



Implementation of the Convention on Biodiversity in Europe: 10 Years of Experience with the Habitats Directive

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1. Introduction

In this article, I will focus on the implementation of the Convention on Biodiversity (CBD)¹ in Europe through the European Community (EC) Habitats Directive (Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora).² The article will assess results after 10 years of experience with this legal regime for species and habitat protection in the European Union (EU). Moreover, it will address the question of whether the rather strict legal regime of the Directive facilitates practicable and effective implementation of the CBD.

I will start, in Section 2, with a short introduction on the relationship between the CBD and the Habitats Directive and on the role of the Habitats Directive in national wildlife law in the EU Member States. In Section 3, I will explain the core elements of the Habitats Directive. Section 4 contains the main part of my contribution. Here I will show the results after ten years of habitat protection by analyzing important case law by national courts and by the European Court of Justice (ECJ). In Section 5, I then will be able to answer the main question of this article: does the rather strict legal regime of the European Habitats Directive form a practicable and effective implementation of the CBD?

2. Implementing the CBD in Europe

The CBD has been implemented in Europe through many policy initiatives, including the Habitats Directive. These initiatives include the European Community Biodiversity Strategy,³ the European Community Biodiversity Clearing House Mechanism,⁴ and Biodiver-

¹ 31 I.L.M. 818 (1992).

² Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, [1992] OJ L 206, full text available at the European Commission's nature conservation homepage, <http://europa.eu.int/comm/environment/nature/home.htm>.

³ Communication of the European Commission to the Council and to the Parliament (4 February 1998), see <http://europa.eu.int/comm/environment/docum/9842en.pdf>.

⁴ <http://biodiversity-chm.eea.eu.int>

sity Action Plans in the areas of Conservation of Natural Resources, Agriculture, Fisheries, and Development and Economic Cooperation.⁵ Biodiversity protection also has been integrated into many other important policy areas, such as the Common Fisheries Policy,⁶ and the 6th Environment Action Program.⁷ In the latter program, which forms the basis for the EC environmental policy for the next decade, nature and biodiversity protection is one of the four priority areas.⁸

These are all policy documents, in contrast to the 1979 Birds Directive and the 1992 Habitats Directive, which are legally binding instruments through which the CBD is implemented. The drafting of the Habitats Directive started long before the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992. Therefore, the genesis of the Habitats Directive does not lay in the CBD but in the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats⁹ and the 1979 Birds Directive.¹⁰ In many respects, the Birds Directive is the predecessor of the Habitats Directive. When the Habitats Directive entered into force, the Birds Directive remained in force as well, although with some amendments (see below). Still, the Habitats Directive was negotiated in the same timeframe as the CBD, as can be concluded from Article 2 of the Directive, stating that the aim of the Directive is “to contribute towards ensuring biodiversity (. . .).” The Directive fits perfectly within the CBD framework, as I will show below in the description of the core elements of the Directive. Therefore, all the policy documents mentioned above emphasize the importance of the Habitats Directive for the implementation of the CBD in Europe.

Indeed, from a legal perspective, the Habitats Directive is the most influential instrument promoting biodiversity of the European Union (EU). It has many implications for national

⁵ Commission Communication of 27 March 2001 to the Council and the European Parliament: Biodiversity Action Plan for the Conservation of Natural Resources (Volume II), Agriculture (Volume III), Fishing (Volume IV), and Development and Economic Cooperation (Volume V), COM(2001)162. The basic document for these action plans is the Communication from the Commission to the Council and the European Parliament of 5 February 1998 on a European Community Biodiversity Strategy, COM(98)42. For all of these documents, see the European Commission website at <http://europa.eu.int/scadplus/leg/en/s15006.htm> or the EC Biodiversity Clearing House Mechanism website at http://biodiversity-chm.eea.eu.int/convention/cbd_ec/strategy/.

⁶ *Green Paper on the Future of the Common Fisheries Policy*, COM(2001)135, see http://europa.eu.int/comm/fisheries/greenpaper/green1_en.htm.

⁷ 6th EAP 2001–2010 *Our Future, Our Choice*, COM(2001)31, see <http://europa.eu.int/comm/environment/newprg/>.

⁸ 6th EAP, p. 4. The other three priority areas are: climate change, environment and health, and sustainable use of natural resources and waste management.

⁹ ETS No. 104. A Council of Europe Convention that was not only signed by most EU Member States, but also by the European Community as a whole. The Convention is available at the Council of Europe’s Treaty Office website, <http://conventions.coe.int/>.

¹⁰ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, [1979] OJ L103. Full text available at http://europa.eu.int/eur-lex/en/consleg/main/1979/en_1979L0409_index.html and through the European Commission’s nature conservation homepage, <http://europa.eu.int/comm/environment/nature/home.htm>.

biodiversity law in present and future EU Member States.¹¹ The provisions of the Habitats Directive, as the provisions of all Directives, have to be transposed into binding national legislation within the time limits set by the Directive. Article 249 of The Treaty Establishing the European Community (EC Treaty) provides that Directives are binding on each Member State as to the result to be achieved. However, national authorities are vested under some circumstances with discretion as to how to implement Directives.¹² The degree of discretion accorded to member States depends on the precise wording of the Directive in question. Directive When looking at the field of environmental law in general and of the Habitats Directive in particular, we can conclude that the European Court of Justice takes a rather strict position: Member States are required to be very precise when transposing Directives, so as to ensure beyond any doubt that the goals of the Directive will be met. In wildlife law cases, the Court often adds that this is especially relevant in cases such as these “in which the management of the common heritage is entrusted to the Member States in their respective territories.”¹³

When the provisions of a Directive have been transposed into national legislation accurately and within the time limit, national laws have to be applied. To ensure that the goals of the Directive are achieved, applicable national laws will have to be interpreted in the light of the Directive.¹⁴ In a case of inaccurate transposition (or when a Member State has not yet transposed a Directive at all), provisions of the Directive may take direct effect.¹⁵ When the duties arising from a provision are clear enough, national authorities (including decentralized authorities) and national courts are not allowed to apply existing national legislation, but instead are required to apply the relevant provision of the Directive. Courts must even do so on their own initiative.¹⁶

At the same time, the European Commission has the power to bring matters before the Court of Justice if it feels that a Member State has failed to fulfill an obligation under the Treaty (Article 226 EC Treaty). In such an infringement procedure, the Court can order a Member State to pay a penalty for not observing a duty under EC law.¹⁷

¹¹ The present EU Member States are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Thirteen countries have applied for EU membership. One of the conditions for becoming a Member State in the “enlargement” process is the implementation of the Habitats Directive into national law. The thirteen applicants are: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey. See <http://europa.eu.int/comm/enlargement/>.

