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Biodiversity Loss Permitted?

Redesignation and Declassification of Natura 2000 Sites

Position Paper

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The Natura 2000 is a pool of nature conservation areas with Community. These conservation areas are an asset for the EU, EU Member States, and the European public – based on the concept of common heritage and also reflecting the importance attached to the conservation of biodiversity in Europe. However, conditions and procedures for declassification or redesignation of Natura 2000 sites are unclear. These conditions and procedures must be clear and easily accessible in order to ensure sufficient protection for conservation efforts under Natura 2000.

Natura 2000 conservation areas are based on two directives: the Birds Directive and the Habitat Directive. One major difference between these two directives is related to the method and procedure of designating 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 status. This is based upon scientific evidence provided by expert bodies, such as a list of habitats of protected species. Thus, there is no room for discretion. The power of designation belongs to the Member States.
- Under the Habitat Directive, there are various conditions that are not obvious, i.e. can be interpreted in a number of ways, thus there is a certain margin of discretion. The final decision, based on the proposal of Member State, is in the hands of the European Commission (hereinafter "Commission").

There are several judgments of the European Court of Justice (ECJ) related to the Natura 2000 network, mostly in connection with the initial designation and the management of such sites, as for example the assessment and authorization of a project or plan having an impact on a particular area. These judgments demonstrate that the ECJ is sensitive to the interests of nature conservation, which the ECJ considers to have preference over economic and other interests. However, there are no cases related to de-classification or re-designation of conservation areas, as this is relatively unprecedented.

While the ECJ has yet to make a judgment on declassification or redesignation of conservation areas, the text of the two Natura 2000 directives provides some insight. According to Article 3 of the Birds Directive (Directive 2009/147/EC), 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 by creating protected areas, among other actions. Article 4 requires Member States to classify in particular the most suitable territories in number and size as Special Protection Areas (SPAs) for the conservation of these species. Member States are responsible to ensure that the designation of SPAs is based only on scientific reasons.

While there are no specific provisions related to the declassification or redesignation of areas, some conclusions may still be drawn. Article 4 mentions that "Trends and variations in

population levels shall be taken into account as a background for evaluations." Consequently, if there is no scientific reason to protect the area – i.e. the area is no longer habitat for birds listed in Annex I of the Birds Directive – then Member States should not keep the protection status. As all the measures shall be reported to the Commission, there is a chance to review such changes in protection status. Still, there is no specific procedure or measure which addresses declassification or redesignation of areas.

In case of the Habitat Directive (Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora), the idea of creating a coherent European ecological network is the main reason behind the norm. This directive uses the designation of special areas of conservation (SAC). While the process of SAC designation begins with a proposal from a Member State, or else from the Commission in exceptional cases, the Commission makes the final decision on whether to grant the designation. The designation has several conditions such as being applied for maintenance or restoration of natural habitats. This is different from the Birds Directive, which protects areas mostly based upon the presence of birds listed in the Annexes. The Habitat Directive also assimilates the special protection areas classified under the Birds Directive in the Natura 2000 network.

There is also a possibility for the review of the conservation status on the basis of Article 9 of the Habitat Directive, which requires the Commission to periodically review the contribution of Natura 2000 towards the achievement of the Directive's objectives. It is possible for the Commission to redesignate or declassify if there is no longer any Community interest to reach the favorable conservation status, i.e. there is a change in understanding what is essential for "a coherent European ecological network of special areas of conservation." The procedure of such decision is not very well formulated, but includes the procedures outlined in 1999/468/EC: Council Decision of 28 June 1999, which implements the powers conferred on the Commission.

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

While there is no practical information related to declassifying SACs under the Habitat Directive, under Article 6 par. 4, the Commission to allow plans or projects to derogate from the general protections of SACs based on both a lack of other alternatives and an overriding public interest. Such opinions of the Commission are available on their website. The most recent case was from Hungary (Audi investment in Western Hungary (European Commission, Brussels, 25 January 2011 – C(2011) 351)). In this case, according to the Commission, the Article 6 par. 4 requirements are fulfilled, due to two reasons:

- the alternative solutions are not satisfactory 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. Thus, it is very likely that there is a discrepancy between the general understanding of overriding public interest and the ECJ practice, which may have a major impact on the possible redesignation and declassification cases, the conditions and procedures of which are not formulated in a satisfactory and transparent way.

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