The Habitats Directive in the case law of the CJEU

Hendrik Schoukens & An Cliquet
Ghent University, Belgium
Objectives

- Overview of the case law of the CJEU on the Habitats Directive
- Importance of role of national judges to contribute to the proper and uniform application of the Habitats Directive
Overview of the presentation

1. Procedures at EU level
2. Introduction to the Habitats Directive
3. Most important case law by the CJEU on the Habitats Directive
4. Role of national courts
PROCEDURES AT EU LEVEL
Litigation at EU level

- EU case law on the Habitats Directive is massive:
  - Around 20% of all environmental cases
  - Up to now, more than 80 rulings at CJEU

- Most of the cases involve infringements for bad application (Art. 258 TFEU)

- Relatively few though interesting judgments on preliminary reference (Art. 267 TFEU) .... Yet the number is growing (!)

- Up to now, inadmissibility of cases for the review of the legality of a decision with regards to the Habitats Directive (Art. 263 TFEU)
Infringement Procedure

- Duty of Loyalty of Member States to apply EU Law
- Responsibility of the Commission to ensure compliance with EU law ("Guardian of the Treaties")
- In case of non-compliance for incorrect transposition or bad application:
  - Pre-litigation procedure by Commission
  - Referral by Commission to CJEU (litigation procedure)
- Infringement procedure can be triggered by the Commission, either directly, or further to a complaint
- Complaints by individuals: no obligation for the Commission to initiate the litigation procedure
Infringement cases

- Non communication by the transposition deadline:
  - Case Comm. vs. Greece (C-329/96); Case Comm. vs. Germany (C-83/97)

- 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
    - Examples: Cases Comm. vs. UK (C-6/04); Comm. vs. Germany (C-98/03); Comm. vs. Austria (C-508/04)
Infringement cases

- **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 Habitats Directive, because of the margin of manoeuvre left to Member States
  - No ruling yet based on a general and persistent breach of EU law by a Member State
Infringement cases

- Source for interpretation, but judgments often come too late (the damage has occurred), except if interim measures are requested by the Commission (Art. 279 TFEU)
  - Notable example: Case Comm. vs. Poland (C-441/17R)
- Member States must take the necessary measures to comply with a judgment, otherwise the Commission may refer the matter to the Court (may specify a lump sum or penalty payment) (Art. 260 TFEU)
Belgium is ordered to pay a fine of €10 million for failing to comply with the EU Court of Justice’s 2004 judgment concerning the treatment of urban waste water.

In 2004, the Court ruled that Belgium had infringed several provisions of the EU Directive concerning urban waste-water treatment that aims to protect the environment from the consequences of the discharge of waste water. The infringement took place in several regions across the country.

However, at the time the present action was brought by the European Commission, the infringement was valid for one Flemish and 21 Walloon areas, as well as for the capital, Brussels.

According to today’s judgment, by not complying with the relevant EU Directive, Belgium failed to fulfill its obligations under the Treaty on the Functioning of the EU. The Court also pointed out that the failure to fulfill obligations lasted for nearly 9 years, which is an excessive amount of time. In addition, given the fact that Belgium has recognized the need for increased environmental protection on its territory, the lack of treatment for urban waste water constitutes damage to the environment.

However, the Court acknowledged that the country has agreed to substantial investments in order to comply with the 2004 judgment and has made considerable progress on this task. A final judgment is expected.
EU Court imposes emergency ban on logging in Białowieża Forest

News / 28 July 2017

The Court of Justice of the EU has issued a ban on logging in Białowieża Forest, saying all chainsaws and harvesters must be stopped immediately. The ruling shows that, in the Court’s opinion, increased timber harvesting in Poland’s Białowieża Forest could cause serious and irreparable damage to this priceless natural environment.

The court today confirmed that is has imposed an order which means Poland must put a halt to all tree cutting in the ancient forest. This effectively suspends the March 2016 decision of Polish Environment Minister Jan Szyszko, which allowed a huge increase of timber harvesting. This logging ban is effective until EU judges make a final decision in the case.

ClientEarth lawyer Agata Szafraniuk said: “In the history of the EU, emergency measures like this ban have only been used three times in nature conservation issues. Once, exactly ten years ago, it was used against Jan Szyszko in his first term as Poland’s Environment Minister. Back then, Mr Szyszko withdrew a plan to build a road through the precious Rospuda Valley in Poland. We hope that this time the outcome will be similar.”
Polish authorities face fines of €100,000 per day over illegal Bialowieza logging, court rules

News / 20 November 2017

The Court of Justice has today upheld the emergency ban on logging in Bialowieza Forest, saying it will impose fines of at least €100,000 a day if Poland's Environment Minister keeps ignoring the Court's decisions. This formal warning sets a new precedent – financial consequences have never before been applied at this stage of the procedure.

Fifteen of the EU’s most senior judges rejected the Polish Minster’s arguments that the logging is essential for public safety, saying this only applies to trees near main roads and major infrastructure in the forest.

