have no relationship with the management of the Natura 2000 site; and
 - Create a risk of a significant effect on the site.



- ❖ An appropriate impact assessment cannot be waived because of the low cost of the project or its purpose (C-256/98 Commission vs France)
- ❖ The restriction of an appropriate impact assessment to projects subject to notification or authorization procedures is inconsistent with Article 6 (C-98/03 Commission vs Germany)
- Exceptions : when plans or projects are **considered necessary for imperative reasons of overriding public interest and if there are no other alternatives: art. 6.4 of the habitats Directive requires compensation measures to be taken.**



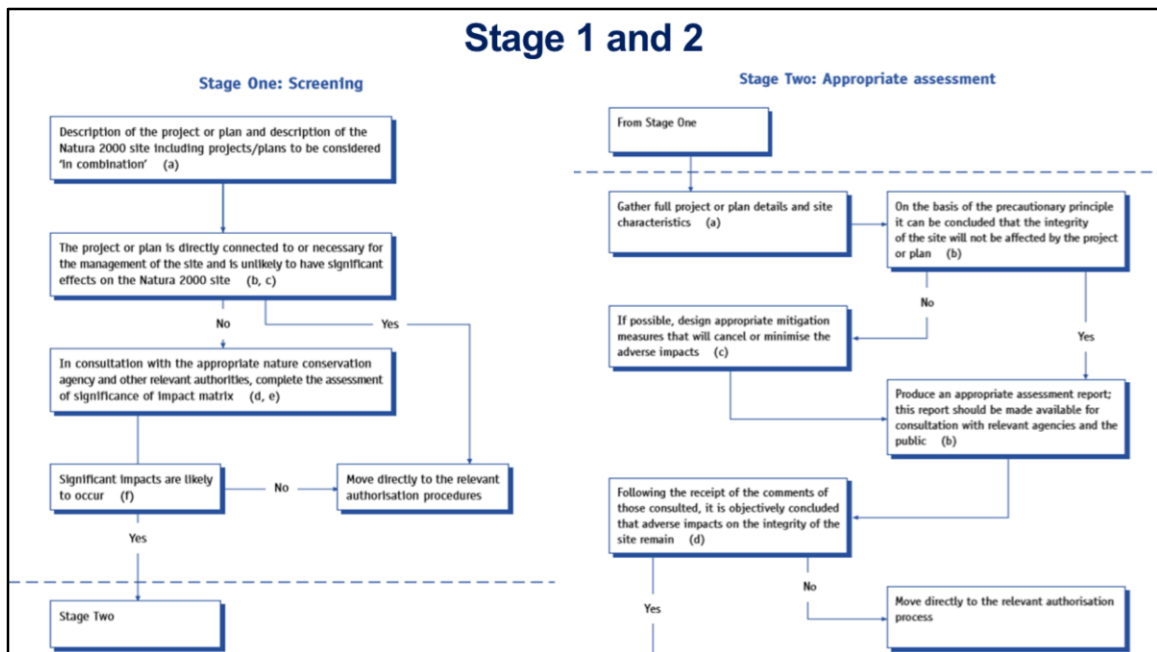
Need for having an appropriate impact assessment procedure, framework and exceptions

Appropriate impact assessment of plans and projects : Articles 6.3 and 6.4 of the Habitats Directive

- **6.3** : 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.
- **6.4** : 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.