¹² Treaty of Rome of 25 March 1957, as last amended by the Treaty of Amsterdam of 2 October 1997, OJ 1997 C340/1. For the consolidated version of the Treaty, see http://europa.eu.int/abc/treaties_en.htm.

¹³ For instance: Case 252/85, *Commission v. France* [1988] ECR 2243. All ECJ case law is available at the ECJ’s website, <http://curia.eu.int/en/juris/>.

¹⁴ Even using the same words is not always sufficient, see, for instance, cases C-231/97 and C-232/97, *Van Rooij and Nederhoff*, [1999] ECR I-6355 and I-6385. When, in national legislation, terms are simply copied from a Directive, these terms have to be interpreted in such a way that the goal of the Directive will actually be achieved.

¹⁵ See extensively J.H. Jans, *EUROPEAN ENVIRONMENTAL LAW* 173–210 (2nd ed., 2000).

¹⁶ Case C-72/95, *Kraaijeveld* [1996] ECR I-5403.

¹⁷ The procedure is rather complicated, see Jans, *supra* note 15, 164–170. The penalty can be as high as circa USD 250,000 for each day that the Member State does not observe a duty under EC law.

3. Core elements of the Habitats Directive

The Habitats Directive basically consists of two sets of rules, as does the Birds Directive. First, there is a section on the designation of special areas of conservation (SACs). Second, there is a section on species protection. Both sets of legal instruments fit in the framework for *in situ* conservation, laid down in Article 8 of the CBD. The designation of special protected areas is set forth in Article 8(a) of the CBD, while species protection, both within and outside special protected areas, falls within the scope of Article 8(c) and (k).

3.1. Special areas of conservation

The designation of special areas of conservation takes place in three steps. In the initial phase, Member States propose a list of sites that either host certain habitat types or certain endangered species (Article 4, Para 1, Habitats Directive). Habitat types that can be proposed as SACs are listed in Annex I and include a total of about 200 habitat types, such as estuaries, reefs, vegetated sea cliffs, rivers with muddy banks, 25 different types of grassland formations, turloughs, active raised bogs, blanket bogs, calcareous rocky slopes, permanent glaciers, fields of lava, and 51 different types of forests (such as fennoscandian hemiboreal natural old broad-leaved deciduous forests). Annex II contains endangered animal and plant species. Sites hosting these species can be proposed by the Member States as an SAC as well. This Annex contains about 700 species of mammals, reptiles, amphibians, fish, invertebrates, and plants. Birds are not listed here. The Birds Directive has a similar procedure for designating Special Protection Areas (SPAs) for 181 species of bird listed in Annex I of the Birds Directive.¹⁸ Several of the habitat types and the species listed in Annex I and II have been marked as priority habitat types or priority species, indicating that they are especially vulnerable or threatened.

In the second phase, i.e., the phase in which we are now,¹⁹ the European Commission decides which of the proposed sites will be declared “of Community importance” (Article 4, Para 2) (SCI, Site of Community Importance). The Commission will pay special attention to transboundary sites and to sites hosting priority habitat types or priority species.

During the final phase, Member States are obliged to designate the sites of Community importance as an SAC under national law once the Commission has made the selection of SCIs (Article 4, Para 3).

Together with the areas already designated under the Birds Directive, these SPAs and SCIs form a coherent ecological network throughout Europe called *Natura 2000* (Article 3). The main goal of *Natura 2000* is to link different areas throughout Europe in order to combat habitat fragmentation, which is regarded as the main cause of the extinction of species.²⁰

¹⁸ However, there is one important difference in the procedure: Member States have to select and designate these areas themselves, without intervention of the European Commission (Article 4 of the Birds Directive).

¹⁹ The first decision was published on 28 December 2001, adopting the list of sites of Community importance for the Macaronesian biogeographical region, see <http://europa.eu.int/comm/environment/nature/natura.htm>.

²⁰ See D. Quammen, *THE SONG OF THE DODO, ISLAND BIOGEOGRAPHY IN AN AGE OF EXTINCTIONS* 159 (1996).

By early 2001, 2,920 sites had been designated under the Birds Directive, encompassing 209,792 square kilometers, while 12,225 sites had been proposed under the Habitats Directive, covering 388,243 square kilometers.²¹ Compared to their entire national territory, SPAs under the Birds Directive comprise a few percent in France, Ireland to as much as 22.3% or 24.1% in Denmark and the Netherlands, respectively. SACs under the Habitats Directive cover between 5.7% (France) and 23.8% (Denmark) of the national territory.²²

Once an area has either been designated under the Birds Directive or selected by the European Commission under the Habitats Directive, a strict legal regime applies. Originally, the Birds Directive had its own legal regime for SPAs, laid down in Article 4(4) of the Birds Directive. This was a very strict regime, which was replaced in 1992 by the regime that was adopted for SACs under the Habitats Directive. Since then, Article 6 of the Habitats Directive has applied to all of these areas (including the ones designated under the Birds Directive). The Habitats Directive obliges member states to:²³