Related content:
Infringement cases - Order in C-441/17R

- **Prima facie case:** “As regards the first plea, it is sufficient to note, first, that the Republic of Poland, in the context of the present proceedings for interim measures, has not contested the fact that the Polish authorities failed to ascertain, in accordance with the best scientific knowledge available in the field, that the active forest management operations at issue would not adversely affect the integrity of the Natura 2000 Puszcza Białowieska site. Second, the very fact that the scientific opinions referred to by the parties are contradictory requires the Court hearing the application for interim measures, whose assessment is necessarily summary”
Urgency: “Such consequences are likely to constitute serious and irreparable damage for the interests of the European Union and for its common heritage. Indeed, once it has occurred, the damage caused by the felling and removal of the old trees and deadwood, including standing trees that are dying, would be impossible to rectify subsequently, should the Commission’s allegations concerning Poland’s failure to fulfil obligations be established, due to the obvious fact that, as the Commission rightly submits, it would be impossible to restore the areas affected by such operations to their former state. In addition, the seriousness of the damage alleged by the Commission is demonstrated by the fact that those operations, in view also of their scale and intensity, risk causing, if they are pursued, the irreversible transformation of a significant area of a natural forest into a harvested forest, risking the loss of the habitats of rare species, including a number of birds and endangered beetles.”
Weighing up of interests: “The Court observes in this regard that, on the basis of the material provided by the parties, the interests to be weighed up are, on the one hand, the preservation of the habitats and species referred to in paragraph 1 of the present order from a potential threat in the form of the active forest management operations at issue and, on the other hand, the interest of preventing damage to the natural habitats of the Białowieża Forest resulting from the presence of the spruce bark beetle. (...) the Republic of Poland has not stated the reasons why the cessation of those operations until judgment is given in the main action, that is to say, probably for only a few months from the date of the present order, is likely to cause serious and irreparable damage to that habitat.”
The preliminary reference mechanism

- Art. 267 TFEU provides for two proceedings:
  - Interpretation
  - Interpretation and validity of acts of EU institutions
- Obligation for supreme courts, possibility for ordinary courts
- Few cases on Habitats Directive (+/- 20), mainly about sites’ selection criteria, provisional measures before sites’ designation, assessment mechanism under Art. 6 (3) - (4)... yet the number is rising given the increased reliance on the EU Nature Directives before the national courts (eg Waddenzee, Sweetman I, Orleans, cf. infra)
Review of legality

- Litigation triggered by companies, mainly to challenge the Commission decisions adopting lists of Sites of Community Importance
- Court of first instance: inadmissibility, because such decisions are not directly and individually addressed to those companies
- The CJEU, in appeal, confirmed this case law:
  - Natural or legal persons who own land within the sites of Community interest adopted by the contested decision are not individually concerned by that decision (Commission decision to adopt the list of Sites of Community Importance of the Boreal biogeographical region)
  - Case Markku Sahlstedt and Others (C-362/06 P) - quid Aarhus Convention?
The EU has seven biogeographical regions, each with its own characteristic blend of vegetation, climate and geology. Working at this level makes it easier to protect species and habitats within Natura 2000 sites under similar natural conditions, irrespective of political and administrative boundaries.
INTRODUCTION TO THE HABITATS DIRECTIVE
Nature & Biodiversity

What's new?

- Inland waterways and nature protection: New guidelines
- 7 BEST projects selected
- Natura 2000 Newsletter – issue 32: Celebrating 20 years of the habitats Directive
- Celebratory event in Slovenia – see the pictures!

News Archive

Biodiversity – the variety of life on Earth – makes our planet habitable and beautiful. We depend on it for the food, energy, raw materials, air and water that make life possible and drive our economy. And we look to the natural environment for equally important things like aesthetic pleasure, artistic inspiration and recreation.

The EU is committed to the protection of biodiversity, and to halting biodiversity loss within the EU by 2020.
Introduction to Habitats Directive

- The Birds Directive (‘79, replaced in 2009) and Habitats Directive (‘92) form the cornerstone of EU’s nature conservation policy

- Overall goal of Habitats Directive: maintain or restore the natural habitats and species of wild fauna and flora of Community interest, at a favourable conservation status

- 2 pillars:
  - Creation of a European ecological network (Natura 2000 network), consisting of:
    - Special protection areas (SPAs) (Birds Directive)
    - Special areas of conservation (SACs) (Habitats Directive)
  - Strict species protection
Introduction to Habitats Directive

- Monitoring obligation under Art. 11 and reporting obligation under Art. 17 (every 6 years)
- Around 18% of EU territory is covered by Natura 2000
- Only 17% of habitats and 17% of species (other than birds) and 52% of birds species are in favourable conservation status
- Management and protection regimes are still far from being in place

- Habitats and Birds Directives are good pieces of legislation, but there is a lack of implementation!
The State of Nature in the EU

Reporting under the EU Habitats and Birds Directives 2007–2012
40-85% of habitats: unfavourable
40-70% of species: unfavourable
Air pollution still harming Europe's ecosystems, despite reduced emissions

Emissions of nitrogen-containing pollutants continue to harm sensitive ecosystems, according to two new reports published today by the European Environment Agency (EEA). Nonetheless, both reports show a marked improvement over the last two decades.
CJEU CASE LAW ON HABITATS DIRECTIVE
Designation of SACs (Habitats Directive)

- Art. 4 Habitats Directive: designation of Special Areas of Conservation (SACs) for:
  - Annex I habitats
  - Annex II species