Legislation



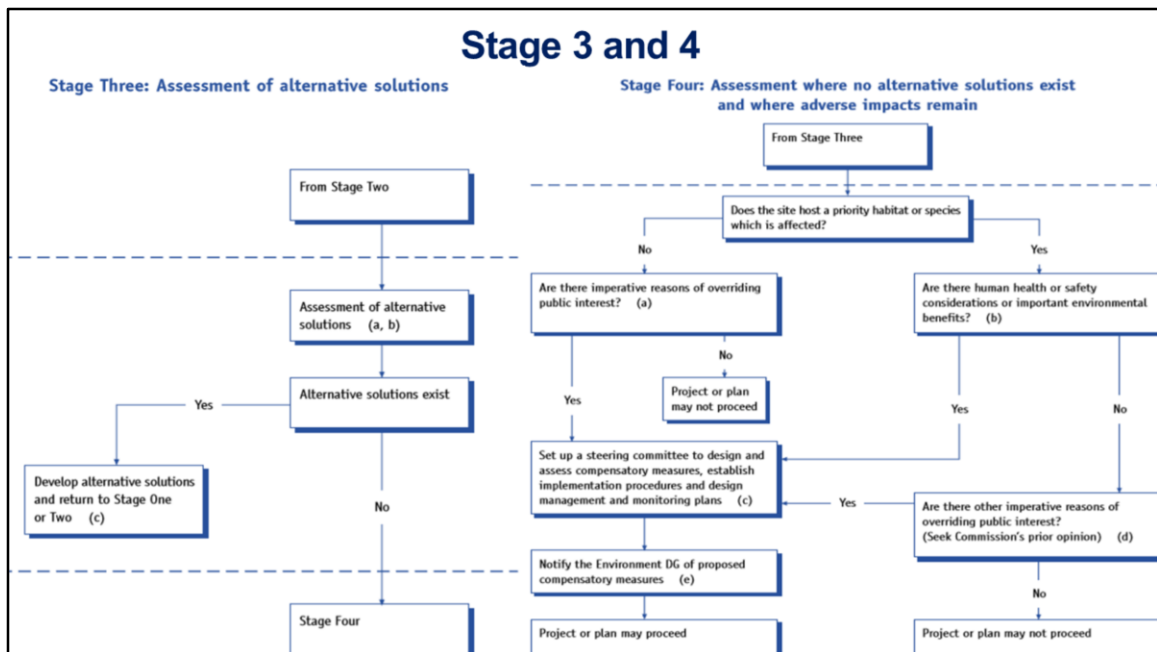
-The specific meaning of “plan or project” is not clear, mainly because there is no definition. The definition of the EIA Directive covers activities that will certainly be projects, but it should not be considered exhaustive.

-The condition for an appropriate assessment (AA) is that the measure in question is likely to have a significant effect. The CJEU has interpreted the term “likely” in the light of the precautionary principle. Precaution requires that an assessment is conducted if there is reasonable doubt as to the absence of significant effects. If there is such doubt it must be refuted or confirmed by the assessment to ensure that the site is not affected. Mere assumptions are not sufficient to exclude effects, in particular at this stage. The significance of potential effects depends on the conservation objectives of the sites. Only effects relevant to the objectives can be significant, but if they are relevant they will also be significant.

-Issues examined in an AA:

Description of the plan or project, description of the baseline condition when it is relevant to the conservation objectives and integrity of the Natura 2000 site including soil, water, flora, fauna, climate and relationships between them, identification of impacts and assessment of their significance.

Findings of the AA must be recorded and reported



-Article 6(4) thus imposes 3 conditions for carrying out a plan or project despite a negative AA

Absence of alternative solutions

Imperative reasons of overriding public interest (IROPI)

Obligation to carry out compensatory measures

-Imperative reasons of overriding public interest (IROPI)

- Not defined but article 6(4) mentions human health, public safety and beneficial consequences of primary importance for the environment
- Guidance document on article 6(4) of the Habitats Directive (January 2007)
- Clarifies the concepts of alternative solutions, IROPI, compensatory measures, overall coherence
- Only public interests can be balanced against conservation aims of the Directive
- Projects developed by private bodies can only be considered if the above public interests are served
- Short-term interests cannot be overriding

Example 1 : C-127/02, Mechanical fishing of cockles in the SPA of the Waddenzee

- Mechanical fishing of cockles is a “Projet” as defined in the Habitats directive and the Environmental impact assessment directive : **“The mere probability that such an effect attaches to that plan or project” triggers the appropriate impact assessment obligation.**
- “In the light, in particular, of **the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment**”
- **“ A less stringent authorization criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.”**



Self-explanatory

Exemple 2 : C- 404/09, Commission vs Spain (Alto Sil)

