JUSTICE AND ENVIRONMENT
European Network of Environmental Law Organizations

Biodiversity Loss Permitted?

Redesignation and Declassification of Natura 2000 Sites

Legal Analysis

Justice and Environment 2011

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Natura 2000 is the pool of nature conservation areas with Community interest, based on two directives: the Birds Directive – which has been renewed recently – and the Habitat Directive. There is a great difference between these two directives related to the method and procedure of designating the areas as sites of Community interest:

- Under the Birds Directive, the fact that protected species are living in a given habitat area is enough to receive the Special Protection Area (SPA) status (see below). This is based upon scientific evidence provided by expert bodies, such as the list of habitats of protected species, provided by ORNIS and other organizations. Thus, there is no room for discretion.

- Under the Habitat Directive, designation requires various conditions that are far from being obvious, i.e. can be interpreted in a number of ways, thus there is a certain margin of discretion. The final decision is in the hands of the European Commission (hereinafter "Commission").

1. Birds Directive

Council Directive 79/409/EEC on the conservation of wild birds was the first of genuine Community nature conservation legislation. Now it is replaced by Council Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (hereinafter "Birds Directive"). The preamble emphasizes the reason for legal regulation, among others:

> (4) The species of wild birds naturally occurring in the European territory of the Member States are mainly migratory species. Such species constitute a common heritage and effective bird protection is typically a trans-frontier environment problem entailing common responsibilities.

Like in the first directive, the major requirements are set in Article 3:

Article 3

> 1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.
> 2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:
> (a) creation of protected areas;
> (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;

(c) re-establishment of destroyed biotopes;
(d) creation of biotopes.
...

Furthermore, the Article 4 requires Member States (MSs) to establish SPAs for bird conservation based on science, including specific considerations for species listed in Annex I:

Article 4

1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies." …

The MSs shall designate Special Protection Areas (SPAs), on the basis of scientific reasons only. Later, when the Natura 2000 network has been established, these SPAs became one of the pillars of this network.

It is also worth mentioning that criteria to establish an SPA may be broader, on the basis of Article 4, if the conditions mentioned there are met (e.g., "Trends and variations in population levels") or in case of regularly occurring migratory species. This is different from habitat protection as in Article 4 of the Habitat Directive, where there is a time limit to transmit a list – three years after notification of the Directive for MSs, and six years for the Commission – at which point the list is completed, without any further additions since the date of notification of the Directive.

Articles 5-8 cover the necessary protection and conservation measures that MSs shall take, such as measures that restrict or prohibit hunting, capture or killing.

Article 9 also allows an MS the possibility to derogate from the general rules:

Article 9

1. Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution, for the following reasons:
(a) - in the interests of public health and safety,
- in the interests of air safety,
- to prevent serious damage to crops, livestock, forests, fisheries and water,
- for the protection of flora and fauna;
(b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;
(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.'

The derogations must be specific and shall be reported to the Commission.

2. Habitat Directive

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora is also known as the "Habitat Directive." The preamble establishes the foundational concepts of the Habitat Directive, including the following:

> "Whereas, in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;
> Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favorable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable;
>
> Whereas it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued…"

Thus the Birds Directive uses the special areas of conservation (SAC) as the main tool to conserve natural habitats. Furthermore, to achieve SAC designation, a certain process must be followed. Again, the preamble summarizes clearly:

> "Whereas sites eligible for designation as special areas of conservation are proposed by the Member States but whereas a procedure must nevertheless be laid down to allow the designation in exceptional cases of a site which has not been proposed by a Member State but which the Community considers essential for either the maintenance or the survival of a priority natural habitat type or a priority species…"

This means that the MSs propose the areas to be designated as a SAC, but the Commission makes the final decision on designation. Summing up the whole in a definition:

Article 1

> l. *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favorable conservation status, of the natural habitats and/or the populations of the species for which the site is designated…

Article 3

> 1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites

> hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favorable conservation status in their natural range.
>
> The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC."

The second part of the first paragraph of the above Article 3 embodies the SPAs, classified under the Birds Directive, thus integrating them into the Natura 2000 network.

The procedure of proposing a site as SAC and designating it as a SAC is specified in Article 4, excerpts of which are below:

Article 4

> 1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host….
> The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site….
>
> 2. On the basis of the criteria set out in Annex III (Stage 2) ... the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species….
> The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21….
>
> 4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most….

