

IV.2 Nature

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36

IV.2 Nature	36
IV.2.1 Introduction	36
IV.2.2 Birds Directive and Habitats Directive	37
IV.2.2.1 Introduction	37
IV.2.2.2 Objective, scope and tools of the Birds and the Habitats Directives	38
IV.2.2.3 Strengths and weaknesses	39
IV.2.3 Natura 2000.....	40
IV.2.4 Implementation deficits and link with other environmental legislation	41
IV.2.5 Way forward and the role of ECOs	43

IV.2.1 Introduction

Biodiversity is the most integrated indicator used to describe the well-being and functioning of eco-systems and thus presents the ultimate test of environmental sustainability. Surprisingly perhaps, little background information is available for this indicator and only a few proxies, like number of birds species or nature reserves, have been developed, leaving us with an immense knowledge gap and uncertainty about the most effective design of environmental policies. Precaution must therefore rule most of the decision-making. Conservation of pristine or stable semi-natural habitats is of crucial importance, as it allows the protection of highly valued – albeit sometimes little understood - ecosystems. Nature conservation has a long history in Europe and receives great public attention.

Pressure on habitats and subsequent loss of biodiversity as a result of population growth and industrialisation in Europe is intense and in the mid 1970s Europe started to put in place strategies to protect biodiversity – but with limited success. The low quality and lack of ambition with which Member States were implementing and enforcing EU laws became evident almost immediately. No other policy has been subject to as many complaints by citizens as the EU’s nature protection laws. The deficit in integrating nature protection into other policies and providing coherent policies is also significant.

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Europe's precious biodiversity continues to be under pressure on several fronts - including invasive species, wasteful land-use, poor planning and intensive farming practices. In addition there is now growing evidence of the serious effects of climate change on species distribution and survival.

The ambitious target to halt biodiversity decline by 2010

37

In 2001, at the EU Spring Summit in Gothenburg, the EU Heads of State and Government committed themselves to halting the decline in biodiversity in the EU by 2010, as part of the EU Sustainable Development Strategy. The target is also laid down in the legally binding Decision on the Sixth Environmental Action Programme (6th EAP) (*EC 2002*). The 6th EAP highlights nature and biodiversity as a top priority.

IV.2.2 Birds Directive and Habitats Directive

IV.2.2.1 INTRODUCTION

EU nature conservation policy is based on two main pieces of legislation – the 1979 Birds Directive (*EC 1979*) and the 1992 Habitats Directive (*EC 1992*).

The Habitats Directive focuses on the protection of wild species and their habitats. Each Member State is required to identify sites of European importance, so called Special Areas of Conservation (SACs), and to put in place management plans where necessary. Under the earlier Birds Directive Member States are required to classify so-called Special Protection Areas (SPAs), which are similar to SACs and may overlap at times. The sites identified under the two Directives make up Natura 2000, the EU's network of protected areas. This effectively is the cornerstone of EU policy for nature conservation.

The Birds Directive developed largely out of public concern about the annual killing of migratory birds, which was widespread in southern Europe, as well as a result of pressure from citizens' organisations and the European Parliament. As early as 1971, suggestions were mooted for Community legislation on bird conservation. Research undertaken by the European Commission which indicated a reduction in the number and population of migrating bird species due to hunting, agricultural intensification and the destruction of habitats resulted in the Commission proposing a directive in 1976. The initiative was controversial and many Member States were reluctant about the Community entering into this sphere raising questions about the legal basis of Community action on the grounds of remoteness from the functioning of the common market. The Directive was finally adopted in 1979, which is remarkable considering that it was eight years before the Single European Act (1987) gave the Community a clear legal basis for measures concerned with nature conservation¹⁴.

¹⁴ The Commission had argued that Europe's wild birds were part of the common heritage of the Community, that an effective protection demanded transboundary cooperation and that conserving wild birds was necessary to 'attain, within the operation of the common market, the Community's objectives regarding the improvement of living conditions, a harmonious development of economic activities throughout the Community, and a continuous and balanced expansion.'

The Second Action Programme on the Environment (1977) already hinted at a more ambitious proposal for the protection of habitats. The Commission mentioned in the programme that it would submit appropriate proposals for Community action, if necessary, to ensure that the Bern Convention, that was being developed by the Council of Europe at the time, could be satisfactorily applied. Many of the provisions of the Bern Convention on the Conservation of European Wildlife and Natural Habitats, signed in September 1979, served as a model for the Habitats Directive, which was agreed 13 years later. However, the 1992 Habitats Directive goes one step further by aiming to protect selected habitats for their own sake rather than because they were home to valuable species. The directive was proposed by the Commission in 1988 just after the Single European Act had extended the Community's competence to the environmental sphere. The directive was to a large extent a result of combined pressure from the European Parliament and the requirements of international law.

