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Habitats Conservation in EC Law—From Nature Sanctuaries to Ecological Networks

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I. Introduction

Although less marked than on other continents, Europe's biological diversity displays a number of particular characteristics. Significant variations in the physical environment (climate, soils, hydrology, winds, topography), the influence of the Atlantic Ocean and the different regional seas, as well as the geological and climatic history of the region (glaciations) have contributed to the evolution of a rich diversity of animal species, ecosystems, and natural landscapes on the continent. Various large groups of inland and freshwater ecosystems (forests, moors, brush land, and steppes), mountains (rocky outcrops and sands), internal freshwater systems (lakes and rivers), wetlands (peat-bogs, swamps), deserts and tundra (agricultural and artificial eco-systems) span the continent, shaped both by the physical conditions characterizing the continent (soils, climate, hydrology, exposure, and so on) and by human activity. The diversity of the European landscape (tundra, taiga, groves, open fields, hilly and mountain landscapes, arid lands or steppes, regional or artificial reclaimed lands, dehesa) is testament to the millennial symbiosis between man and his natural environment.

Today however, biodiversity faces a major crisis at both global and European levels, the implications of which have yet to be fully appreciated. Whereas natural landscapes were characterized by forests prior to the advent of man, they have over time been transformed into artificial or semi-natural landscapes. Increasingly fragmented by transport infrastructures, subject to intensive urbanization, cultivation, or cattle grazing, polluted and eutrophized, the ecosystems sink to the lowest common denominator, losing their cultural and natural specificity. For animal and plant species, this results in a fragmentation and isolation of their habitats, constituting one of the most serious threats to their long-term survival. As a result of this, they are suffering an unprecedented rate of extinction, which is only exacerbated by additional threats (poaching, excessive hunting, damage inflicted by tourism). On a more global scale, global warming and the depletion of the ozone layer risk precipitating much more profound changes to the distribution, structure,

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and functions of European ecosystems. In Europe, the number of species deemed by the International Union for the Conservation of Nature (IUCN) to be under threat runs into the hundreds; 42 per cent of mammal species (out of a total of 250), 15 per cent of bird species (total 520), 30 per cent of amphibian species (total 75), 45 per cent of reptile species (total 120), 41 per cent of freshwater fish species (total 190), 12 per cent of butterfly species (total 575), and about 21 per cent of plant species (total 12,500) are now considered to be under threat.[1]

Faced with the prospect of Noah's Ark literally sinking, Community lawmakers have afforded special importance to the conservation of the natural habitats of wild fauna and flora enshrined in two legal instruments. So-called 'special protection areas' intended to protect wild bird habitats were set up under Directive 79/409/EEC on the Conservation of Wild Birds (Birds Directive).[2] In tandem with this, pursuant to Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive),[3] 'special conservation areas' (SCA) intended to protect particular non-bird habitats of Community interest must also be classified. Special protection areas (SPAs) and SCAs have subsequently been consolidated into one single coherent network, called Natura 2000.

Setting out the rules pertaining to habitats and species conservation according to a systematic structure is a tall order, as the Birds and Habitats Directives not only cover the protection of, respectively, species and their habitats, but the scope of their provisions also notably overlaps in places.[4] It would therefore appear expedient to analyse separately the provisions relating to habitats conservation laid down by these two Directives.

After a general section briefly sketching out the objectives of the two Directives (Section II), a distinction will be drawn between the obligations which Member States are under in terms of the selection, classification, and de-classification of the two types of areas (Section III), and those relating to the protection and management of such areas (Section IV). The scope of this chapter is narrower than the one recently published by our colleague Jonathan Verschuuren in the fourth volume of this *Yearbook*. Whereas Verschuuren's article focused on the effectiveness of the nature

[1] See IUCN Species Survival Commission, *2002 IUCN Red List of Threatened Species*, published on the internet at: http://www.redlist.org.

[2] [1979] OJ L103/1.

[3] [1992] OJ L206/7.

[4] See D. Baldock, 'The Status of Special Protection Areas for the Protection of Wild Birds' (1992) 4 *Journal of Environmental Law*, 139; N. de Sadeleer and C.-H. Born, *Le Droit international et communautaire de la biodiversité* (Paris: Dalloz, 2004), 481–568; J. H. Jans, 'The Habitats Directive' (2000) 12–3 *Journal of Environmental Law*, 385–90; L. Krämer, *Casebook on E.U. Environmental Law* (Oxford: Hart, 2002), 283–330; L. Krämer, *EC Environmental Law* (London: Thomson-Sweet & Maxwell, 2003), 175–98; A. Nollkaemper, 'Habitat Protection in European Community Law—Evolving Conceptions of a Balance of Interests' (1997) 9 *Journal of Environmental Law*, 271; D. Owen, 'The Application of the Wild Bird Directive beyond the Territorial Sea of European Community Member States' (2001) 13–1 *Journal of Environmental Law*, 38–78; W. Wills, 'The Birds Directive 15 years Later—a Survey of the Case-Law and a Comparison with the Habitats Directive' (1994) 6 *Journal of Environmental Law*, 219; J. Verschuuren; 'Effectiveness of Nature Protection Legislation in the EU and the US—The Birds and Habitats Directives and the Endangered Species Act' (2004) 3 *The Yearbook of European Environmental Law*, 305–28.

protection regime in the United States of America (US) and in Europe, this chapter deals exclusively with the classification and de-classification of the SPAs and SCAs.