1. Establish the necessary conservation measures which correspond to the ecological requirements of the habitat types or species listed on the sites (Para 1). Under this provision, competent authorities have to ensure that the owner(s) of a SAC actively manage the site, for instance, by taking such positive action as regulating the ground water level or by applying certain agricultural practices.
2. Take appropriate steps to avoid the deterioration of natural habitats and the habitats of species, as well as significant disturbance of the species for which the areas have been designated (Para 2). This provision applies to existing activities affecting an SAC, such as agriculture, fisheries, recreation, or military use.
3. Assess the implications of any plan or project likely to have a significant effect on the site and if necessary, prohibit the plan or project (Para 3). This provision applies to projects such as the construction of roads or railways, the building of houses or the exploration for fossil fuels. The word “likely” indicates that the precautionary principle has to play a role when determining whether a prior assessment is necessary or not.²⁴ Applying the precautionary principle to biodiversity conservation is in accordance with the approach taken in the CBD. In one of its preambular paragraphs, the CBD states that

²¹ For information on all of the sites either proposed under the Habitat Directive or designated under the Birds Directive, see the European Commission’s “Natura 2000 barometer” at <http://europa.eu.int/comm/environment/nature/barometer/barometer.htm>. Unfortunately, the barometer has not been updated since January 2001.

²² When reading these figures, two things have to be kept in mind: a site can qualify under both Directives at the same time, and countries with large shorelines (like Denmark and the Netherlands) have designated large portions of marine areas, which, obviously, is easier to do than designating land areas.

²³ The European Commission has issued a manual on how to apply the provisions of Article 6 in practice: *Managing Natura 2000, The Provisions of Article 6 of the Habitats Directive 92/43/EEC*, Luxembourg, 2000, available at the Commission’s website: <http://europa.eu.int/comm/environment/nature/legis.htm>. In November 2001, the Commission issued more elaborate methodological guidance on the provisions of Article 6(3) and 6(4) of the Directive, called “Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites”, available at <http://europa.eu.int/comm/environment/nature/natura.htm>.

²⁴ C.W. Backes, J.M. Verschuuren, *The Precautionary Principle in International, European, and Dutch Wildlife Law*, 9 COLO. J. INT’L ENVTL. LAW AND POLICY 1, 68 (1998).

“where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.”²⁵ Although the Habitats Directive does not include rules on the means to carry out the prior assessment, it often takes the form of an environmental impact assessment.²⁶ Again, this is in conformity with the CBD. Article 14(1)(a) of the CBD states that an environmental impact assessment should be introduced for projects that are likely to have significant adverse effects on biodiversity. If it is concluded that there are significant negative effects, according to Article 6(3) of the Directive, the project cannot proceed forward.

However, Paragraph 4 contains an exemption to this rule. If there are imperative reasons of overriding public interest, including those of a social or economic nature, the project may still go ahead, provided there are no alternative solutions and all compensatory measures are taken to ensure that the overall coherence of the *Natura 2000* network is maintained. If priority habitat types or priority species are involved, advice from the European Commission must be requested prior to the decision to go ahead with a project under the terms of Article 6(4).

This exemption originally did not exist in the Birds Directive. As mentioned above, it was decided that the same clause would apply to areas already designated under the Birds Directive, thus replacing former Article 4(4) of the Birds Directive. Adopting a more lenient regime was a reaction to the *Leybucht* case, in which the ECJ concluded that Article 4(4) hardly allowed for exemptions at all. The Court decided that: “The power of the Member States to reduce the extent of special protection areas can be justified only on exceptional grounds corresponding to a general interest which is superior to the general interest represented by the ecological objective of the Directive. In that context the economic and recreational requirements referred to in Article 2 of the Directive do not enter into consideration (. . .).”²⁷ This was considered to be too strict.

3.2. *Species protection*

The second set of rules in both the Birds and Habitats Directives are rules on species protection. All European species of wild birds and all the species listed in Annex IV of the Habitats Directive (mammals, reptiles, amphibians, fish, invertebrates, and plants) are protected against (Articles 5 and 6 Birds Directive; Article 12, Para 1, and Article 13, Para 1 Habitat Directive):

²⁵ 31 I.L.M. 818 (1992).

²⁶ European Commission, *Managing Natura 2000, The Provisions of Article 6 of the “Habitats” Directive 92/43/EEC*, Luxembourg, 2000, 36. It must be noted, though, that carrying out an impact assessment on the basis of Article 6(3) of the Habitats Directive significantly differs from “normal” environmental impact assessments. The scope of the assessment is much more specific: the assessment is aimed at determining the effects of a project on the integrity of the site, in the light of its conservation objectives, M. Montini, *Habitats Impact Assessment: An Effective Instrument for Biodiversity Conservation?*, 9 ENVTL. LIABILITY 4, 185 (2001).

²⁷ Case C-57/89, *Commission v. Germany* [1991] ECR I-883.

- a) all forms of deliberate capture or killing;
- b) deliberate disturbance, particularly during the period of breeding, rearing, hibernation, and migration;
- c) deliberate destruction or taking of eggs;
- d) deterioration or destruction of breeding sites or resting places;
- e) deliberate picking, collecting, cutting, uprooting, or destruction of plants;
- f) keeping, transport, sale or exchange, or offering for sale or exchange, specimens of plants taken in the wild and most species of wild birds (including readily recognizable parts or derivatives of such birds).

Again, derogation from these provisions can be granted (under Article 16 of the Habitat Directive), provided that:

- there are no satisfactory alternatives, and
- the derogation is not detrimental to the maintenance of the species concerned at a favorable conservation status in their natural range.

Examples of specific reasons for such derogation include: The interest of protecting wild flora and fauna; the prevention of serious damage to, for instance, crops or other types of property; or for imperative reasons of overriding public interest, including those of a social or economic nature. This exemption clause is very similar to the provision of Article 6(4).

