

Biodiversity Loss Permitted?

Redesignation and Declassification of
Natura 2000 Sites

Legal Analysis Summary

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Natura 2000 is the pool of nature conservation areas with Community interest, 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 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 status (see below). 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.
- 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 (MS), is in the hands of the European Commission (hereinafter “Commission”).

With these differences in mind, the potential for redesignation and declassification of Natura 2000 Sites must be examined under both the Birds Directive and the Habitat Directive. While redesignating or declassifying Natura 2000 sites is largely unprecedented, there is potential for such actions in the future, and so the potential legal basis for doing so must be prudently examined.

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 (“Birds Directive”), but the essence has not been changed. The preamble emphasizes the reasons for legal regulation of birds, including that “[s]uch species constitute a common heritage and effective bird protection is typically a trans-frontier environment problem entailing common responsibilities” (Preamble, paragraph 4).

The major requirements are set in Article 3, which requires MSs to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds. Article 3 elaborates that 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.

Article 4 requires MSs to classify in particular the most suitable territories in number and size as Special Protection Areas (SPAs) for the conservation of these species. MSs are responsible to ensure that the designation of such SPAs is based only on scientific reasons.

Articles 5 to 8 cover the necessary protection and conservation measures that MSs shall take, such as measures that restrict or prohibit hunting, capture or killing. As the Birds Directive has three annexes with different list of species, such measures may apply differently depending on which annex a particular species is listed in.

Article 9 allows a MS the possibility to derogate from the general rules of keeping, managing and protecting the SPAs and the species therein (e.g. by allowing limited hunting) based on one of 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 always be specific (specifying, for example, the species subject to the derogation and the methods of capture or killing) and must be reported to the Commission, which reviews the derogation for compatibility with the Birds Directive.

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

A few cases from the European Court of Justice (ECJ) may shed further light on declassification and redesignation under the Birds Directive. The *C-57/89 (EC Commission vs. Germany)* is a landmark decision of the ECJ for the Birds Directive. In the area subject to dispute – the Ostfriesische Wattenmeer, a wetland of international importance under the Ramsar Convention – Germany designated a protected area. Some years later in the areas of Rysumer Nacken, Germany disposed of dredged material from the Ems, and in Leybucht, a bay of some 2800 hectares within the Wattenmeer, Germany decided in 1985 to increase the existing dike in the area. Both actions allegedly had a harmful effect on the habitat protected under the Birds Directive, but Germany claimed they were necessary to mitigate flooding and protect coastal structures. The Commission initiated an infringement case

against Germany.

The Court stated that although MS have a certain discretion with regard to the choice of the territories which are most suitable for special protection areas, they do not have the same discretion in modifying or reducing the extent of the areas, since they have themselves acknowledged in their declarations that those areas contain the most suitable environment for the species listed in annex I of the Birds Directive. It follows that the power of MS to reduce the extent of a special protection area can be justified only on exceptional grounds. Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the Directive. In this case, the Court held that the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dike works and the strengthening of coastal structures as long as those measures are confined to a strict minimum and involve only the smallest necessary reduction of the special protection area.

Some details are clarified in *Case C-44/95 ('Lappel Bank')* about the margin of discretion of the MS to modify or reduced habitat protected under the Birds Directive, which the Court rules is very narrow. This is a preliminary ruling case, in a legal dispute between Regina v Secretary of State for the Environment ex parte Royal Society for the Protection of Birds. The essence of the ruling is that "...a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive" (paragraph 42).

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:

- "... 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;
- ... it is necessary to designate special areas of conservation in order to create a coherent European ecological network ...;
- ... it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued ..."

Thus the Habitat Directive uses the designation of special areas of conservation (SAC) as the main tool to conserve natural habitats. Furthermore, to achieve SAC designation, a certain process must be followed. For example, the procedure must begin with the proposal of a MS, but the Commission makes the final decision. As Article 1 clearly states: (I) *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."

The Habitat Directive could set up the Natura 2000 network as a coherent European ecological network of SACs in order to enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored to a favorable conservation status. The Habitat Directive also assimilates the special protection areas classified under the Birds Directive into the Natura 2000 network.

On the basis of the criteria set out in the Directive and relevant scientific information, creation of a SAC goes through the following process. Each MS proposes a list of sites, which is transmitted to the Commission. In exceptional cases, the proposal may also come from the Commission. The Commission subsequently establishes a draft list of sites of Community importance and later adopts this list. Once a site of Community importance has been adopted in accordance with the above procedure, the MS concerned shall designate that site as a SAC.

Several ECJ disputes elaborate on the process of designating SACs. In *judgment C-67/99 (Commission vs. Ireland)* the ECJ underlines the importance of providing a full list of possible Natura 2000 sites by the MS to the Commission in order to have a satisfactory decision.

The MS, when setting up a list of proposed sites, should also take care for the necessary protection measures. This is the conclusion of *Case C-244/05 (preliminary ruling from the Bayerischer Verwaltungsgerichtshof in the proceedings Bund Naturschutz in Bayern e.V. and others vs. Freistaat Bayern)*, in which the ECJ concluded the following:

“Consequently ... 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” (paragraph 51).

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. Among others, any project and plan shall only be carried out on such an area if there is no significant negative effect or if there is no alternative solution, or for imperative reasons of overriding public interest, including those of a social or economic nature. In the latter case, the MS shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. Note that for priority natural habitats, the conditions are even stricter.

In *Case C-209/02 (Commission vs. Austria)* the conditions of authorizing a project in Natura 2000 areas were not met. The ECJ concluded the following:

"... by authorizing the proposed extension of the golf course in the district of *Wörschach* in the Province of Styria despite a negative assessment of its implications for the habitat of the corncrake (*crex crex*) in the '*Wörschacher Moos*' SPA situated in that district and classified as provided for in Article 4 of the Birds Directive, the Republic of Austria has failed to fulfill its obligations under Article 6(3) and (4), in conjunction with Article 7, of the Habitats Directive” (paragraph 29).

There is also a possibility to review the conservation status on the basis of Article 9, which requires the Commission to periodically review the contribution of Natura 2000 towards the achievement of the Habitat Directive's objectives and may decide on declassification. 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 consecutive elements with some margin of discretion present, 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 may not have discretionary elements. There is discretion only on what kind of measures are to be taken.

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