However, it is still important to bear in mind that this analysis is only one part of a broader picture. In spite of the interesting issues that it will generate, reasons of space prevent this study from including an analysis of 'automatic' protection mechanisms for the breeding sites and resting places of particular species, stemming from various obligations to protect wild fauna and flora.[5] Similarly, the different directives on water management (in particular Directives 91/676/EEC on the Protection of Waters against Pollution Caused by Nitrates from Agricultural Sources (Nitrates Directive),[6] and 2000/60/EC establishing a Framework for Community Action in the Field of Water Policy (Water Framework Directive),[7]) will not be discussed, though they do have a significant bearing on the quality of marine habitats. Likewise, no attempt will be made to comment on the provisions of Directive 2004/35 on Environmental Liability with Regard to Prevention and Remedying of Environmental Damage (Environmental Liability Directive).[8] Finally, reasons of space again prevent a discussion of the advantages and drawbacks for nature conservation of the numerous auxiliary regimes implemented by regulations adopted within the framework of forestry and agricultural policy, even though they have had a considerable impact on the conservation of habitats protected by the particular zoning arrangements set in place by the Birds and Habitats Directives.[9]

II. The Coexistence of Two Distinct Regimes of Habitat Conservation under the Birds and Habitats Directives

A. Birds Directive

Initial efforts on the part of the European Community (EC) led to the protection of avifauna with the adoption in 1979 of the Birds Directive. The protection of birds was considered by the framers of the Directive to be a 'trans-frontier environment problem entailing common responsibilities', in particular relating to migratory species which 'constitute a common heritage'.[10]

[5] The Habitats Directive places Member States under an obligation to establish a 'system of strict protection' of the species listed in Annex IV, outlawing in particular the 'deterioration or destruction of breeding sites or resting places' (Art. 12(1) a–d). In contrast with the species habitat classification scheme provided for under Art. 6(2)–(4) of the Habitats Directive, this set up an 'automatic' protectory framework of species habitats (or more precisely one part of the habitat, i.e. breeding and resting places), covering the geographical extent of the directive in its entirety. A recent judgment handed down by the ECJ concerning a 'region essential for the reproduction of marine turtles' in Greece has stressed the importance of this provision for the conservation of endangered species (Case C-103/00, *Commission* v. *Greece* [2002] ECR I-1147).

[6] [1991] OJ L375/1.

[7] [2000] OJ L327/1.

[8] [2004] OJ L143/56.

[9] For a descriptive account of these regimes, see de Sadeleer and Born, n. 4 above, 616–711.

[10] n. 2 above, preamble, section 3.

In line with the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention),[11] the Birds Directive distinguishes between the protection of the habitats of bird species (Articles 3 and 4) and the protection of bird species as such by the regulation of their capture and their trade (Articles 5–9). This chapter will address only those provisions relating to habitats.

According to its preamble and first article, the objective of the Birds Directive is to ensure the conservation of all species of naturally occurring birds in the wild state in Europe. This conservationist objective manifests itself in an obligation on the part of Member States to 'take the requisite measures to maintain the population of [bird] species at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements'.[12]

It is clear on reading this provision that 'ecological, scientific and cultural requirements' are more important than 'economic and recreational requirements', the latter being only of ancillary relevance. In the majority of its judgments, the European Court of Justice (ECJ) has reiterated its position that Article 2 of the Directive does not constitute an additional derogation from the general protection regime, rather being intended as a definition of the *ratio legis* of the Directive, providing an underlying inspiration for its various provisions including in particular the derogatory framework set out in Article 9.[13] This means that Member States cannot invoke Article 2 as a means of evading the obligations imposed by other provisions relating to the protection of habitats laid down by the Directive.

B. Habitats Directive

The Birds Directive only amounted to a piecemeal approach to the implementation of a policy of conservation of biological diversity, because other wildlife was equally deserving of a Community protection regime. Moreover, the need to follow a coherent nature conservation policy, in particular in the light of the seriousness of the threats hanging over all wild fauna and flora, together with their environments, precipitated a general intervention on the part of the EC. These various considerations led the Community to adopt the Habitats Directive.[14]

The adoption of this Directive was justified by the fact that it was an 'essential objective of general interest' within the meaning of Article 174 EC,[15] due on the one hand to the trans-frontier nature of the problems involved (animals like plants are surely not well acquainted with state borders) and on the other hand the Member States' role as guardians of the Community's natural heritage.[16]

[11] Bern (Switzerland), 19 Sept. 1979 (entered into force 1 June 1982). [12] n. 2 above, Art. 2.