The basis for imperative reasons of overriding public interest of a social or economic nature regarding maintenance of species at a favorable conservation status only applies to species protected under the Habitats Directive, not to birds. The Birds Directive, in Article 9, only allows for derogations on the grounds of the interests of public health and safety, air safety, and to prevent serious damage to crops, livestock, fisheries, etc. Therefore, the Birds Directive, as far as species protection is concerned, is stricter than the Habitats Directive. However, this more lenient regime, allowing for economic and social considerations to be taken into account, was only adopted for the provisions that apply to area conservation, not for the provisions on species protection.²⁸

3.3. Liability

In addition to these rules in the Habitats Directive, the European Commission, in January 2002, published a “Proposal for a Directive on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage.”²⁹ According to the proposal, operators of activities causing damage or an imminent threat to biodiversity are obligated to repair such damage or take preventive measures (Article 4 and 5). In case they are unwilling to do so, the competent authorities are required to restore biodiversity, in which case they can recover the costs from the operator who caused the damage or the imminent threat (Article 7). In the proposal, “biodiversity” is defined as the natural habitats or

²⁸ The reason for this is unclear. Possibly, the European legislator in 1992 simply forgot to change Article 9 of the Birds Directive because, as a consequence of the *Leybucht* case, all the attention was focused on area conservation at that time.

²⁹ COM(2002)17. The proposal is available at <http://europa.eu.int/comm/environment/liability/>.

species listed in the Annexes to the Birds and Habitats Directives, and other habitats or species protected under national law (Article 2(1)(2)). The proposal also provides rules for the competent authority to ensure the remedying of environmental damage, such as rules on compensatory restorative action covering interim losses to biodiversity pending total recovery of biodiversity to the “baseline condition” (Annex II). This is the condition of the natural resources and ecosystem services that would have existed had the damage not occurred, estimated on the basis of historical data, reference data, control data, or data on incremental changes (such as the number of dead animals) (Article 2(1)(1)). This proposal offers competent authorities a strong enforcement tool and, therefore, it seems to be an important addition to the rules in the Habitats Directive. This is especially true, since environmental NGOs will be accorded the right to request the competent authority to take action under this Directive (Article 14), and to have decisions, acts or failures to act, by the competent authority reviewed by national courts (Article 15).

4. Selected case law by national courts and the ECJ on the Habitats Directive

These provisions of the Birds Directive and the Habitats Directive, many of which are vague, have been interpreted in many cases by both the European Court of Justice (ECJ) and by national courts. In this section, I will give some examples of case law to show the consequences of the Habitats Directive in order to be able to answer the main question of this article: does the rather strict legal regime of the Directive form a practicable and effective implementation of the CBD?

4.1. Designating special areas of conservation

There is substantial case law on the designation of sites. Although, the wording of the relevant provisions of both Directives appears to imbue member States with a wide margin of discretion to decide which sites to include in the designation process, the ECJ has severely circumscribed this discretion. The Court has decided that only ornithological³⁰ or ecological³¹ interests may play a role when deciding on the designation of sites. Economic considerations may not be taken into account.

As far as bird areas are concerned, the Court presumes that all the sites listed in the International Bird Association report “Important Bird Areas in Europe” (IBA) must be designated as Special Protection Areas under the Birds Directive.³² A Member State can

³⁰ Under the Birds Directive, Case C-355/90, *Commission v. Spain* [1993] ECR I-4421 (*Santoña Marshes* case), and Case C-44/95, *Regina v. Secretary of State for the Environment ex parte Royal Society for the Protection of Birds* [1996] ECR I-3805 (*Lappel Bank* case).

³¹ Under the Habitats Directive, Case C-371/98, *First Corporate Shipping* [2000] ECR I-9235 (*Severn estuary* case).

³² Case C-3/96, *Commission v. The Netherlands* [1998] ECR I-3031. This report, “IBA89”, was compiled by the International Bird Association on behalf of the European Commission in 1989. The report has recently been updated: M.F. Heath and M.I. Evans (eds.), *IMPORTANT BIRD AREAS IN EUROPE. PRIORITY SITES FOR CONSERVATION*, Vol. I and II (BirdLife International, 2000).

only overturn this designation when it can establish that such a site is no longer an important bird area. A corresponding rule applies when deciding on the geographic scope of a site. All of an area that is determined to be of ornithological interest has to be designated by the Member State. In 1999, the ECJ held that France failed to fulfill its obligations since it had designated only 2,750 hectares of the Seine estuary, while 21,900 hectares was considered to be of importance for the birds listed in Annex I of the Birds Directive.³³

Many other Member States have been faced with similar judgments, either for designating an insufficient number of special protection areas under the Birds Directive,³⁴ or for failing to propose sufficient special areas of conservation under the Habitats Directive.³⁵

4.2. *Applying Article 6 on designated sites*

4.2.1. *Transposition of Article 6 into national legislation* Transposition into national legislation of the duties of Article 6, i.e., the legal regime that applies to designated sites, saw a slow start as well: infringement procedures were started against many Member States, of which some are still pending,³⁶ while others have led to ECJ judgments.³⁷

4.2.2. *Does Article 6 have direct effect?* Since it is not entirely up to Member States alone to designate areas under the Habitats Directive, some argue that it is not possible to directly apply Article 6 before the Commission has selected the areas that are of community importance.³⁸ Some national courts also take this position,³⁹ but most courts now think

³³ Case C-166/97, *Commission v. France* [1999] ECR I-1719 (*Seine estuary case*).

³⁴ Case C-3/96, *Commission v. The Netherlands* [1998] ECR I-3031.

³⁵ Case C-67/99, *Commission v. Ireland* [2001] ECR I-5757, Case C-71/99, *Commission v. Germany* [2001] ECR I-5811, Case C-220/99, *Commission v. France* [2001] ECR I-5831.