- Designation procedure for SACs in 3 phases:
  - List of Member States
  - List of Sites of Community Importance (SCIs) by Commission, in agreement with Member States
  - Designation by Member States of SACs + establishment of conservation priorities (within 6 years after adoption of Community list)

- Designation is based on criteria of Annex III (ecological criteria)

- As soon as a site is placed on the Community list, it shall be subject to Art. 6 (2)-(4)
Designation of SACs (CJEU)

- A Member State may not take account of economic, social and cultural requirements or regional and local characteristics when designating a site
  - Case First Corporate Shipping (C-371/98)

- Member States have a margin of discretion when making their site proposals, but they must do so in compliance with the criteria laid down by the Directive - national case-law leaves a bit more margin and bargaining power for national authorities (e.g. case Dutch CoS on Spoonbills, Belgian CoS on designation of MPAs in the Belgian Part of the North Sea)

- By failing to transmit the list of sites to the Commission, within the prescribed period, the Member State has failed to fulfil its obligations
  - Case Comm. vs. Ireland (C-67/99); Case Comm. vs. Germany (C-71/99); Case Comm. vs. France (C-220/99)
Substantive criteria when designating SACs (CJEU)

- An obligation to propose ‘potential areas for restoration measures’ as SCIs can be inferred at most indirectly from the first sentence of Article 4(1) and Annex III (Stage 1) of the Habitats Directive. Under the first sentence of Article 4(1), Member States are to indicate which habitat types and species to be protected the proposed site hosts. This could be interpreted as meaning that only actually existing occurrences can justify a proposal for a site. Annex III (Stage 1) nevertheless also envisages the possibility, in the assessment of sites, of including a restoration of occurrences.

- The inclusion of potential restoration areas for restoration measures in the identification of SCIs is consistent with the objective of Article 2(2) and Article 3(1) of the Habitats Directive of restoring natural habitats and species of wild fauna and flora of Community interest at a favourable conservation status. If existing occurrences of habitat types or species are not sufficient to guarantee a favourable conservation status, such occurrences must be restored.
  - Case Hoekschewaards Landschap (C-281/16)
Designation of SACs (CJEU) - level of protection awaiting final designation

- The protection regime of Art. 6 only applies once sites are on the Community list; but Member States have to take protection measures in the meanwhile - *effet utile*?
  - Case Dragaggi (C-117/03)

- Member States must, in accordance with the provisions of national law, take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission; it is for the national court to assess whether that is the case
  - Case Bund Naturschutz Bayern (C-244/05)
Designation of SACs (CJEU)

- A Member State cannot refuse to agree to the inclusion of a site in the draft list of SCIs drawn up by the Commission, on grounds other than environmental protection (e.g. no economic reasons linked to dredging and accessibility in view of port areas)
  - Case Stadt Papenburg (C-226/08)

- Within a proposed SCI: a project for upgrading a country road, accompanied by corrective measures, does not constitute in itself an intervention of a kind which places the Iberian lynx on the site concerned in danger of extinction and which, accordingly, risks seriously compromising the ecological characteristics of that site (quid: difference with Art. 6., §2)
  - Case Comm. vs. Spain (C-308/08)
By not establishing the conservation priorities within the required timeframe, Spain failed to fulfill its obligations

- Case Comm. vs. Spain (C-90/10)
Declassification of SACs (CJEU)

- Pursuant to Article 9 of the Habitats Directive an SAC may be declassified ‘where this is warranted by natural developments noted as a result of the surveillance provided for in Article 11’.
- The inclusion of a site in the EU list gives rise to the presumption that it is relevant in its entirety from the point of view of the Habitats Directive’s objective of conserving natural habitats and wild fauna and flora. A proposal by a Member State to reduce the size of a site placed on that list requires proof that the areas in question do not have a substantial interest in achieving that objective at national level. In addition, the Commission may accept and implement the proposal only if it concludes that those areas are also not necessary from the perspective of the entire European Union.
  - Case Hoekschewaards Landschap (C-281/16)
Declassification of SACs (CJEU)

- The competent authorities of the Member States are required to propose to the Commission the declassification of a site on the list of SCIs, where those authorities have received a request from the owner of land included in that site, alleging an environmental degradation of the site, provided that that request is based on the fact that, despite compliance with the provisions of Article 6(2) to (4) of that directive, that site can definitively no longer contribute to the conservation of natural habitats and of the wild fauna and flora or the setting up of the Natura 2000 network.
  - Case Cascina Tre Pini (C-301/12)
Designation of SPAs (Birds Directive)

- Art. 4 Birds Directive: designation of most suitable territories in number and size as Special Protection Areas for:
  - Birds of Annex I
  - Migratory birds
Designation of SPAs (CJEU)

- For the designation only ecological criteria can be used; conservation measures apply even without official classification as SPA
  - Case Comm. vs. Spain (Marismas de Santona) (C-355/90)
- All most suitable areas according to the scientific standard work ‘Important Bird Areas’ must be designated
  - Case Comm. vs. Netherlands (C-3/96)
- IBA: rebuttable presumption of compliance - also other scientific studies can be used to substantiate the non-designation of a site
  - Case Comm. vs. Ireland (C-418/04)
Designation of SPAs (CJEU)