- Open-cast coal mine projects around the Alto Sil site (classified as SPA and SAC)
- “In order to establish a failure to fulfil obligations within the meaning of Article 6(2) of the Habitats Directive, **the Commission does not have to prove a cause and effect relationship between a mining operation and significant disturbance** to the capercaillie. Since Article 6(2) and (3) of the Habitats Directive are designed to ensure the same level of protection, **it is sufficient for the Commission to establish the existence of a probability or risk that that operation might cause significant disturbances for that species**”



Self-explanatory

Example 3 : C-521/12, Briels case (road-widening project)

- A road-widening project in the Netherlands affects an SPA.
- The government plan to take measures to create new meadows elsewhere in the same site,
- Can it be is to be regarded as a 'compensatory measure' within the meaning of the directive ?
- **“ Protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3).**
- **It is clear that these measures are not aimed either at avoiding or reducing the significant adverse effects for that habitat type caused by the A2 motorway project; rather, they tend to compensate after the fact for those effects. They do not guarantee that the project will not adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive.”**



Self-explanatory

Other obligations : Prohibition of Killing, Capturing and Trading protected species



Self explanatory

Strict protection regime: Killing, Capturing and Trading protected species

- Article 5 (Birds Directive) – Article 12 (Habitats Directive) prohibit :
 - ✓ Deliberate killing or capture by any method;
 - ✓ Deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
 - ✓ Taking their eggs in the wild and keeping these eggs even if empty;
 - ✓ Deliberate disturbance of the protected species particularly during the period of breeding and rearing, hibernation and migration;
 - ✓ Deterioration or destruction of breeding sites or resting places
 - ✓ Keeping birds of species the hunting and capture of which is prohibited.
 - ✓ Transport and sale or exchange of specimens



Topics which will be discussed in detail in the other session.

Nature of Litigation at EU level

- EU Case law on the Habitats Directive is massive
- Most of the cases involve infringements for bad application (Art. 258 TFEU)
- Relatively few though interesting judgments on preliminary reference (Art. 267 TFEU)
- Up to now, inadmissibility of cases for the review of the legality of the Habitats Directive (Art. 263 TFEU)



European Commission launches infringement procedures against those Member States that do not transpose, implement and enforce properly EU legislation.

CJEU Case Law - Infringement Procedure

- Duty of Loyalty of Member States to apply EU Law
- If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties:
 - Non communication, non conformity or bad application
 - Can be triggered by the Commission as Guardian of the Treaties, either directly, or further to a complaint, a parliamentary question or a petition.
- Enforcement procedure, launched after a pre-litigation phase:
 - ✓ No need for the Commission to demonstrate a specific motive or interest
 - ✓ No restrictions on timing
 - ✓ Complaints by individuals: no obligation to initiate the procedure



Infringement cases (1)

- Non communication by the transposition deadline:
 - ❖ “Objective” infringement, no value for interpretation
 - ❖ Promote the “useful effect” of the Directive: Member States must adopt transposing measures, the national judge shall ignore or set aside any incompatible national law (C-329/96 Com v. Greece)
- Incomplete or incorrect transposition (non conformity):
 - “Faithful transposition is particularly important (...), where management of the common heritage is entrusted to the Member States in their respective territories” (see Cases C-6/04 Com. v UK, C-98/03 Com. v Germany, and C-508/04, Com. V Austria, see § 59).
 - The Court has clarified a number of provisions: see for instance, about the scope of the EIA procedure under Art. 6(3), Case C-241/08, Com. V France, 4th March 2010)



Self explanatory.

General context

Infringement cases (2)

- Bad application of the Habitats Directive:
- ❖ More complex to address: factual dimension, vested interests at stake
- Infringements may vary:
 - Scope, or content of protective or conservation measures
 - Insufficient or bad implementation, e.g. conflicts between projects, plans or programmes and conservation objectives within a Natura 2000 site
 - But only few cases about management measures required by Art. 4 (1), because of the margin of manoeuvre left to Member States
 - And no ruling yet based on a general and persistent breach of EU law by a Member State (see in the field of waste management, Case C-494/01 Com. v Ireland)
- Source for interpretation, but judgments come often too late (the damage has occurred), except if interim measures are requested by the Commission (Art. 279 TFEU)



Self explanatory.

Content of infringement case for the Habitats Directive in particular.

Thank you
for your
attention