IV.2.2.2 OBJECTIVE, SCOPE AND TOOLS OF THE BIRDS AND THE HABITATS DIRECTIVES

The Birds Directive obliges Member States to preserve, maintain or re-establish a sufficient diversity and area of habitats for birds in order to maintain healthy populations of all species. This is to be done primarily by creating protected areas, managing habitats both inside and outside protected areas, re-establishing destroyed biotopes and creating new ones. Member States are to lay down a general system of protection for all species of wild birds, although exceptions are made for hunting and for certain other reasons.

Annex I of the directive lists particularly vulnerable species which are to be subject to special conservation measures concerning their habitat in order to ensure their survival and reproduction. Member States are to classify the most suitable territories (both land and sea) as Special Protection Areas (SPAs) for the conservation of these species and to prohibit the capture and hunting of these birds. Annex II lists species that can be hunted within certain limits.

The aim of the Habitats Directive is to contribute to the maintenance of biodiversity through the conservation of natural habitats and the protection of wild fauna and flora. The directive aims to establish a 'favourable conservation status' for both habitat types and wild species of Community interest. It requires Member States to designate sites as Special Areas of Conservation (SACs) and set up necessary conservation measures, including management plans, which will result in the establishment of a 'coherent European ecological network' of sites of Community importance to be known as Natura 2000.

Annex I lists habitat types whose conservation requires the designation of Special Areas of Conservation (SACs). A habitat type is defined as being of Community interest if it is in danger of disappearance within its natural range, where the Community has a special responsibility for their conservation because of the proportion of their natural range falling within EC territory, or which represents an outstanding example of one or more of the six biogeographical regions (Alpine, Atlantic, Continental, Macronesian, Mediterranean and Boreal). A seventh region, the Pannonian region, was added by the 2003 Accession Treaty.

Annex II contains a list of animal and plant species of Community interest, the conservation of which benefits from the special designation of their habitats. As with Annex I, a number of priority species are identified.

IV.2.2.3 STRENGTHS AND WEAKNESSES

39

One of the strengths of the Birds Directive is that it applies to *all* wild bird species in Europe, and that it introduced for the first time site-based conservation measures into EU policy (with the selection of SPAs to be based on ornithological criteria only). It has also provided a transboundary solution for the protection of migratory species (in this case birds), and tackles the problems of hunting and trade.

The directive is weak, however, insofar as it did not set a timeframe or threshold for the completion of the SPA network, merely referring to the obligation to create “sufficient sites”. However, 25 years after the directive has been adopted, it is common knowledge that many Member States are still far behind fulfilling this obligation, and further judgments of the ECJ can be expected.

The margin of discretion available to Member States under the Birds Directive concerning the granting of derogations, and in particular to specify hunting seasons for migratory birds, has also led to problems, and has been interpreted differently in different Member States. A significant number of cases of alleged insufficient implementation have had to be resolved by the ECJ. The “Guidance document on hunting” under the Birds Directive developed by the European Commission in 2003 is based on case law by the ECJ and extensive stakeholder discussion and provides more clarity on many aspects of the directive, including criteria for determining the duration of the hunting season.

Compared to the Birds Directive, the Habitats Directive is a more modern legislative tool. It reinforces the basic principle of the Birds Directive, notably species and site protection measures, and extends some of the provisions to include, management and impact assessment provisions in article 6. This article also extends to the Birds Directive by means of Article 7, which amends the Birds Directive.

The creation of the biogeographical seminars which examine the ecological representativity of the national lists (amount, distribution, quality of the sites) has to be welcomed. The Habitats Directive lays down that the only criteria on which the selection of Natura 2000 sites can be based are ecological ones.

Article 8 offers the possibility of co-funding of the management plans (Article 8), which can help create jobs in the countryside and enable local people to benefit from conservation. Another strength of the directive is that Natura 2000 sites are protected even if the threats originate from outside the border of the conservation area. Compensation is obligatory if a Natura 2000 site is damaged. Natura 2000 contains a modern idea of developing networks and corridors (Article 10), which is especially important because of the impact of climate change.