[13] Case C-247/85, *Commission* v. *Belgium* [1987] ECR I-3029, para. 8; Case C-262/85, *Commission* v. *Italy* [1987] ECR I-3073; Case C-435/92, *Association pour la protection des animaux sauvages et Préfet de Maine-et-Loire et Préfet de la Loire-Atlantique* [1994] ECR I-67, para. 20.

[14] n. 3 above. [15] para. one of the preamble to the Habitats Dir.

[16] See para. four, ibid.

Following the example of the Berne Convention on the conservation of European wildlife and natural habitats, the Habitats Directive intended to ensure, other than for winged creatures, the maintenance of biological diversity by requiring the conservation of particular natural habitats as well as certain species of wild fauna and flora. Required measures thus operate along twin tracks. Member States must on the one hand ensure the conservation of natural habitats and species habitats, whilst on the other protecting the species as such by regulating their capture or their harvest.

In contrast with the Birds Directive, the obligation to maintain species in a favourable conservation status does not apply to the whole spectrum of biological diversity, as such a task would indubitably be too arduous. Thus paragraph 2 of Article 2 provides that 'measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest', and not to all species of wild fauna and flora. This means that the scope of application of the Habitats Directive is restricted to natural habitats and so-called species 'of Community interest' as set out in the Annexes, the adoption of which is decided by a qualified majority vote of the Council of Ministers acting on a proposal of the Commission.[17] The Directive does not therefore cover all types of natural habitats and species habitats within the territory of the EC. This contrasts with the position for the Birds Directive, which applies to all Community avifauna.

Natural habitats 'of Community interest' include 'terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural' which are either endangered, have suffered a regression in their natural area, or constitute outstanding ecosystems, characteristic of one or more biogeographical regions.[18] As for the so-called species of 'Community interest', these are situated within the territory of a Member State and are either endangered, vulnerable, rare, or endemic.[19]

Article 2 of the Habitats Directive differs in another sense from Article 2 of the Birds Directive. Whilst Member States are obliged to maintain their bird populations simply at a 'level which corresponds to different requirements', they must, however, maintain or re-establish natural habitats and the habitats of species of wild fauna and flora of Community interest in a 'favourable conservation status'. The conservation status of a species is considered to be non-favourable where a series of conditions is not complied with (e.g. reduction of the area of distribution, reduction in population).

The concept of 'conservation status' has the merit of being much more precise than that of a 'level which corresponds to different requirements' contained in Article 2 of the Birds Directive. Such precision can therefore facilitate a precise determination in scientific terms of the objectives which Member States are obliged to fulfil in the area of nature conservation. Nonetheless, 'measures taken

[17] n. 3 above, Art. 19. [18] ibid., Art. 1(b), (c). [19] ibid., Art. 1(g).

pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics',[20] an obligation which does not constitute an additional derogation from the protection regime set out in the Directive, as is clear from the jurisprudence of the ECJ on this provision.

III. Selection Classification and Declassification of Areas Protected under the Natura 2000 Network

In order to fulfil its objective of the conservation of biodiversity, the Habitats Directive provides for the constitution of a 'coherent ecological network', called Natura 2000, which is made up of 'sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II' as well as the SPAs (SPA) created under the Birds Directive.[21]

The Natura 2000 network 'shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.[22] This objective establishes a duty to act both for the European Commission and for Member States.

Being required to integrate itself into the pan-European ecological Network,[23] the approach of the Natura 2000 network is both scientific (involving the selection of constituent sites) and integrated (allowing for particular derogations).

The ecological coherence of the Natura 2000 network rests mainly on Member States' site selection procedures based on ecological criteria. However, the selection procedure differs significantly between SPAs (i) and SCAs (ii). Moreover, the areas may be de-classified where certain conditions are satisfied (iii and iv).

A. The Specific Obligation to Classify SPAs Established for the Preservation of Bird Habitats

i. General Principles

Whereas Article 3 of the Birds Directive is intended to safeguard the habitats of all species of wild birds within the EC,[24] Article 4 obliges States to adopt, in respect

[20] ibid., Art. 2(3). [21] ibid., Art. 3(1). [22] ibid.

[23] See Pan-European Biological and Landscape Diversity Strategy 1995. Although the Natura 2000 network is classified as 'ecological' by Art. 3 of the Directive, the functional aspect of the network is only set out in the non-binding provisions of the Habitats Dir. The Habitats Dir. lays down in addition to the selection and designation procedure for SCAs that 'where they consider it necessary' the Member States shall 'endeavour' to improve the ecological coherence of Natura 2000 through the maintenance and development of 'features of the landscape which are of major importance for wild fauna and flora, as referred to in Art. 10' (Art. 3(3)), which is to be done 'in their land-use planning and development policies'.