- For sites that have not been formally designated, but should have been classified, the stricter regime of Art. 4 (4) Bird Directive still applies, and not the regime of Art. 6 (2)-(4) Habitats Directive (which replaces Art. 4 (4) 1st sentence of the Birds Directive)

- A Member State cannot derive an advantage from its failure to comply with its Community obligations
  - Case Comm. vs. France (Basses Corbières) (C-374/98)
Designation of SPAs (CJEU)

- Maps demarcating SPAs, must be invested with unquestionable binding force; they must be capable of being relied upon as against third parties
  - Case Comm vs. Belgium (C-415/01)
- Designation obligation does not stop at the date of transposition of the Directive
  - Case Comm. vs. Austria (Corncrake) (C-209/04)
Declassification of SPAs (CJEU)

- A Member State may not reduce the surface area of an SPA or alter its boundaries unless the areas excluded from the SPA are no longer the most suitable territories for the conservation of species of wild birds within the meaning of Art. 4(1) of the Directive
  - Case Comm. vs. Portugal (C-191/05)
Conservation (Habitats Directive)

- Art. 6 Habitats Directive: conservation measures
- Art. 6 (1):
  - Only applies to SACs
- Art. 6 (2)-(4):
  - Applies to SACs and SPAs

- Interpretation guides by Commission on Art. 6 *(updated version in 2018 (!!!)) & also article-specific guidances (on conservation measures, site-specific conservation objectives etc.*)
MANAGING NATURA 2000 SITES
The provisions of Article 6
of the ‘Habitats’ Directive 92/43/EEC
Conservation Art. 6, §1 (Habitats Directive)

- Member States have to take conservation measures which correspond to the ecological requirements of the habitats and species present in the sites
  - Applies only to SACs
  - Similar obligation in Art. 4 Birds Directive
  - No explicit deadline as to the achievement of the favourable conservation status
  - No specific guidance as to the territorial level at which the favourable conservation status is to be assessed - at the EU level (Natura 2000 beyond national boundaries) - pragmatic: take into account national and site-specific conservation status
    - Case Hoekschewaards Landschap (C-281/16)
Conservation Art. 6, §1 (CJEU)

- By not adopting the appropriate conservation measures, Spain failed to fulfill its obligations
  - Case Comm. vs. Spain (C-90/10)
- Measures aimed at the compensation of the disappearance of a body of 20 hectares of tidal mudflats and tidal marshes of the Natura 2000 site are not eligible as appropriate conservation measure in light of Article 6(1) of the Habitats Directive
  - Case Orleans (C-387/15)
- Whenever a SAC is in an unfavourable conservation status, Member States are expected to consider the implementation of restoration measures in order to allow recovery
  - Case Hoekschewaards Landschap (C-281/16)
Conservation Art. 6, §1 (Habitats Directive/national case-law)

- Member States shall take appropriate steps to avoid, in the sites, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated - Applies to SACs and SPAs

- No substantive provisions on the achievement of the favourable conservation status at site-level - can Member States postpone the achievement of favourable conservation status in view of the economic repercussions to which more stringent policies might lead

  - Dutch CoS (2017): the Dutch programmatic approach for nitrogen should can favour the avoidance of further deterioration over the more arduous challenge to recover nitrogen-affected Natura 2000 sites to an favourable conservation status
Conservation Art. 6, §2 (CJEU)

- Overgrazing by sheep: by failing to take appropriate steps to avoid, in the Owenduff-Nephin Beg Complex SPA, the deterioration of the habitats of the species for which the site was designated, Ireland has failed to fulfil its obligations
  - Case Comm. vs. Ireland (Owenduff) (C-117/00)

- It may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate
  - Case Comm. vs. United Kingdom (C-6/04)
Conservation Art. 6, §2 (CJEU)

- Extension of a skiing area (felling of trees): incompatible with the protective legal status from which that area should have benefited pursuant to Art. 6 (2)
  - Case Comm. vs. Italy (C-304/05)

- Industrial development: by failing to take appropriate steps to avoid, in the SPA‘Valloni e steppe pedegarganiche’, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which that area was established, Italy failed to fulfil its obligations
  - Case Comm. vs. Italy (C-388/05)
Conservation Art. 6, §2 (CJEU)

- Member States cannot allow that certain types of activities, such as, fishing, aquaculture and hunting related activities, are to be generally exempted from the implementing provisions from Art. 6, § 2
  - Case Comm. vs. France (C-241/08)
- Ongoing activities (eg open-cast mines and dredging works) need to be assessed against the ratio of Article 6, §2 even when they have been explicitly authorized prior to the designation of a site (quid: vested rights?)
  - Case Comm. vs. Spain (Alto Sil) (C-404/09)
- Even for activities that do not qualify as a ‘project’ (and thus require an ex ante-assessment pursuant to Art. 6, §3), the non-regression obligation applies.
  - Case Stadt Papenburg (C-226/08)
Conservation Art. 6, §2 (CJEU)