Moreover the Habitats Directive has strengthened the importance of Environmental Impact Assessment (EIA) and Strategic Environmental Impact Assessment (SEA)(*see chapter V.3.5*), because Article 6 of the directive provides real juridical impacts and the possibility to complain to the Commission. Another strength of the directive is that it foresees a strict timeframe; however, in spite of this a complete protection of sites will only be guaranteed six years after the adoption of the European list of sites.

A weakness of the Habitats Directive is, however, that at the time of its adoption it did not sufficiently provide for the protection of marine sites. Moreover there is no obligation for the designation of sites for the protection of migratory species. The definition of marine habitats is not as obvious as terrestrial ones, but at least, types of shores should be designated according to their importance to marine biodiversity to counter the deterioration of large coastal and marine areas throughout Europe.

In addition, there have been enormous delays in the Member States concerning the implementation of the Birds and the Habitats Directives, and both are amongst the most litigated directives of the EU. The assessments of plans and projects with a significant impact on a Natura 2000 site are often inadequate. Many of the provisions of the Habitats Directive, such as the definition of the concept 'favourable conservation status' are set out in guidelines which are not legally binding. Whether and in which way the concept of "favourable conservation status" also applies to the Birds Directive, is still under discussion.

IV.2.3 Natura 2000

The development of Natura 2000 is without doubt one of the most ambitious tasks in terms of nature conservation in the EU and presents an essential step towards the target of halting biodiversity loss by 2010. The Natura 2000 network now covers around 17% of the territories of the Member States before the EU's 2004 enlargement, an area about the size of Germany.

The Natura 2000 network will include three categories of sites: those hosting the habitat types of Community importance listed in Annex I of the Habitats Directive; secondly those sites comprising the habitats of certain animal and plant species of Community importance listed in Annex II of the Habitats Directive; and thirdly the 'Special Protection Areas' for birds classified by Member States under the Birds Directive.

Member States were asked to submit to the Commission by June 1995 a list of sites within their territories which are potentially of Community importance. The next step is for the Commission to draw up, in agreement with each Member State, a draft list of sites of Community importance (for each biogeographical region), drawing on the national lists. By 1998 the final list was supposed to be adopted by the Commission having been presented to a committee of Member State representatives where voting is by qualified majority. The third step is the designation of sites selected as being of Community importance as SACs by the Member States concerned. This is to be done as soon as possible and at the latest within six years. Member States have to set up the necessary conservation measures, including management plans, and to take all the steps neces-

sary to avoid the deterioration of the habitats or disturbance of the species for which the 'areas' have been designated.

All plans or projects which individually or in combination with others are likely to have significant effects on sites are to be subject to an appropriate assessment of the implication for the conservation value of the site. Where an assessment of a plan or project indicates that it will damage the conservation interest of a site and there are no alternative solutions, but the plan or project must be carried out for 'imperative reasons of overriding public interest', including those of a 'social or economic nature', the Member State must take all compensating measures necessary to protect the overall coherence of Natura 2000. The Commission must be informed of the measures adopted¹⁵.

41

The management and monitoring of Natura 2000 will require significant and continuous investment. However, it should not be forgotten that there are significant socio-economic and environmental benefits accrued from designating Natura 2000 areas (*IEEP and WWF 2002*).

In the exceptional case of this directive Community co-financing is to be provided to help Member States to meet their obligations as a huge financial burden will be imposed on some Member States because of the uneven distribution of habitats and species within the Community. Whereas the Natura 2000 network covers for instance 10% of the territory in France (at the moment), it covers 38% of the territory of Spain. On average the network covers 15 % of all European territory (*Le Monde 2005*).

The official deadline for the finalisation of Natura 2000 lists as set out in the directive was 1998. The first list of sites of EU conservation importance was approved by the European Commission for the Macronesian biogeographical region (which covers the Canary Isles, the Azores and Madeira) in December 2001. This was followed in 2004 by the adoption of the list of sites for the Alpine, Atlantic and Continental biogeographical region. Implementation in the new Member States is under way and when completed will make a sizeable contribution to the total area under protection.