[24] There is a fundamental difference between this general obligation to protect bird habitats and that laid down in Art. 4 relating to special protection areas and intended to protect the habitats of the bird species included in Annex I of the Directive. Due to the reference in Art. 3 to Art. 2, Member States may balance ecological interests with other interests where implementing protection regimes for

only of the bird species contained in Annex I of the Directive, 'special conservation measures concerning their habitat' and in particular to classify various parts of the national territory as 'SPAs'. This provision is still applicable because the Habitats Directive did not introduce any modifications to the initial stages of the classification of SPAs.[25] As will be noted below in Section IV, however, the protection regime for classified SPAs has now been superseded by the Habitats Directive.

The classification must apply to the 'the most suitable territories in number and size' for the conservation of the species listed in Annex I in order to 'ensure their survival and reproduction in their area of distribution'. This Annex sets out the species threatened with extinction, those which are vulnerable to modifications of their habitat, and finally those which are not under threat but require particular attention on account of the specificity of their habitat (181 taxons—i.e. species and sub-species—are currently included in this list). 'Similar measures' are to be taken for migratory species, in particular those dependent on wetlands.[26] Due to the threats to which Annex I species are subject, combined with the fact that migratory species constitute a common heritage for the whole Community, the character of the protection regime is 'specifically targeted and reinforced'.[27]

Ratione loci, the classification applies to the 'geographical sea and land area where this directive applies',[28] the Directive covering 'the European territory of the Member States to which the Treaty applies'.[29] The habitat conservation regime provided for by the Birds Directive is not limited only to the territorial waters, extending also to Member States' exclusive economic zones as well as the continental shelf.[30]

ii. Selection Criteria for the SPAs

Since no common selection procedure was provided by the framers of the Birds Directive, Member States have in the absence of common standards had to designate their areas according to strictly national criteria, which explains the heterogeneous nature of the areas set up to date.

The classification of SPAs is *a priori* a matter for the Member States. This raises the question as to the extent of the States' margin of appreciation when designating SPAs: must they classify all of the most appropriate sites or may they restrict it to only a portion of them?

Anxious to ensure a uniform application of the Birds Directive, the ECJ has thus elaborated, in the numerous cases that have come before it, the scope of the obligation to select and classify SPAs under Article 4(1)(2) of the Birds

wild bird habitats. Such balancing is precluded for the classification of SPAs. The ECJ has held States to account for violations of Art. 3 (Case C-117/00, *Commission* v. *Ireland* [2002] ECR I-5335).

[25] Case C-44/95, *R.* v. *Secretary of State for the Environment, ex p. Royal Society for Protection of Birds (Lappel Bank)* [1996] ECR I-3805, paras. 39–41. [26] n. 2 above, Art. 4(2).

[27] Case C-44/95, para. 23. [28] n. 2 above, Art. 4(1). [29] ibid., Art. 1(1).

[30] D. Owen, 'The Application of the Wild Bird Directive beyond the Territorial Sea of European Community Member States' (2001) 13–1 *Journal of Environmental Law*, 38–78.

Directive.[31] In a line of cases the ECJ has managed to determine the extent of the States' margin of appreciation. It has confirmed that 'the classification of those areas is nevertheless subject to certain ornithological criteria determined by the directive, such as the presence of birds listed in Annex I, on the one hand, and the designation of a habitat as a wetland area, on the other'.[32] The ECJ has held in other judgments that sites satisfying these criteria must be protected even where protected areas have not yet been established.[33] In order to be classified, the site need not necessarily have 'a unique or at least particular importance' for the relevant species;[34] the proper test is rather that there be a sufficient interest, either for the Annex I species or for other migratory species. It follows that all sites that appear to be 'the most appropriate' must be classified.[35] This solution has been followed by German and Dutch courts.[36]

States' margin of appreciation is therefore limited both in terms of the number[37] and surface area[38] of the areas, which must be sufficiently important to guarantee the conservation of both endangered and migratory species. Moreover, the exclusion of one of the most appropriate parts of the national territory breaches the obligation to classify the most suitable territories.[39]

iii. Balance between Ecological and Economic Interests

The required balance between economic and ecological factors is laid down by the Birds Directive. According to the general scheme of this Directive, the conservation

[31] The leading cases handed down on the conservation of areas classified under the Birds and Habitats Directives are: Case C-334/89, *Commission* v. *Italy* [1991] ECR I-3073; Order of the President 57/89-R, *Commission* v. *Germany* [1989] ECR I-2490; Case C-57/89, *Commission* v. *Germany* (*Leybucht*) [1991] ECR I-883; Case C-355/90, *Commission* v. *Spain* (*Santoña Marshes*) [1993] ECR I-4221; Case C-44/95, *R.* v. *Secretary of State for the Environment, ex p. Royal Society for Protection of Birds* (*Lappel Bank*) [1996] ECR I-3805; Case C-3/96, *Commission* v. *Netherlands* [1998] ECR I-3031; Case C-166/97, *Commission* v. *France* (*Seine Estuary*) [1999] ECR I-1719; Case C-96/98, *Commission* v. *France* (*Poitevin Marsh*) [1999] ECR I-8531; Case C-374/98, *Commission* v. *France* (*Basses-Corbières*) [2000] ECR I-10799; Case C-117/00, *Commission* v. *Ireland* [2002] ECR I-5335; Case C-202/01, *Commission* v. *France* (*Plaine des Maures*) [2002] ECR I-11019; Case C-415/01, *Commission* v. *Belgium* [2003] ECR I-2081; Case C-240/00, *Commission* v. *Finland* [2003] ECR I-2817; Case C-378/01, *Commission* v. *Italy* [2003] ECR I-2877; Case C-72/02, *Commission* v. *Portugal* [2003] ECR I-6597; Case C-209/02, *Commission* v. *Austria* [2004] ECR I-1211; Case C-127/02, *Landelijke Vereniging tot behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* v. *Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (*Waddenzee*) [2004] ECR I-0000.