- The Court has previously held that national legislation including procedures for intervention by the competent authorities that were merely reactive and not also preventive disregarded the scope of the obligations stemming from Article 6(2) of the Habitats Directive. In the present case, the legislation at issue in the main proceedings allows the authorities, having regard to conservation objectives, first, to impose measures both preventive and corrective. Secondly, that legislation also includes a power of coercion, also including the possibility of adopting urgent measures.
  - Case Coöperatie Mobilisation for the Environment UA (Case C-293/17)
Precautionary principle: The very existence of a probability or risk that an economic activity on a protected site might cause significant disturbances for a species is capable of constituting an infringement of Article 6(2) of the Habitats Directive, without a cause and effect relationship between that activity and significant disturbance to the species having to be proved.
- Case Comm. vs. Spain (Alto Sil) (C-404/09)

Ecological evaluation if the prior permit contains manifest falls short of the requirements set out by Article 6(3) of the Habitats Directive, with the necessity of ex post-monitoring and - if need be - the withdrawal and/or revision of existing permits.
- Case Grüne Liga Sachsen (C-399/14)
- Case Comm. vs. Spain (Alto Sil) (C-404/09)
Balancing provisions: so far as concerns the economic cost of the steps that may be considered in the review of alternatives, including the demolition of the works already completed, as relied on by the referring court, it must be stated, that that is not of equal importance to the objective of conserving natural habitats and wild fauna and flora pursued by the Habitats Directive. Therefore, account being taken of the strict interpretation of Article 6(4) of that directive, it cannot be accepted that the economic cost of such measures alone may be a determining factor in the choice of alternative solutions under that provision.

- Case Grüne Liga Sachsen (C-399/14)
Conservation Art. 6, §3 (Habitats Directive)

- Assessment of plan/project:
  - Plan/project with likely significant effect: subject to an appropriate assessment in view of the site's conservation objectives
  - In case of an adverse effect: plan is not allowed

- Applies to SACs and SPAs

- Assessment of new projects or plans

- Commission:
  - Assessment also applies to plans or projects outside the sites with a likely effect within the site
  - Plans include for example sectoral plans, but not policy declarations
  - Projects include for example intensification of agriculture
Conservation of Art.6, §3 (Habitats Directive)

- No definition of the term ‘project’ in the Habitats Directive, yet frequently reference is made to the definition that is included in Article 1(2) of the EIA Directive

- Article 1(2) of the EIA Directive: *the execution of construction works or of other installations or schemes; * other interventions in the natural surroundings and landscape including those involving the extraction of minerals’
Conservation Art. 6, §3 (CJEU)

- Illustrations:
  - Projects include existing activities that require a new permit
    • Case Cockle fisheries (C-127/02)
  - Plans include policy plans (such as land use plans) that have great influence on subsequent decisions
    • Case Comm. vs. UK (C-6/04)
  - Projects include drains maintenance works
    • Case Comm. vs. Ireland (C-418/04)
  - Projects include dredging works in a navigable channel
    • Case Stadt Papenburg (C-226/08)
Conservation Art. 6, §3 (CJEU)

- **Physical interventions**: the renewal of an existing permit cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘project’ within the meaning of the provisions preceding Article 1(2)(a) of the EIA Directive.
  - Case Brussels Hoofdstedelijk Gewest (C-275/09)

- **Significant effects or not**: the definition of project in Article 1(2)(a) of the EIA Directive does not definitively delimit the concept of ‘project’ under the first sentence of Article 6(3) of the Habitats Directive. Rather, the crucial factor is whether the activity concerned is likely to have a significant effect on a protected site. This cannot be ruled out in the case of fertilising and grazing, as the resulting nitrogen deposition can adversely affect many protected habitat types.
  - Case Coöperatie Mobilisation for the Environment UA (Case C-293/17)
Conservation Art. 6 (3) (CJEU)
Conservation Art. 6, §3 (CJEU)

- Plan has a very broad meaning - reference can be made to Article 2(a) of the SEA Directive: land use-plans, sectoral plans, development plans, hunting schemes, etc. - beyond the definition set out by SEA Directive (cf. art. 2 Directive 2001/42/EC)

- **Mixed plans**: A plans aimed at the realization of conservation objectives which equally allows project development actions cannot be exempt from Article 6(3) of the Habitats Directive
  - Case Comm. v. France (C-241/08)

- **Management plans** - specific rules: a plan solely concerned with increasing the volume of harvestable timber by the carrying out of active forest management actions with a Natura 2000 forest cannot be exempt from Article 6, §3 of the Habitats Directive
  - Case Comm. v. Poland (C-441/17)
Conservation Art. 6(3) (CJEU)

- Cannot be excluded from a prior assessment assessment:
  - Certain categories of projects cannot be excluded from the assessment, if criteria cannot ensure that the excluded projects will not damage the sites - conclusive scientific evidence is mandatory (feasible?)
    • Case Comm. vs. Germany (C-98/03)
  - Member States cannot systematically exempt works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site
  - Member States cannot systematically exempt works and development programmes and projects which are subject to a declaratory scheme from the procedure for assessing their implications for the site
    • Case Comm. vs. France (C-241/08); Case Comm. vs. Belgium (C-538/09)
Conservation Art. 6(3) (CJEU)

- Single project and ongoing uses?
  - The application of fertilisers on the surface of land or below its surface, authorised under national law before the entry into force of the Habitats Directive, may be regarded as one and the same project for the purposes of that provision, exempted from a new authorisation procedure, in so far as it constitutes a single operation characterised by a common purpose, continuity and, inter alia, the location and the conditions in which it is carried out being the same. If a single project was authorised before the system of protection laid down by that provision became applicable to the site in question, the carrying out of that project may nevertheless fall within the scope of Article 6(2) of the Habitats Directive.