It is also possible that the first step comes from the Commission according to Article 5 of the Directive, under which the Commission may itself propose a site as a SAC if a MS excluded the site from their national list but scientific information indicates that the site should be included.

Of course, designating an area is not enough, so there are also several requirements related to the maintenance and management of the areas, mostly covered by Article 6 and by the relevant Commission Guidance. For the text of the documents, see the following documents (available at http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm):

- Guidance document: Managing Natura 2000 sites (2000)
- Guidance document on the Assessment of Plans and Projects significantly affecting Natura 2000 sites (November 2001)
- Guidance document on Article 6(4) (January 2007)

From our point of interest, the most important part of Article 6 is paragraph 4:

Article 6

> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
>
> Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

Some opinions of the Commission have addressed Article 6. The different opinions of the Commission are all published in the website. The most recent case was about an Audi investment in Western Hungary (European Commission, Brussels, 25 January 2011 – C(2011) 351 on the request of Hungary pursuant to Art. 6(4) Sub Par. 2 of Council Directive 92/43 ... concerning the modification of the development plan of the *Győr* town). According to the Commission, the Article 6(4) requirements are fulfilled, due to two reasons:

- the alternative solutions were not satisfactory to the authorities because of a lack of infrastructure and the vicinity of housing areas, among other reasons; and
- there are imperative reasons of overriding public interest because Audi's investment provides employment in the region (approximately 10.000 new jobs)

Knowing the ECJ practice, this decision by the Commission does not seem to be absolutely in line with the judgment of the ECJ, as the Court does not want economic concerns to override conservation efforts.
Under Article 9, there is also a possibility for the review of the conservation status, including the potential for declassification:

Article 9

> The Commission, acting in accordance with the procedure laid down in Article 21, shall periodically review the contribution of Natura 2000 towards achievement of the objectives set out in Article 2 and 3. In this context, a special area of conservation may be considered for declassification where this

is warranted by natural developments noted as a result of the surveillance provided for in Article 11.

According to this review procedure, if the Commission may decide finally on the conservation status from a European context, this may also mean the reverse, thus to "free" the given sites from their conservation status.

In exploring declassification, first one has to look at the general principles and requirements set out in Articles 2 and 3:

- the Community interest shall always be there in order to reach the favorable conservation status;
- it is essential for 'a coherent European ecological network of special areas of conservation';
- otherwise there are not any more direct references to the essence of the case.

However, Article 2 and 3 do not provide a very useful link to declassification. Neither does Article 11, which obliges MSs to undertake surveillance of the conservation status of the natural habitats and species, but does not provide details on how to do so or the effect of the surveillance.

Finally, Article 21 is also not very clear on how to declassify sites, actually referring the procedure back to the Commission again, thus there is a relatively large margin of discretion. Article 21 refers the procedure to Council Decision 1999/468/EC of 28 June 1999, which lays out the procedures for the exercise of implementing powers conferred on the Commission. Specifically, Article 5 of the Council Decision, discusses the regulatory procedure, setting up a regulatory committee composed of the representatives of the MSs and chaired by the representative of the Commission, and also provides some procedural details. Article 7 of the Council Decision discusses the rules of procedure of such committees.

Consequently, redesignation or declassification of SACs under the Habitat Directive can be based upon several consecutive elements with some margin of discretion, and thus declassification may overall be considered a discretionary decision. On the other hand, decisions of redesignation or declassification of SPAs under the Birds Directive, which depends on the presence of birds that are listed in the Annexes of the Birds Directive may not have discretionary elements. There is discretion only on what kind of measures are to be taken.

3. Natura 2000 judgments (examples)

A basic obligations related to Natura 2000 territories is to, in case of plans and programmes affecting territories considered as deserving protection, consider their examination to be important in order to prevent significant environmental impact that may result in endangering the designation of the territory.

In the *judgment C-67/99 – Commission vs. Ireland*, the Court underlines the importance of providing a full list of possible Natura 2000 sites to the Commission in order for the

Commission to make an informed decision. The European Court of Justice (ECJ) makes the following reasoning:

> "It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive (Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 22)" (paragraph 34).