[32] *Santoña Marshes*, n. 31 above, para. 26; *Seine Estuary*, n. 31, above para. 38; *Poitevin Marsh*, n. 31 above, para. 41; *Lappel Bank*, n. 31 above, para. 26.

[33] *Santoña Marshes*, n. 31 above, para. 22; *Seine Estuary*, n. 31 above, para. 38; *Poitevin Marsh*, n. 31 above, para. 41; *Lappel Bank*, n. 31 above, para. 26; *Basses-Corbières*, n. 31 above, para. 26.

[34] In *Santoña Marshes*, n. 31 above, the ECJ did not follow the restrictive interpretation proposed by the Advocate General (Opinion of Advocate General Van Gerven, para. 8).

[35] Case C-3/96, *Commission* v. *Netherlands*, n. 31 above, para. 62.

[36] For Germany see *Bundesverwaltungsgericht*, 19 May 1998; BVerwGE, *NvwZ*, h.7, p. 717; *NvwZ*, 1998 h.6, pp. 616–23; *Zeitschrift für Unweltrecht* (1998) 4, 203–10. For the Netherlands see District Court Leeuwarden, 17 July 1998, *Koninklijke Vermande* (1998) 9, 565, obs. Lambers.

[37] Case C-3/96, n. 31 above, para. 32.

[38] *Basses-Corbières*, n. 31 above, paras. 27 and 29; *Plaine des Maures*, n. 31 above, para. 28.

[39] *Santoña Marshes*, n. 31 above, para. 29; *Lappel Bank*, n. 31 above, para. 26; *Seine Estuary*, n. 31 above, paras. 11–15.

of wild birds is the rule.[40] The upshot of this, as has been consistently reiterated by the ECJ, is that Article 2 cannot constitute an independent derogation from the general protection regime.[41] Except in cases of express authorization, Member States may not try to water down the scope of the rule requiring avifauna protection by basing their decisions on any consideration other than ecological necessity. Accordingly, even the existence of social unrest relating to the exploitation of marble quarry has been held not to justify any delay in the classification of an SPA of a nesting site for the Bonelli eagle.[42]

Similarly, 'economic and recreational requirements' cannot influence the choice and delimitation of the protected area.[43] Such a strict reading of the Directive is especially justified since a State's margin of appreciation declines in line with the vulnerability of bird or migratory species threatened with a modification of its habitat.[44]

If the choice and establishment of an SPA can only be made on scientific grounds, economic considerations may nonetheless play a role where national authorities decide *a posteriori* to reduce the surface area of an SPA. Thus, a Member State may be obliged to designate a site as an SPA even when it knows that it will thereafter have to abide by the various substantive and procedural requirements when introducing any subsequent changes.[45] The intervention of economic interests at this latter stage is in no way paradoxical, since paragraphs 3 and 4 of Article 6 impose such conditions with a view to preventing the authorities from riding roughshod over ecological interests for future projects that compromise the integrity of the site (see section IV.D).

iv. The Assessment of Scientific Criteria

Since the Member States' margin of appreciation in relation to ecological objectives is limited, one might speculate as to the scope of the scientific criteria which must be taken into consideration in the classification of SPAs. The ECJ held in *Commission* v. *Netherlands* that 'the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Directive'.[46] This finding should be interpreted in the following manner. The reference to 'appropriateness of classifying' means that the States' margin of appreciation is not of a political nature. Where the site appears, from a scientific point of view, to constitute an appropriate territory for the conservation of endangered or migratory species, it must be classified as an SPA.

[40] Opinion of Advocate General Fennelly in *Lappel Bank*, n. 31 above, para. 53.
[41] See n. 5 above. [42] *Basses-Corbières*, n. 31 above, para. 13.
[43] *Santoña Marshes*, n. 31 above, paras. 17–18; Case C-3/96, n. 31 above, para. 57; *Lappel Bank*, n. 31 above, para. 25.
[44] Opinion of Advocate General Fennelly in *Lappel Bank*, n. 31 above, paras. 65–6.
[45] *Lappel Bank*, n. 31 above, para. 41. [46] Case C-3/96, n. 31 above, para. 61.