  - Case Coöperatie Mobilisation for the Environment UA (Case C-293/17)
Conservation Art. 6, §3 (CJEU)

- **When is an assessment necessary?**
  - An assessment is necessary if it cannot be excluded, on the basis of objective information, that the plan or project will have a significant effect on that site

- **Meaning of significant effect:**
  - Where a plan or project is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site - objective criteria

- **Application of the precautionary principle:**
  - The competent national authorities, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects

  Case Cockle fisheries (C-127/02)
Conservation Art. 6, §3 (CJEU)

- **Screening**
  - Likely to have a significant effect on a Natura 2000 site
  - Objective analysis in view of the site’s characteristics (site-specific conservation objectives)
  - Mitigation measures cannot be taken into account during the screening
    - Case Sweetman II (C-323/17) <> screening under EIA Directive (as amended)
  - No quantitative thresholds (eg. threshold for critical loads) unless sound scientific evidence
    - Case Coöperatie Mobilisation for the Environment UA (Case C-293/17)
Conservation Art. 6, §3 (CJEU)

- What is an appropriate assessment?
  - An appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site’s conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site’s conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

  - Case Cockle fisheries (C-127/02)
Room for an integral (not individual) assessment at regional level?

- Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an ‘appropriate assessment’ within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation’s objectives of protection. That is so, however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain.

- Case Coöperatie Mobilisation for the Environment UA (Case C-293/17)
Dutch programmatic approach - favouring adaptive management?
Conservation Art. 6, §3 (CJEU)

- Direct effect of Art. 6 (3):
  - Where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Art. 6(3), it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State
  - Case Cockle fisheries (C-127/02)
Conservation Art. 6, §3 (CJEU)

- **Relationship between Art. 6 (2) and (3):**
  - Authorisation of a plan or project granted in accordance with Art. 6(3) necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Art. 6(2).
  - However, it cannot be precluded that a plan or project granted in accordance with Art. 6 (3), subsequently proves likely to give rise to deterioration or disturbance. Art. 6(2) makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora.
  - Case Cockle fisheries (C-127/02)
Conservation art. 6, § 3 (CJEU)

- Meaning of ‘adverse effect on the integrity of the site’:
  - A plan or project will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance; the precautionary principle should be applied for the purposes of that appraisal
  - Case Sweetman (C-258/11)
Conservation art. 6, § 3 (CJEU)

- **Conservation objectives:**
  - Under Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is considered to be ‘favourable’ when, inter alia, its natural range and the areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.
  - In circumstances such as those at issue in the main proceedings, where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited.
  - Case Coöperatie Mobilisation for the Environment UA (Case C-293/17)
Conservation art. 6, § 3 (CJEU)

- Mitigation vs compensation (I) - creation of new habitat:
  - 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.

- Case Briels (C-521/12)
Conservation art. 6, § 3 (CJEU)

- **Mitigation vs compensation (II) - habitat restoration program for harbor expansion:**
  - Measures, contained in a plan or project not directly connected with or necessary to the management of a site of Community importance, providing, prior to the occurrence of adverse effects on a natural habitat type present thereon, for the future creation of an area of that type, but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on the integrity of that site, may not be taken into consideration in that assessment. Such measures can be categorised as ‘compensatory measures’, within the meaning of Article 6(4), only if the conditions laid down therein are satisfied.
  - Case Orleans (C-387/15)
Conservation art. 6, § 3 (CJEU)

- Mitigation vs compensation (III) - dynamic management for wind farms in Natura 2000:
  - It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires ‘dynamic’ management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development.
  - Case Grace and Sweetman (C-164/17)
**Conservation art. 6, § 3 (CJEU)**

- **Mitigation vs compensation (IV) - future reduction actions and restoration measures integrated in a programmatic and integral approach:**
  - The appropriate assessment of the implications of a plan or project for the sites concerned is **not to take into account the future benefits of such ‘measures’ if those benefits are uncertain**, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty.

  - Case Coöperatie Mobilisation for the Environment UA (Case C-293/17)
Conservation art. 6, § 3 (CJEU)

- Cumulative effects - death by a thousand cuts:
  - The failure to take into account of the cumulative effect of projects in practice leads to a situation where all projects of a certain type may escape the obligation to carry out an assessment, whereas, taken together, they are likely to have significant effects on the environment
  - Case Comm. v. Ireland (C-418/04)
Exception Art. 6(4): a plan/project, in spite of a negative effect, is allowed under the following conditions:

- No alternatives possible
- Only for imperative reasons of overriding public interest (including social and economic reasons)
  - For priority habitats or species: only for reasons relating to human health, public safety or the environment or on advice of Commission for other reasons
- Compensation is required
Conservation Art. 6 (4) (Habitats Directive)

- **Alternatives:**
  - Can include the zero-option
  - Cost of alternatives is not relevant (unless costs are disproportionate high) (cf. Grüne Liga Sachsen, see *supra*)
  - Can include mitigation measures