The C-57/89 - EC Commission vs. Germany is a landmark decision of the ECJ for the Birds Directive. According to the facts, Germany declared the *Ostfriesische Wattenmeer*, situated in the *Land Niedersachsen* at the North Sea, to be a wetland of international importance under the Ramsar Convention on international wetlands. In 1983, Germany indicated to the Commission that the *Wattenmeer* was a protected area according to Article 4 of Directive 79/409 (the predecessor to the modern Birds Directive). In 1985 Germany declared the *Wattenmeer* to be a national park under German law and informed the Commission of this decision in 1988, within the context of discussions on the designation of birds' habitat under Directive 79/409.

In the areas of *Rysumer Nacken*, Germany disposed of dredged material from the Ems, thus increasing the height of the area. As for the *Leybucht*, a bay of some 2,800 hectares within the *Wattenmeer*, Germany decided in 1985 to increase the existing dike in the area.

The Commission objected to the work in the *Rysumer Nacken*, because it was of the opinion that the dredged sludge would lead to the disappearance of certain bird habitat. The first letter of notice was sent in 1987, and not receiving an answer, a reasoned opinion was sent in 1988. The Commission accepted that the measures of coastal protection in *Leybucht* could be considered necessary, but they had to be limited to the strict minimum, and the German measures went beyond that minimum.

According to the German opinion, even from the first information sent to the Commission, it was clear that the *Rysumer Nacken* was not designated as a SPA. With regard to the *Leybucht*, the Commission claims that the building of the dike would damage the habitat in a SPA. Therefore the building of the dikes should be limited not to exceed the minimum necessary deterioration of the SPA in question. Again Germany stated that the new line of the dike and also the areas connected to the dike were excluded from the SPA.

The court had to interpret Article 4 of the Directive in order to come to a decision. It stated that although MSs have a certain discretion with regard to the choice of the territories which are most suitable for special protection areas pursuant Article 4(1) of the Directive, they do not have the same discretion in modifying or reducing the extent of the areas, since they have themselves acknowledged in their declarations that those areas contain the most suitable environment for the species listed in Annex I of the Directive.

The interpretation of Article 4(4) may be underlined by the ninth recital of the preamble, which emphasizes the special importance which the directive attaches to special conservation measures concerning the habitats of the birds listed in Annex I in order to ensure the survival and reproduction in their area of distribution. It follows that the power of MSs to reduce the extent of a special protection area can be justified only on exceptional grounds. Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the Directive.

With regard to the reason put forward in this case, it must be stated that the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dike works and the strengthening of coastal structures as long as those measures are confined to a strict minimum and involve only the smallest necessary reduction of the SPA. Also, among other benefits, the dike works have specific positive consequences for the habitat of birds, as they close two navigation channels which cross the *Leybucht*, and as a result these areas will be left in absolute peace. Finally, the ECJ stated that the construction work itself does not exceed the disturbance limit.

Based on these reasons, the ECJ dismissed the application of the Commission.

This judgment is a nice set of decisions, balancing the different interests, giving regard to the positive and negative effects at the same time. It is also a good example of how far the ECJ goes in its careful examination of individual cases related to Natura 2000.

Some details are clarified in *Case C-44/95 - 'Lappel Bank,'* which is a case about the margin of discretion of the Member States. The case is a preliminary ruling case in a legal dispute between Regina v. Secretary of State for the Environment ex parte Royal Society for the Protection of Birds. The following excerpts shows that in designating SPAs and their boundaries under the Birds Directive, in contrast to the Habitats Directive, overwhelming economic interests cannot outweigh ecological interests:

> "14. Accordingly, taking the view that the need not to inhibit the viability of the port and the significant contribution that expansion into the area of *Lappel Bank* would make to the local and national economy outweighed its nature conservation value, the Secretary of State decided to exclude that area from the Medway SPA….
>
> 25 Consequently, having regard to the aim of special protection pursued by Article 4 and the fact that, according to settled case-law (see in particular Case C-435/92 *APAS v Préfets de Maine-et-Loire and de la Loire Atlantique* [1994] ECR I-67, paragraph 20), Article 2 does not constitute an autonomous derogation from the general system of protection established by the directive, it must be held (see paragraphs 17 and 18 of *Santońa Marshes*) ° that the ecological requirements laid down by the former provision do not have to be balanced against the interests listed in the latter, in particular economic requirements....
>
> 31 Accordingly, without its being necessary to rule on the possible relevance of the grounds corresponding to a superior general interest for the purpose of

classifying an SPA, the answer to the first part of the second question must be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive…..