³⁶ In August 2001, the European Commission sent "Reasoned Opinions" (second warning letters) for not having properly transposed Article 6 of the Habitats Directive into national legislation to Sweden, the UK, Italy, Germany and the Netherlands. At that time, Portugal had already been referred to the Court of Justice for the same reason.

³⁷ Case C-83/97, *Commission v. Germany* [1997] ECR I-7191, Case C-256/98, *Commission v. France* [2000] ECR I-2487.

³⁸ J.H. Jans, *The Habitats Directive*, 12 J. ENVTL. L. 388 (2000).

³⁹ For instance, in the Netherlands, the Administrative Law Division of the Council of State in judgments before July 2001, such as the judgment in the *Duinen van Velsen* case, 27 March 2001 [2001] AB 281. The Administrative Law Division of the Council of State (the highest administrative court in the Netherlands) changed its position in July 2001 in its judgment on the *Korenburgerveen*, 11 July 2001, 29 MILIEU EN RECHT 3, 95-99 (2002). Since then, it states that, although the European Commission had not yet published the list of sites under the Habitats Directive, Member States still have to pay attention to the obligations of Article 6 as a consequence of Article 10 EC Treaty. The latter Article states that it is a general principle of law that all government authorities in all the EU Member States have to facilitate the achievement of the Community's tasks and that they shall abstain from any measure which could jeopardize the attainment of the objectives of the EC Treaty.

that Article 6 does have direct effect. This, for instance, is the case in the United Kingdom (UK),⁴⁰ in Germany,⁴¹ and in the Netherlands.⁴²

For sites that have been designated as an SPA under the Birds Directive, or that qualify as such and therefore should have been designated, the situation is evident: Here the Member State itself that must carry out the selection and designation on the basis of ornithological criteria. When a site that is on the IBA list has not been designated for a sound reason, the provisions of the Directive take direct effect.⁴³ However, one question remains: which criteria should be applied to such areas, the strict criteria of the former Article 4(4) of the Birds Directive, or the more lenient criteria of Article 6(3) and 6(4) of the Habitats Directive? Although most national courts opted for the latter,⁴⁴ the ECJ in December 2000 took a different position. In the *Basses Corbières* case, against France concerning disturbance of the Bonelli's Eagle (*Hieraetus fasciatus*) in the Basses Corbières area and the deterioration of the eagle's habitat as a result of activities in limestone quarries, the Court held that a Member State could not derive an advantage from its failure to comply with its Community obligations.⁴⁵ Therefore, Article 6 of the Habitats Directive does not apply to areas that have not been classified as SPAs but that should have been so classified. Instead, the stricter Article 4(4) Birds Directive still applies to these areas. The consequence of this approach is that it is not possible to call upon economic or social reasons to derogate from the duty to prohibit activities that deteriorate the site or that lead to a significant disturbance of the species for which the site should have been designated.

4.2.3. Applying Article 6 in concrete cases There are cases where Member States did not apply Article 6, either directly (direct effect) or through national (implementing) legislation. An interesting judgment of the European Court of Justice demonstrating the consequences of Article 6(2), was a case against France related to the Poitevin Marsh, which was drying out due to drainage and cultivation for agricultural purposes.⁴⁶ Although the case was decided on the basis of the former Article 4(4) of the Birds Directive, it makes clear that existing activities, such as agriculture, must be regulated when a site has been designated as a Special Protection Area or when a site should have been designated as such. This is true even when these activities take place *outside* the boundaries of the SPA, as long as such activities have a negative effect on the SPA, they fall within the scope of Article 6.

⁴⁰ *R. v. Secretary of State for Trade and Industry, ex parte Greenpeace Ltd*, High Court (Queen's Bench Division) 5 November 1999 [2000] 2 COMMON MARKET L. REV. 94, 134 (2000).

⁴¹ Federal Administrative Court 19 May 1998, NEUE VERWALTUNGSZEITSCHRIFT 961 (1998), Administrative Court of Stade 27 January 1999, 21 NATUR UND RECHT 7, 411 (1999).

⁴² Cf. footnote 39.

⁴³ For instance, in the Netherlands: Administrative Law Division of the Council of State (*Texel* case) 31 March 2000, 27 MILIEU EN RECHT 10, 257–259 (2000).

⁴⁴ For instance, in the Netherlands the District Court of Leeuwarden, 17 July 1998, 25 MILIEU EN RECHT 10, 250–267 (1998), and the Administrative Law Division of the Council of State (*IJburg* case), 11 January 2000, 27 MILIEU EN RECHT 10, 254–257 (2000), and in Germany the Administrative Court of Stade, 27 January 1999, 21 NATUR UND RECHT 7, 411–414 (1999).

⁴⁵ Case C-374/98, *Commission v. France* [2000] ECR I-10799 (*Basses Corbières* case).

⁴⁶ Case C-96/98, *Commission v. France* [1999] ECR I-8789, 2 COMMON MARKET L. REV. 681 (2000).

Designating an area as an SAC, therefore, can have many consequences for existing activities in that area. In a Dutch case involving a local zoning plan for the island of Texel, a national court decided that the plan was invalid because attention had not been paid to the consequences of military activities taking place on a part of the island.⁴⁷ The plan itself did not alter these activities, which had been conducted for decades. However, since this area was on the Important Bird Area list, the court ruled that the area should have been designated as an SPA, and therefore found that the Habitats Directive had direct effect. The Court subsequently tested the zoning plan against Article 6(2) and concluded that it was not clear whether the military activities would result in deterioration of the site or disturb the species for which the area should have been designated. The Court held that competent authorities should have assessed this before adopting the plan.