- **Compensation:**
  - Last resort!
  - Additional to normal practices of implementation of Directives
  - Ensure overall coherence of Natura 2000
  - Compensation must be operational when damage occurs; or overcompensation for interim losses
Conservation Art. 6 (4) (CJEU)

- By authorising the proposed extension of a golf course despite a negative assessment of its implications for the habitat of the corncrake in the Wörschacher Moos’ SPA, Austria has failed to fulfil its obligations under Art. 6 (3)-(4)
  - Case Comm. vs. Austria (corncrake) (C-209/02)
- Alternatives must be examined, even if they could present certain difficulties
  - Case Comm. vs. Portugal (Castro Verde) (C-239/04)
Conservation Art. 6 (4) (CJEU)

- By authorising the extension of a ski area, without complying with the provisions which allow a project to be carried out, in spite of a negative assessment of the implications and in the absence of alternative solutions, only for imperative reasons of overriding public interest and then only after adopting all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected, Italy failed to fulfil its obligations under Art. 6 (3)-(4)
  - Case Comm. vs. Italy (C-304/05)

- Creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest
  - Case Solvay (C-182/10)
Species protection (Habitats Directive)

- Art. 12 Habitats Directive: prohibition of deliberate capture or killing, deliberate disturbance, deterioration or destruction of breeding sites or resting places... of Annex IV animal species
- Art. 13 Habitats Directive: prohibition of deliberate picking, collecting, cutting, uprooting or destruction... of Annex IV plant species
- Art. 16 Habitats Directive: exceptions to prohibitions (prevention of damage, in interest of public health and safety...)

- Commission Guidance document on art. 12 and 16
Strict Protection of Animal species

Guidance on Habitats Directive Articles 12 and 16

Up until now, most of the attention regarding the implementation of the Habitats Directive has focused on the establishment of the Natura 2000 network. This “1st pillar” of the directive refers to the conservation of natural habitats and of the habitats of species. The Habitats Directive however comprises a “2nd pillar”, which is related to the protection of species. In particular, Articles 12 and 16 are aimed at the establishment and implementation of a strict protection regime for animal species listed in Annex IV(a) of the Habitats Directive within the whole territory of Member States.

A Working Group of Member States formed under the Habitats Committee, met eight times from June 2002 to February 2005 to discuss certain concepts and definitions used in Articles 12 and 16 which have caused implementation problems in member states. The groups’ final report dealing with “Species protection – Article 12 of the Habitats Directive” (500 KB) can be viewed on the Commission’s CIRCA platform.

Based on the work of the group, the Commission Services have elaborated a “Guidance document on the strict protection of animal species” (see hereunder). The document is intended to ensure a common understanding of the respective provisions among national and regional authorities, conservation bodies and other structures responsible for or involved in the implementation of the Habitats Directive. It should provide help for elaborating pragmatic and flexible ways of dealing with the provisions and making them effective and practical, while fully respecting the legal framework.

Open Guidance document:

“Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/ECC” (final version Feb 2007 [pdf], 600 KB).
Species protection (CJEU)

- Deliberate character - spatial implications (taken into account when issuing planning permits (?)):
  - The use of mopeds on the sand beach and the presence of pedalos and small boats in the sea area constitute the deliberate disturbance of the Caretta caretta turtle during its breeding period
    - Case Comm. vs. Greece (Caretta caretta) (C-103/00)
  - For the condition ‘deliberate’ action, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.
    - Case Comm. vs. Spain (snares) (C-221/04)
Species protection (CJEU)

- Protection of breeding or resting places:
  - By not limiting the prohibition laid down in Art.12(1)(d) to deliberate acts, which it has done in respect of acts referred to in Art.12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding grounds or resting places increased protection against acts causing their deterioration or destruction; given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Art. 12(1)(d) is not limited to deliberate acts
    - Case Comm. vs. Germany (C-98/03), Case Comm. vs. UK (C-6/04)
Species protection (CJEU)

- Protection measures:
  - By failing to take, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle Caretta caretta on Zakinthos so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, Greece has failed to fulfil its obligations
    - Case Comm. vs. Greece (Caretta caretta) (C-103/00)
  - The system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature
  - By not having taken sufficient protection measures for the Cyclades blunt-nosed viper, Greece has failed to fulfil its obligations
    - Case Comm. vs. Greece (Cyclades blunt-nosed viper) (C-518/04)
Species protection (CJEU)

- By failing to take all the requisite specific measures for the effective implementation of the system of strict protection for several species (including the absence of species action plans and an appropriate monitoring system), Ireland failed to fulfil its obligations
  - Case Comm. vs. Ireland (C-183/05)

- By failing to establish a programme of recovery and restoration measures to ensure strict protection of the European hamster, France has failed to fulfil its obligations under Article 12(1)(d)
  - Case Comm. vs. France (hamster) (C-383/09)

- By not having taken the requisite measures to establish and apply a system of strict protection for the Cypriot grass snake, Cyprus has failed to fulfil its obligations
  - Case Comm. vs. Cyprus (Cypriot grass snake) (C-340/10)
Species protection (CJEU)

- Exceptions:
  - Case Comm. vs. Finland (wolf hunt) (C-342/05)
    - By authorising wolf hunting on a preventive basis, without it being established that the hunting is such as to prevent serious damage within the meaning of Article 16(1)(b) of the Habitats Directive, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1)(b) of that directive.
    - To be continued (via Art. 16(1)(e) of the HD - ‘limited numbers’?)
ROLE OF NATIONAL COURTS
Role of national courts

- The national judge has a key role to play to ensure compliance with the Habitats and Birds Directives at the national level, in particular in the event of bad application.