IV.2.4 Implementation deficits and link with other environmental legislation

The implementation of the Birds Directive has been controversial and poor in several Member States. It has resulted in rulings against e.g. France and Sweden and many other countries have been referred to the ECJ. Likewise, the implementation of the Habitats Directive has been seriously delayed in certain regions and Member States. As a result the Commission has been warning since July 1999 that regional funding under the Structural Funds may be withdrawn from Member States where implementation of the Birds and Habitats Directives is particularly inadequate. The following year the Commission stated that operations financed by the Structural Funds

¹⁵ In the case of sites hosting priority habitat types or species, the grounds for proceeding with damaging projects are restricted to those relating to human health or public safety, environmental improvements of primary importance or other imperative reasons of overriding public interest.

must not threaten areas likely to be included in the Natura 2000 network.. Otherwise funding would not be released. This is believed to be the first instance of the Commission threatening Member States to withhold funding as a way to make them apply environmental legislation.

42

The submission of national lists of proposed SAC sites as specified under Article 4 (1) of the Habitats Directive has been delayed in all Member States. In January 2000 the Commission took further action against several Member States who had failed to adequately transpose the Habitats Directive into national legislation and to submit complete lists of sites of potential importance for the establishment of the Natura 2000 network. In September 2001 the ECJ ruled that Ireland, France and Germany had contravened the Directive as they had failed to provide adequate lists of proposed SACs and to submit these before the 11 June 1995 deadline (*cases C-71/00, C-67/99 and C-220/99*). This was followed in March 2003 by a judgement of the ECJ against Italy for poor transposition of the Habitats Directive (*case C-378/01*).

In January 2005 the Commission sent a final warning to France for not having classified a sufficient number of SPAs under the Birds Directive, in spite of an ECJ ruling of 2002 (*case C-202/01*). This could lead to a second judgment of the ECJ with possible penalties for France.

The present state of the network still varies enormously between the Member States. The problem ranges from the lack of definitive lists in some Member States to a serious delay in the presentation and implementation of the site's management plans in others. This is particularly serious as the sites continue to be subject to projects that often reveal to be damaging. The European Commission has had difficulties in responding to all the complaints made by individuals and citizens' organisations in effective time, and has thus been unable to avoid the degradation of several sites.

Europe's Environmental Impact and Strategic Environmental Assessment Directives are crucial supporting instruments for the protection of designated sites from harmful developments (*see chapter V.3.5*).

Under the EU Water Framework Directive from 2000 Member States had to provide a list of all protected areas under Community legislation, including the ones for the conservation of habitats and species, by the end of 2004. The specific objectives for such sites have to be achieved at the latest by 2015 if no other deadlines are provided for (*see chapter IV.5.7*). It can be expected that the overall 2015 objective of "good ecological status" for all waters substantially supports and improves the status of nature protected sites, most of which are dependent on the functioning of their aquatic components (*see chapter IV.5.5.1*).

The new EU Directive on environmental liability from 2004 needs to be transposed and implemented at national level by 2007. This Directive ensures that companies (the ones covered by the Directive are the ones covered by other EU laws, e.g. IPPC) have to pay the costs for damages to the environment, including damages to protected habitats and species. Member States should encourage companies to take out insurance or other financial guarantees (*see chapter V.3.3.5*).

IV.2.5 Way forward and the role of ECOs (Environmental Citizens' Organisations)

National and European citizens' organisations play a key role in the implementation of the Habitats Directive on the ground and contribute to the management and monitoring of the designated sites:

43

- ▶ ECOs have proposed many Natura 2000 sites successfully. The European Habitats Forum¹⁶ has taken part in biogeographical seminars and citizens' organisations have shown gaps in national lists. WWF has made shadow-lists, which have been extremely useful in these seminars. BirdLife has identified Important Bird Areas, and the ECJ has used these as a manual against e.g. Netherlands and Finland, which has led to the classification of more SPAs. Due to the work of Portuguese ECOs for instance, many projects and infrastructures which would have caused damage to natural areas have been stopped, postponed or more adequate minimisation measures have been imposed, like in the case of the Vasco da Gama Bridge in Lisbon or the South Motorway.
- ▶ ECOs have had the determining role in driving poor national implementation forward by launching national court cases, complaints with the European Commission, which eventually resulted in rulings of the European Court of Justice¹⁷. The EEB as made proposals to the Commission for improving the effectiveness of complaints (*EEB 2002*).
- ▶ ECOs help to ensure that both the EIA and SEA directives are properly applied (*see chapters V3.5.1 and V3.5.2*). The purpose of those directives is to ensure that the environmental consequences of development measures, plans and programmes on protected areas are identified and assessed during their preparation and before their adoption. The public and environmental authorities can give their opinion and all results are to be integrated and taken into account in the course of the planning procedure.