A case presently pending before the European Court focuses on potential deterioration of an SPA in Ireland as a consequence of overgrazing. This area, which has also been proposed as an SAC, is an important area for the Red Grouse (*Lagopus lagopus*). According to the Commission and the Advocate General, Ireland failed to fulfill the duties arising from Article 6(2) for this area.⁴⁸ If the Court follows the opinion of the Advocate General in this case, it will be clear that adopting plans to limit the density of grazing on heath land and bog is insufficient. Ireland would be required to actually limit present agricultural activities, for instance, by limiting the intensity of sheep rearing (“destocking”). Article 6(2) thus restricts all present activities that deteriorate the area.

As far as the provisions for decisions on plans or projects are concerned, i.e., Article 6(3) and 6(4), there is a large body of case law as well, mainly by national courts. Cases before the European Court of Justice can be expected in the near future as well, since the European Commission recently initiated several infringement procedures on projects in which Article 6(3) and 6(4) may not have been properly applied.⁴⁹ The cases that came before national courts once again demonstrate that the provisions of Article 6(3) and 6(4), again, must be taken very seriously. In the Netherlands, an Administrative Court annulled a permit for the exploration for mineral gas in a wetland designated as an SPA under the Birds Directive because there had not been a proper assessment of the consequences of the drilling for the area as a whole and for the birds for which this area had been designated as an SPA.⁵⁰

In another Dutch case, the judges showed little regard for a government decision to allow the construction of a transboundary business park on the Dutch/German border in one of

⁴⁷ Administrative Law Division of the Council of State, 31 March 2000, 27 MILIEU EN RECHT 10, 257–259 (2000).

⁴⁸ In this case, C-117/00, *Commission v. Ireland*, there already is an opinion of the Advocate General (dated 7 March 2002), available at <http://curia.eu.int/en/jurisp/index.htm>. A Court judgment will be given soon.

⁴⁹ On 14 March 2002 the Commission announced to start actions for non-compliance with the Birds and Habitats Directive against France, Italy, Ireland, Germany, Austria, Portugal, Spain and Luxembourg. Many of these proceedings concern concrete projects, such as the construction of a dyke in an SPA in Portugal, an irrigation project affecting a SPA in Spain and a golf course extension damaging the habitats of the endangered corncrake (*Crex crex*) in Austria.

⁵⁰ District Court of Breda, 6 November 2000, 28 MILIEU EN RECHT 3, 64–70 (2000).

the last habitats of the common hamster.⁵¹ Although this decision was made on the basis of Article 16 of the Habitats Directive (i.e., species protection, see Section 4.3, *infra*), it is an interesting case to be discussed here as well, since, as mentioned above, the exemption clause from Article 16 is very similar to that of Article 6(4). According to the court, no serious study had been made into possible alternative ways to structure the projects that would achieve the objective of job creation without damaging habitat. Also, the court held that the government had not sufficiently demonstrated that the unemployment rate for the region was so high that an overriding public interest justified the threats to the habitat.

A case before the German Federal Administrative Court also demonstrates that the goal of the project determines the alternatives that must be explored and what kind of information must be gathered in order to pass the test of Article 6(4).⁵² Regional authorities had drawn up a plan to re-route a motorway from the city of Hildesheim to a new route outside the city. However, this new route would pass through an SAC under the Habitats Directive containing a priority habitat (xeric sand calcareous grasslands). To justify this new route, the regional authorities claimed that the new road was necessary to protect human health. Many casualties on the existing road were attributed to its path through a densely populated area. The Federal Administrative Court found that if this was the reason to derogate from Article 6(3), two things should have been made very clear in the plan to re-route the road. First, the authorities should have shown that it is impossible to make the existing road safer, for instance, by practical measures such as road junctions, or by adjusting the speed limit for particular sections of the road. Secondly, the authorities should have presented evidence that the new road would lead to fewer casualties.

Examples of projects that were approved under the guidelines of Article 6(3) and 6(4) exist as well. In 1995, the European Commission adopted two opinions in which the Commission approved two sections of a planned motorway in Germany, causing adverse effects on natural sites in two river valleys in the northern part of Eastern Germany. Both valleys had been designated as Special Protection Areas under the Birds Directive, as well as Special Areas of Conservation under the Habitats Directive (the latter because priority habitats had been present in the area, i.e., fenland, bog land, and residual alluvial forests). The Commission answered four questions as the basis of its decision as follows:⁵³

⁵¹ Administrative Law Division of the Council of State, 15 January 2001, 28 MILIEU EN RECHT 3, 73–78 (2001).

⁵² Federal Administrative Court, 27 January 2000, 22 NATUR UND RECHT 8, 448–453 (2001).

⁵³ For a more elaborate discussion of this case, see A. Nollkaemper, *Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests*, 9 J. ENVTL. L. 279–284 (1997). Nollkaemper distinguishes the need to balance the socio-economic interests against the interests of biodiversity conservation as a separate test, *id.* At 280. I think the European Commission considers this test as being part of the “alternatives”-test (the third question). Later case-law shows that Article 6(4) requires competent authorities to look for alternatives that do not harm biodiversity or do lesser harm to biodiversity. Instead, Nollkaemper does not distinguish the need for compensation as a separate question (282). However, the Manual “Managing Natura 2000” (*supra* note 23) shows that this is an important separate question: If there are no alternatives the project still cannot go ahead when there is no possibility to compensate for habitat loss, see the Manual at 44–45.