Given the ECJ's desire to circumscribe the discretionary power of States, it is not too difficult to flesh out the notion of 'ornithological criteria'.[47] The following requirements drawn from the jurisprudence of the ECJ would at the very least have to be taken in account.

First of all, it is incumbent on the national authorities to verify which species are to be subject to particular conservation measures, as they are in a better position to do so than the Commission.[48] Therefore the delimitation of an SPA requires a scientific impact study by national administrations informed by criteria relating to the ecology of the endangered species. Following this, the conservation measures required under the Birds Directive must be drawn up with a view to safeguarding the endangered or migratory species' prospects of survival and reproduction 'in their area of distribution', that is, in 'the geographical sea and land area where this directive applies'.[49] This means that the appreciation of ornithological criteria by the State cannot be accomplished from a local, regional, or national viewpoint, but rather at the level of the whole EC.[50] Finally, the Commission must ensure that the whole set of SPAs designated by Member States constitutes, at Community level, a 'coherent whole which meets the protection requirements of these species'.[51]

The Birds Directive does not provide a list of the territories most suitable for classification as SPAs, nor does it set out any precise criteria for designating them. In order to be able to exercise its role as guardian of the treaties effectively, the European Commission must frequently resort to scientific inventories which indicate, on the basis of common scientific criteria, those areas which are ecologically most important for birds, known as Important Birds Areas (IBA).[52] The ECJ has held that the IBA inventory 'although not legally binding on the Member States concerned, contains scientific evidence making it possible to assess whether a Member State has complied with its obligation to classify as SPAs the most suitable territories in number and size for conservation of the protected species'.[53]

A raft of ornithological criteria allow for a definitive assessment as to whether a site is worthy of classification. An analysis of the ECJ's case law shows that it draws on several ornithological criteria when deciding whether to impose protection. Therefore, the classification cannot be made on the grounds of the mere presence of a rare species, such as the Eurasian spoonbill included in Annex I, but rather due to

[47] In addition to the Opinion of Advocate General Van Gerven in *Santoña Marshes*, see Case C-3/96, n. 31 above, paras. 65–71 as well as paras. 46–57 of Advocate General Fennelly's Opinion in that case.

[48] Opinion of Advocate General Fennelly in Case 3/96, n. 31 above, para. 79, based on the ECJ's reasoning in Case C-334/89, *Commission* v. *Italy* [1991] ECR I-93, para. 9.

[49] n. 2 above, Art. 4(1)(3).

[50] It goes without saying that considerations of national importance should be disregarded for migratory species because such birds '*constitute a common heritage*' and '*effective bird protection is typically a trans-frontier environment problem entailing common responsibilities*' (para. three of the preamble to the Birds Dir.).

[51] n. 2 above, Art. 4(3).

[52] R. F. A. Grimett and T. A. Jones, *Important Birds Areas in Europe* (Cambridge: ICBP Technical Publication no. 9), 887.

[53] *Basses-Corbières*, para. 25; Case C-3/96, n. 31 above, paras. 69–70.

the presence in wetlands 'of numerous aquatic birds'.[54] Nevertheless, the 'particular ornithological interest' of a cliff engendered by the presence of only one species, the Bonelli eagle, is sufficient to oblige national authorities to classify a site.[55]

The limitation of public authorities' discretionary power by recourse to objective criteria based on rigorous scientific analysis must be approved insofar as it guarantees greater uniformity in the application of the provisions of the Birds Directive, which in turn leads both to a more effective protection of avifauna and also to a reduction in the imbalances caused by competition between the Member States.[56] Moreover, it would be too easy for Member States to avoid incurring the correct substantive obligations by neglecting to designate areas for which protection is required under the terms of the criteria laid down by the Directive. If this were not the case, then unscrupulous national authorities could accelerate the process of destruction of ornithological sites in order to prevent their subsequent designation with the protection obligations this entails.[57]

v. Form and Content of the Classification Decision

In contrast with the Habitats Directive, the Birds Directive does not have any formal requirements for the classification of a site as an SPA. The ECJ has however held, in respect of a contested decision to classify, that 'a contingent classification of the SPA sites such as that resulting from the Council of Ministers' decision, which may be amended in accordance with the judgments in the actions brought against it, cannot be held to constitute proper fulfilment of the obligation to classify sites which is incumbent on Member States under Article 4(1) and (2) of the Birds Directive'.[58] In the ECJ's opinion, 'the lack of definitive classification as SPAs of the sites at issue prevents the Commission from taking the appropriate initiatives in accordance with Article 4(3) of the Birds Directive, for the purpose of the coordination necessary to ensure that the SPAs form a coherent network'.[59]

Addressing the question of the contestability of classifications which have not yet been published in the Member State's Official Journals, the ECJ has noted that 'the principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to Community rules' and that maps delimiting SPAs 'must be invested with unquestionable binding force. If not, the boundaries of SPAs could be challenged at any time'.[60]

Finally, classification cannot consist of a simple declaration, but rather implies the adoption of a regulatory framework specifying the protection regime.[61] It must set out binding provisions relating to the status of protection in accordance with Article 6(2) of the Habitats Directive.[62]

[54] *Santoña Marshes*, para. 27. The presence of a large number of aquatic birds was also an important consideration in *Seine Estuary*, para. 14 and *Poitevin Marsh*, para. 15.