However, too many EU and national policies and financial incentives run counter to an adequate and ambitious implementation of the Habitats Directive to allow a positive outlook. The respect for nature protection and integration into structural and agriculture policies needs strengthening. Furthermore appropriate financing of nature protection must be ensured¹⁸. In 2004 the Commission estimated the costs for managing Natura 2000 at around 6.1 billion Euro per year. These finances are not at all guaranteed in the EU's proposed financial perspective 2007-2013. The Commission envisages financing Natura 2000 through existing funds, i.e. the Structural and

¹⁶ The European Habitats Forum (EHF) is a group of ECO networks that provide input and advice to DG Environment, particularly relating to the implementation of the Birds and Habitats Directives and the establishment of the Natura 2000 network. The EHF meets with DG Environment twice a year after the Habitats Committee meetings and provides a coordinated means of communication between DG Environment and European nature conservation citizens' organisations.

¹⁷ The decisions of the ECJ in the *Marismas de Santona* (C-355/90) and *Lappel Bank* (C-44/95) cases laid the basis for the Natura 2000 site selection rules, i.e. only ecological criteria.

¹⁸ Although the responsibility for managing Natura 2000 lies with the Member States, Article 8 of the Habitats Directive provides for EU co-financing for the measures essential for maintaining or re-establishing priority habitats and species at a favourable conservation status. This requires a broad range of measures, including land acquisition, site rehabilitation, compensatory/incentive payments for (land) managers, administrative costs, legal fees etc.

Cohesion Funds, Rural Development and the proposed European Fisheries Fund. But this will need considerable awareness raising within the respective departments and remains rather uncertain and open to the reigning day by day political agenda.

44

First of all, for the Commission strategy to work, a clear conditionality in the allocation of funding would need to be established, including an automatic withholding of EU funding if Member States fail to deliver against the environmental acquis, particularly Natura 2000.

Although proper implementation of the directives will be essential for biodiversity protection, this will not be sufficient to achieve the EU's objective of halting the decline in biodiversity by 2010. Firstly most of Europe's biodiversity remains outside the scope of the NATURA 2000 network. Therefore it is crucial that nature protection is integrated in other EU (as well as national and regional) sectoral policies, including agriculture, transport, regional policy, fisheries, etc.

Furthermore environmental organisations should consider the opportunities from linkages with other EU laws. The implementation of the Water Framework Directive in particular bears strong potential improvement for nature and biodiversity protection outside designated areas. The Directive requires the achievement of a "good ecological status", which represents a aquatic biodiversity with minor disturbance, by 2015 for all rivers, lakes and coastal waters, including their floodplains and wetlands. In the case of Natura 2000 protected areas the relevant objectives must be achieved by 2015 at the latest. ECOs should highlight this link and participate in the ambitious implementation of the Water Framework Directive (*see chapter IV.5*).

Secondly a considerable negative impact on biodiversity is assumed to come from more subtle pressures, like chemical and genetic hazards. Therefore the 2004 Environmental Liability Directive provides another great opportunity for the prevention of damage to habitats and species and enforcing the polluter pays principle. Due to the flexibility left to Member States in implementing the Directive and the potential loopholes, its effectiveness will depend on the quality of transposition into national law by 2007. Most importantly ECOs should ensure that licensed industrial activities are not automatically excluded from strict liability and that financial guarantees are mandatory (*see chapter V.3.3.5*). Finally Europe's current chemicals policy reform could – if successfully adopted – end the accumulation of chemicals in the environment and wildlife, reducing the potential impact from hormone or neurological disruption or other irreversible effects on biodiversity.

BIBLIOGRAPHY AND FURTHER READING

EEA (2005) Technical Report No. 1, EEA core set of indicators - Guide

EEB (2002) EC complaints procedure: EEB's seven key recommendations for a change, Position Paper December 2002, Brussels

EC (1979) Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds

EC (1992) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

EC (2002) Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242 of 10/9/2002

IEEP and WFF (2002), Promoting the Socio-Economic Benefits of Natura 2000, Background Report for European Conference, Brussels, 28–29 November 2002

Le Monde (2005) Natura 2000: comment la France veut rattraper son retard, 15 January

McCORMICK, J. (2001) (ed.) Environmental Policy in the European Union, Palgrave: London

RICHARTZ, S.(2004) Brussels in Brief: Finding the Funds for Natura 2000, IEEP, December 2004

WURZEL, R.K.W. (2002) Environmental Policy-making in Britain, Germany and the European Union, The Europeanisation of air and water pollution control, Manchester University Press