1. *Are imperative reasons of overriding public interests involved?* The answer is yes: The socio-economic need to develop this area in the former East Germany is such an imperative reason over overriding public interest.
2. *Will the project actually achieve economic and social benefits?* Although the economic analysis contained some margins of uncertainty, the Commission accepted the decision by German Parliament that this actually would be the case.
3. *Are there alternative ways to achieve the economic and social benefits?* This is the core element of the Commission's opinion. The Commission agreed with the German government that there were no alternative possibilities to develop this area: The road had to cross the river somewhere. However, the Commission did force the German government to adopt an alternative route that was less harmful than the original plan, and to adopt mitigating measures, such as noise barriers and measures to retain oil run-offs.
4. *Do compensatory measures maintain the overall coherence of the Natura 2000 network?* Unfortunately, the Commission did not examine this test in great detail. The Commission simply agreed with the proposed compensatory measures, although there was no certainty that these measures would actually enable the ecosystem to function in the lost areas as it would have without the advancement of the socio-economic measures. In its Manual, published a few years later, the Commission took a much tougher stand. It states, among other things, that:⁵⁴
 - The result of compensatory measures must be operational at the time when the damage occurs on the site of concern;
 - the compensatory measures should address in comparable proportions the habitats and species negatively affected; and
 - the compensatory measures should provide functions comparable to those that had justified the selection criteria of the original site.

4.3. *Species protection*

Since the Birds Directive came into effect in 1981, the European Court of Justice has rendered many judgments on species protection.⁵⁵ Many more cases can be expected, given the number of infringement procedures that the European Commission is currently preparing.⁵⁶ Most of these cases concern either national hunting regulations or trade in birds. The European Court of Justice developed a rather strict approach toward national hunting regulations. Article 7 of the Birds Directive provides that Member States may allow hunting on

⁵⁴ *Supra* note 23, at 46–47.

⁵⁵ Between July 1987 and January 1994 the Court rendered 15 judgments on the Birds Directive. No other piece of EC environmental legislation had, at that time, given rise to as many cases before the Court of Justice, see W.P.J. Wils, *The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive*, 6 J. ENVTL. L. 222 (1994).

⁵⁶ In August 2001, the European Commission started formal procedures because of national hunting practices against Portugal, Spain, Finland, Germany, and the Netherlands.

certain species of birds (listed in Annex II), but not during the rearing season and not during stages of reproduction. In addition, hunting on migratory species is not allowed during the return to their rearing grounds. The Court has ruled that national hunting regulations must take into account prolonged dependence of the fledglings on the parents, and of early migration.⁵⁷ Also, Member States are not allowed to designate staggered closing dates for hunting, which vary according to species, unless they can produce scientific evidence that it does not impede the complete protection of the particular species. Following these ECJ judgments, national courts have declared many national decisions invalid. For instance, in 1999, the French Council of State held that the provisions introduced into the Rural Act in 1998, making it possible to set dates for early opening of waterfowl hunting, “are almost all incompatible with the objectives of species preservation found in Article 7(4)” of the Birds Directive.⁵⁸

The strict approach of the European Court of Justice on species protection can also be seen in a case on the derogation clause of Article 9 of the Birds Directive. Although Member States usually are thought to have discretion as to how provisions of Directives are to be implemented (see above, Section 2), here the Court was less lenient. The Court held that the essential elements of Article 9 have to be transposed completely, clearly, and unequivocally into national rules.⁵⁹ Further, in the *Van der Feesten* case, the Court determined that all of the provisions of the Birds Directive apply to all birds that reside naturally within the territory of all of the EU Member States, as well as accidental migrants. The Court also stated that subspecies of birds that occur naturally in the wild *outside* the EU are also considered within the scope of the Directive if the species to which they belong, or other subspecies of that species, occur naturally in the wild within the European territory.⁶⁰ The latter are included to ensure that there will be no uncertainty as to which species must be protected.

An interesting example of the application of this judgment in national law is a recent criminal case before the Dutch Supreme Court.⁶¹ An individual, who had imported 60,000 specimens of a Chinese subspecies of the Eurasian tree sparrow into the Netherlands and had offered them for sale there, was prosecuted by the Public Prosecutions Department. The High Court originally had acquitted him because the birds had been legally caught in China and the subspecies (*Passer montanus saturatus*) did not habitate in any of the EU Member States, and therefore did not fall within the scope of the Birds Directive. However,

⁵⁷ Case C-157/89 *Commission v. Italy* [1991] ECR I-57. Fixing hunting dates by reference to the period during which the migratory activity is at its peak is not allowed, see Case C-435/92 *Association pour la protection des animaux sauvages v. Préfet de Maine-et-Loire et Préfet de la Loire-Atlantique* [1994] ECR I-67.

⁵⁸ Conseil d'État 3 December 1999, *Association ornithologique et mammalogique de Saone-et-Loire and Association France Nature Environnement v. French Minister for Planning and the Environment*, 3 COMMON MARKET L. REV. 399 (402) (2000), and similarly, on 9 June 2000, *Association France Nature Environnement and Others v. French Minister for Planning and the Environment*, 3 COMMON MARKET L. REV. 404 (407) (2000).

⁵⁹ Case C-262/85 *Commission v. Italy* [1987] ECR 3073 and case C-118/94 *Associazione Italiana per il WWF and Others v. Regione Veneto* [1996] ECR I-1223.

⁶⁰ Case C-202/94 *Van der Feesten* [1996] ECR I-355.

⁶¹ Supreme Court, 1 February 2000 [2000] NJ 245.

the Supreme Court reversed this decision, referring to the *Van der Feesten* judgment of the European Court of Justice. It held that since the species *Passer montanus* occurs in the territory of EU Member States, importing and selling the Chinese subspecies *Passer montanus saturatus* is prohibited by Article 6 of the Birds Directive as well.

So far, most of the case law on species protection under the Habitats Directive has been developed at the national level. The ECJ only very recently rendered its first decision on Article 12 of the Habitats Directive in a case on the protection of sea turtles in Greece.⁶² The Court found that Greece had failed to fulfill its obligations under Article 12 of the Directive to take the requisite measures to establish and implement an effective system of strict protection for the sea turtle (*Caretta caretta*) to avoid any disturbance of the species during its breeding period and any activity which may bring about deterioration or destruction of its breeding sites. According to the Court, the Greek authorities had not done enough to stop the use of mopeds on a beach the turtles used for breeding, and to prevent the presence of small boats near the breeding beaches. The Court emphasized that promulgation of rules and regulations by Greece was not enough: Greece had to ascertain that the turtles were not to be disturbed during the laying period, the incubation period, the hatching of the eggs, as well as during the baby turtles' migration to the sea. Now and in the future, according to the Court, Greece has to make sure that there are no sources of danger to the life and physical well being of the turtles.