[55] *Basses-Corbières*. [56] Opinion of Advocate General Fennelly in *Lappel Bank*, para. 68.

[57] Opinion of Advocate General Van Gerven in *Santoña Marshes*, para. 22.

[58] Case C-240/00, n. 31 above, para. 19. [59] ibid., para. 20.

[60] Case C-415/01, n. 31 above, paras. 21–2. [61] *Santoña Marshes*, paras. 28, 30, and 31.

[62] Case C-415/01, n. 31 above, paras. 16 and 17.

vi. Autonomous Character of the Classification Procedure

Required under Article 3 of the Birds Directive as well as other international conventions, the adoption of any other particular conservation measures, consisting for example of the establishment of national parks or natural sanctuaries, does not relieve the Member State of the obligation to classify its most suitable territories as SPAs, even if it considers that existing arrangements are already sufficient to guarantee the survival and reproduction of the endangered species.[63] Similarly, the fact that a Member State may have classified a significant number of SPAs does not relieve it of the obligation to classify a site when, according to objectively determined ornithological criteria, this would be necessary for the conservation of particular bird species.[64] In fact, the obligation imposed by paragraphs 1 and 2 of Article 4 of the Birds Directive not only provides for the achievement of a general goal, but also requires Member States 'to preserve, maintain and re-establish habitats as such, because of their ecological value'.[65] Any other contrary solution would compromise the objective of the constitution of a coherent network of SPAs, as required by Article 4(3) of the Birds Directive. Moreover, in taking only conservation measures falling short of the classification of a site, Member States could avoid their liability under other obligations not included in Article 3 to take appropriate measures to avoid the deterioration of habitats and disturbances affecting birds in protected areas.[66]

By the same token, the obligation to classify constitutes a baseline obligation which must be subject to strict interpretation due to its clearly defined scope and its essential objective of the conservation of European avifauna.

B. The Specific Obligation to Classify SCAs Established in Order to Preserve Natural Habitats and Species of Community Interest

i. General Principles

The conservation of natural habitats and habitats of species of Community interest is based on a scientific selection procedure of 'special conservation areas' (not to be confused with 'SPAs' dealt with in the previous sections) under the supervision of the Commission and the Habitats Committee, and the additional integration of these areas into the Natura 2000 network.[67] Site selection is decisive in assuring the ecological consistency of the Natura 2000 network. The network can contribute to preserving Europe's biological diversity through the maintenance or re-establishment of different types of natural habitat in a favourable conservation status.[68]

[63] Case C-3/96, n. 31 above, para. 58.
[64] Opinion of Advocate General Van Gerven in *Santoña Marshes*, para. 14.
[65] *Santoña Marshes*, para. 15; Opinion of Advocate General Fennelly in *Lappel Bank*, para. 88.
[66] Opinion of Advocate General Fennelly in Case C-3/96, n. 31 above, para. 33.
[67] n. 3 above, Art. 4(3). [68] ibid., Arts. 2(2) and 3(1).

Ratione loci, the Habitats Directive covers all natural habitats 'in the European territory of the Member States to which the Treaty applies',[69] including the Exclusive Economic Zone and the continental shelf for the conservation of marine habitats.[70]

Since the legal provisions on the conservation of wildlife had previously been limited to the protection of the habitats only of endangered or migratory species, the Habitats Directive represented a real step forward for the Community in providing that the network be structured according to the distribution on each of the national territories not only of particular species habitats, but also of natural habitats. These natural habitats and species are set out respectively in Annexes I and II of the Directive, and are regularly modified by new directives which take into account technical and scientific progress.

The first Annex includes more than 200 types of land, aquatic, marine, or costal natural habitat, including such diverse habitats as chalk grasslands rich in orchids, peat-bogs, shallow sandbanks, alpine rivers, or permanent glaciers. The second Annex includes 230 animal species—mammals, reptiles, amphibians, fish, and various invertebrates—and almost 500 plant species, including ferns and mosses. At the heart of these lists are so-called 'priority' species and natural habitats which require a reinforced protection regime.

ii. The Classification Procedure

The problems faced in classifying SPAs under the Birds Directive and the lessons of the *Leybucht* case (see under sub-section D below) led the framers of the Habitats Directive to perfect the classification regime for SCAs by affording a special place to dialogue between the European Commission and Member States, in particular under the mediation of a regulatory committee assisting the Commission in the classification process.[71] Although the procedure applicable to the designation of SPAs is for the most part summary, the new procedure provides for a strict timetable including three stages in the classification of sites for incorporation into the Natura 2000 network. In the first stage the competent national authorities draw up a list (iii), after which the Commission adopts in a second stage a Community list of the national sites selected (iv). The procedure is concluded by a third phase where Member States classify the sites selected to form part of the Natura 2000 network (v).

iii. Stage One: The National List

Member States must first of all determine in accordance both with scientifically relevant information and with the criteria set out in Annex III the sites hosting the

[69] ibid., Art. 2(1).