42 The answer to the second part of the second question must therefore be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive."

In *C-418/04 case - Commission v Ireland* – several details about the obligation to classify areas as SPAs under the Birds Directive are discussed, from among which we highlight only some basis points:

"The first complaint: inadequate number and size of areas classified as SPAs, contrary to Article 4(1) and (2) of the Birds Directive

34 The Commission claims that Ireland has failed, since 1981, to classify, in accordance with Article 4(1) and (2) of the Birds Directive, all the most suitable areas in number and size for the conservation of the species referred to in Annex I as well as regularly occurring migratory species not listed in that annex. There are two aspects to the first complaint. The Commission states, firstly, that there has been a failure to make any classification in respect of certain sites and, secondly, that there has been a failure to make a complete classification of other sites….

36 The Court notes, as a preliminary point, that, according to its settled case-law, Article 4(1) and (2) of the Birds Directive requires the Member States to classify as SPAs the territories meeting the ornithological criteria specified by those provisions (Case C-378/01 *Commission* v *Italy* [2003] ECR I-2857, paragraph 14 and case-law cited).

37 Secondly, Member States are obliged to classify as SPAs all the sites which, in accordance with the ornithological criteria, appear to be the most suitable for conservation of the species in question (Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraph 62).

38 Thirdly, the obligation imposed on Member States to classify sites as SPAs cannot be avoided by the adoption of other special conservation measures (see, to that effect, *Commission* v *Netherlands*, paragraph 55).

39 Fourthly and lastly, although Member States do have a certain margin of discretion with regard to the choice of SPAs, the classification of those areas is nevertheless subject exclusively to the ornithological criteria determined by the

Birds Directive (see, to that effect, Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 26). The economic requirements mentioned in Article 2 of that directive may therefore not be taken into account when selecting an SPA and defining its boundaries (*Commission* v *Netherlands*, paragraph 59 and case-law cited).

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...

67 It follows from all the foregoing that, in the absence of scientific studies capable of rebutting the results of IBA 2000, that inventory is the most up-to-date and accurate reference for identifying the most suitable sites in number and in size for the conservation of the species listed in Annex I and for the regularly occurring migratory species not listed in that annex….

74 According to settled case-law, the question whether a Member State has failed to fulfill its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, inter alia, Case C-282/02 *Commission* v *Ireland* [2005] ECR I-4653, paragraph 40)….

75 In the present case, it is clear from the indications given as to the abovementioned grounds for failure to fulfill obligations that Ireland does not dispute the allegation that it had not classified 42 of the 140 sites identified in IBA 2000 as SPAs within the period laid down in the additional reasoned opinion notified on 11 July 2003….

1. The Cross Lough area

a) Arguments of the parties

79 The Commission has referred to the Cross Lough area for two reasons. Firstly, Ireland has specifically challenged the need to classify that area as an SPA, even though it was, up to quite recently, an important breeding ground for the sandwich tern (*Sterna sandvicensis*). Secondly, the failure to classify the area in a timely manner was likely to have a negative impact on the protection of the species….

..

124 The Commission argues that Ireland has failed to fulfill its obligation under Article 4(1) and (2) of the Birds Directive because it classified certain sites as SPAs only partially. In its view, the SPA boundaries were in many cases drawn so as to exclude equivalent adjacent areas of ornithological interest as identified in IBA 2000. These criticisms cover a total of 37 sites….

148 In the light of all the foregoing considerations, the Court finds that the first complaint is well-founded, except for the point relating to the classification of SPAs to ensure conservation of the Greenland white-fronted goose, a species

referred to in Annex I, and protection of the lapwing, the redshank, the snipe and the curlew, regularly occurring migratory species not listed in Annex I."

Thus the ECJ concluded that Ireland violated the Birds Directive by failing to classify suitable areas as SPAs for the conservation of Annex I species and regularly occurring migratory species not listed in Annex I. This decision also made clear that economic considerations should not influence on the selection of SPAs and the corresponding boundaries. Overall, this decision reaffirms that unlike the Habitat Directive, under which designation of SACs allow for a large amount of discretion, SPAs need to be designated under a purely scientific basis. This underlying premise is also true for redesignation and declassification in that, for example, species should be redesignated or declassified under the Birds Directive on a purely scientific basis – for example, if an Annex I bird species is no longer present in a certain area.

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The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.