National cases clearly show the importance of Article 12 and the derogation clauses of Article 16 for biodiversity conservation. A good example is the Dutch case, briefly mentioned above, in the section on special areas of conservation (Section 4.2.3). This case concerned plans to construct a transboundary business park on the German/Dutch border near the cities of Heerlen and Aachen to combat regional unemployment in the area. However, the site hosted one of the last populations of the common hamster in the Netherlands. This species (*Cricetus cricetus*) is in Annex IV of the Habitats Directive, and therefore falls under the protection of Article 12. In a series of judgments, the highest Dutch administrative court found that the competent authorities in the Netherlands had not rightfully applied the derogation clauses⁶³ because they had failed to demonstrate that:

- There were no satisfactory alternatives. The authorities had only assessed other possible locations for the business park. They should have also considered options for upgrading existing business parks or the possibility to create jobs in other sectors, such as education or health care.
- The derogation was not detrimental to the maintenance of the populations of the species at a favorable conservation status in their natural range. The authorities did not show that populations dynamics data indicated the species was maintaining itself on a long-term basis as a viable component of its natural habitat, nor that the natural range of the species would not be reduced as a consequence of the decision to construct the business park.

⁶² Case C-103/00 *Commission v. Hellenic Republic* [2002] ECR (not yet published). The text of the decision is available at the ECJ's website <http://curia.eu.int/en/jurisp>.

⁶³ The most important decision being Administrative Law Division of the Council of State, 15 January 2001, 28 MILIEU EN RECHT 3, 73–78 (2001).

- The derogation was necessary for an imperative reason of overriding public interest. According to the Court, combating regional unemployment can be an imperative reason of overriding public interest. However, in this case, the Court found that the authorities had used outdated unemployment figures, and, therefore, had not established that the construction of the business park was an imperative reason of overriding public interest.

Other national courts throughout Europe reached similar important decisions for biodiversity conservation on the basis of the Habitats Directive. For instance, the UK High Court decided that governmental decisions on activities outside the territorial waters also have to be tested against Article 12. The Habitats Directive includes protection of a certain species of reef-forming coral (*Lophelia pertusa*) and cetaceans. Therefore, the decision to grant licenses for oil and gas exploration in the North Atlantic in a 200 nautical mile zone, well outside the 12-mile territorial waters limit, has to be subject to the Habitats Directive in order to be able to establish a system of strict protection.⁶⁴

5. Conclusion

In this article I have discussed a few of a long list of interesting cases before courts throughout Europe that demonstrate stringent implementation of Article 8 and its provisions of the CBD can be an effective approach to conserve biodiversity. At the same time, the regime offered by the Birds Directive and Habitats Directive in the European Union is not so strict that it halts all economic or social progress. It does, however, bring an end to rash decision-making for activities or projects that may harm biodiversity. Only after thorough assessment, as to the effects of activities or projects on biodiversity and of the economic benefits of these activities, can decision-making proceed. If there are alternative solutions that do not harm biodiversity, or do so, but to a lesser extent, these solutions must be chosen. There is also a small possibility that a project will be permitted to proceed if there is no reasonable alternative. There has to be clear evidence that the project is necessary for imperative reasons of overriding public interest. Such conditions are difficult to demonstrate under the strict guidelines within the Directives. The project should go beyond the simple economic interests of one or two business corporations, but instead should benefit an entire region. Even if imperative reasons of overriding public interest can be shown, all biodiversity loss must be reclaimed to safeguard existing populations of endangered species and the European structure of special areas of conservation.

Looking back at ten years of experience with the Habitats Directive in Europe, I think it is safe to conclude that the Directive slowly evolved. Between 1992 and 1998, discussions were principally focused on designation of areas in terms of size and location. However, in the last two to three years, the number of court cases in which concrete projects were tested against the provisions of the Habitats Directive has significantly increased. It took a while for all actors involved to realize that the Habitats Directive is not only an important

⁶⁴ High Court (Queen's Bench Division), *R v. Secretary of State for Trade and Industry ex parte Greenpeace*, 5 November 1999, 2 COMMON MARKET L. REP. 94 (2000). On this judgment, see also Jans, *supra* note 38, at Directive 385–390.

instrument for direct means to conserve biodiversity, but also it provides constraints (of varying degrees) on decision-making for projects that may harm biodiversity. Because of the persistence of the European Commission, which continues to institute infringement procedures against EU Member States for failure to fulfill obligations under the Birds and Habitats Directives, national authorities as well as national courts have come to realize the impact of these Directives.

Nongovernmental organizations have successfully seized the new opportunities offered by the Directive and its provisions to protest against the loss of biodiversity. The proposal for a Directive on Environmental Liability seems to further improve their position. The reason for their success is simple: administrative authorities were not accustomed to providing the amount of data, and legal arguments, that are needed before they can approve a project that harms biodiversity. Therefore, most courts find administrative decisions inadequate. However, authorities, as well as developers, now know from the very outset to develop their plans in such a way as to not deteriorate protected areas or harm populations of endangered species. The benefits to wildlife and their habitat from this new preemptory approach by administrative authorities will be far-reaching. Their efforts must be applauded. However, much more needs to be done to develop a system of special protected areas throughout Europe. So far, many of the SPAs and SACs are small islands in areas where large-scale economic activities are dominant. These islands wait to be connected by contiguous ecological corridors in order to effectively combat habitat fragmentation. Over the past ten years, the collective legal bases of the Birds Directive and Habitats Directive have served as a foundation for such a system. We will have to wait and see whether the next ten years are as successful as the past decade.