- Particular attention should be paid to the way the Court has interpreted both the objectives and content of the Habitats and the Birds Directives.

- In case of unclarities, preliminary questions can be asked to the Court.
Role of national courts

- Important case law by CJEU on access for individuals and NGO’s to national courts (provided for in the Aarhus Convention)
- Slovakian Brown Bear Case -no direct effect but:
  - no standing in environmental procedure: in Slovakia NGOs are excluded from administrative proceedings leading up to the issuance of hunting derogations for protected species (e.g. brown bear)
  - no direct effect yet duty for Aarhus-friendly interpretation: the Slovakian environmental NGO could not rely directly on Art.9(3) of the Aarhus Convention to have access to the proceedings; in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Art.9(3) of the Aarhus Convention
    - Case Lesoochranárske zoskupenie VLK (C-240/09)
Role of national courts

▪ “Schutznorm” - obstacle for NGOs to pursue public interest litigation:
  - **strict standing in public interest litigation under national law:** Under German law environmental NGOs cannot request a review of an administrative action on the basis that it violates a provision protecting the environment as such; they may only act where they can point to a substantive individual right that is, or is at risk of, being impaired
  - **broader access to justice:** an environmental NGO can derive from Art.10a (3), last sentence of Directive 85/337 a right to rely before the courts, in an action contesting a decision authorising projects on the basis of rules of national law flowing from Art. 6 of the Habitats Directive, even where national procedural law does not permit this
    • Case Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV (C-115/09)
Natural landscapes and habitats are a vital part of our planet's biodiversity, and efforts to protect and conserve them are essential for the health of our environment. This image showcases the importance of natural spaces, highlighting the need for conservation initiatives like *Natura 2000* in Germany.}

[Natura 2000](https://www.bund.de) is a network of natural areas that cover 45% of the land area of the European Union. The initiative is designed to protect natural habitats and species across Europe, promoting biodiversity and sustainability. Local organizations like the *BUND* (Bund für Umwelt und Naturschutz Deutschland), also known as Friends of the Earth Germany, play a crucial role in supporting these efforts. The image on the right illustrates the beauty and significance of natural landscapes, emphasizing the importance of preserving these areas for future generations.
Role of national courts

- “Effective judicial protection” → **substantive** legality review:
  - **broad access to justice**: the rights on which such a non-governmental organisation must be able to rely in an action covered by Article 9(2) of the Aarhus Convention include the rules of national law flowing from Article 6 of the Habitats Directive.
  - **substantive review**: an environmental NGO must be able to challenge, in such an action, not only a decision not to carry out an appropriate assessment of the implications for the site of the plan or project in question but also, as the case may be, the assessment carried out inasmuch as it is alleged to be vitiated by defects.
  - **adequate and effective remedies**: Article 9(4) of the Aarhus Convention requires the procedures referred to in Article 9(2) thereof to provide ‘adequate and effective’ remedies.
    - **Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín** - (C-234/15)
Role of national courts

France rebuked for not protecting Pyrenees bears

Brown bears were deliberately introduced to the region over 20 years ago, and have been controversial ever since.

Judges order state to pay €8,000 for “not doing enough”

A court in Toulouse has ruled that France has failed to protect brown bears in the Pyrenees and should pay €8,000 to two pro-bear animal welfare associations.

Bear protection groups Pays de L’Ours-ADET and Feras had complained of “the State’s deficiency in its obligation to maintain the brown bear population in a favourable state of conservation”; an obligation that was first required in a directive published in 1992.

The case was first brought in 2015, with the associations’ lawyer, Alice Terrasse, saying their aim had been to “alert the government to the need to reintroduce the bears into the area”.

Rechter: Bleker moet korenwolf beschermen

DEN HAAG - De Nederlandse Staat is verplicht de ecologische verbindingszones voor de korenwolf, die vanwege de bezuinigingen zijn geschrapt, in ere te herstellen.
Role of national courts

- “Effective judicial protection’ → swift and accessible judicial procedures:
  - In those circumstances, the interpretation of national procedural law, contested by LZ, to the effect that an action against an administrative decision refusing the status of party to an administrative procedure does not necessarily have to be examined during the course of that procedure and is automatically dismissed as soon as the permit applied for is granted, does not enable an organisation such as LZ to be ensured effective judicial protection of the various specific rights inherent in the right of public participation, within the meaning of Article 6 of the Aarhus Convention, as specified in paragraph 46 of the present judgment.
  - Case Lesoochranárske zoskupenie VLK (C-243/15)
References


References

References

- Schoukens, H., “Nitrogen deposition, habitat restoration and the EU Habitats Directive: moving beyond the deadlock with the Dutch programmatic nitrogen approach?”, Biological Conservation 2017, 484-492