[70] In the UK, the English High Court has adopted a teleological approach which extends the scope of application of the special conservation area regime into the exclusive economic zone (cf. *R* v. *Secretary of State for Trade and Industry ex p. Greenpeace*, 5 Nov. 1999: digested by J. H. Jans in (2000) 12–3 *Journal of Environmental Law*, 385–90).

[71] Case C-57/89, *Commission* v. *Germany* (*Leybucht*) [1991] ECR I-2490.

types of natural habitats and the habitats of species which are suitable for integration into the Natura 2000 network. The purpose of this is to provide the Commission with an exhaustive inventory of sites with an ecological interest at the national level which is relevant for the constitution of the network.[72] The list must in particular highlight the so-called 'priority' habitats and species. According to the jurisprudence of the ECJ, the selection of sites is a purely scientific exercise which does not take socio-economic considerations or particular regional or local circumstances into account.[73] This means that any site threatened by industrial development according to a development plan must be included on the list simply on the grounds that it satisfies the Annex III selection criteria.

The European Commission assumes an important role during this first stage of the procedure by verifying, in 'biological seminars', whether the Member States have overstepped their national margin of appreciation.

These stage one lists had to be transmitted by the Member States to the Commission before 10 June 1996. However, in several States this first stage of identification came up against stiff resistance giving rise to various court actions.[74] Anxious to respect the Directive's timetable, the Commission had to instigate default procedures against the States which had not transmitted their lists,[75] deciding in addition for a show of force over the concession of regional Community funding.

Disputes arising out of the failure by Member States to submit sites hosting 'priority' natural or species habitats must be settled through conciliation proceedings between the Commission and the defaulting Member State.[76] Where this procedure does not result in any agreement, the Commission must propose to the Council the designation of the contested site as an SCA.

iv. Stage Two: The Adoption of a Community List of Important Sites

The national lists must enable the Commission to establish, in agreement with each of the Member States, a draft Community list including all 'sites of Community importance' for each of the six relevant biogeographical regions on European territory (Alpine, Atlantic, Continental, Macaronesian and Mediterranean, and Pannonian). During this stage, the European Commission must assess 'the Community importance of the sites included on the national

[72] *Seine Estuary*, n. 31 above, para. 22.

[73] *Seine Estuary*, ibid., para. 25. See also the similar findings of the German Federal Administrative Court: *Bundesverwaltungsgericht*, 19 May 1998; BVerwG, *NvwZ*, h.7, p. 717; *NvwZ*, 1998 h.6, 616–23.

[74] The notification of the lists to the Commission was held by the French Council of State to be a justiciable act and not simply a preparatory act (C.E., 27 Sept. 1999, *Association 'coordination nationale Natura 2000'*, no. 194.648).

[75] See also the censuring of delays in the transmission of national lists: Case C-329/96, *Commission* v. *Greece* [1997] ECR I-3749; Case C-83/97, *Commission* v. *Germany* [1997] ECR I-7191; Case C-220/99, *Commission* v. *France* [2001] ECR I-5831; Case C-71/99, *Commission* v. *Germany* [2001] ECR I-5811; Case C-67/99, *Commission* v. *Ireland* [2001] ECR I-5757.

[76] n. 3 above, Art. 5(d).

lists', that is, evaluate 'their contribution to maintaining or re-establishing, at a favourable conservation status, a natural habitat in Annex I or a species in Annex II and/or to the coherence of Natura 2000'.[77] A site is presumed to be of Community importance if it hosts a priority habitat or species. For other sites the Commission must apply the Annex III (stage 2) criteria when making its assessment. It finalized its draft list after a second round of biogeographical seminars.

The complete list had to be established within six years of the notification of the Directive, that is, before 10 June 1998.[78] This time limit was not respected due to the delay by particular Member States in drawing up their national lists. Only the lists relating to the Macaronesian (Madeira, Azores, Canaries) and Alpine regions have so far been published in the Official Journal.[79]

A committee uniting representatives of the Member States must submit an opinion, by qualified majority, on the draft list to be submitted to it by the Commission which will then adopt the Community list, provided it is in harmony with the committee's opinion.[80] Where this does not happen, the Commission must submit its draft to the Council, which will within three months vote on it by qualified majority; in the absence of a decision by the Council within this time limit, the Commission may legally adopt the list.

v. Stage Three: The EC List of Sites of Community Importance

Required to classify as SCAs any sites present on the national territory as quickly as possible after the recognition of their Community interest (and at the latest, within six years of this recognition), Member States must establish in advance appropriate legal remedies and procedures in order to fulfil their obligations in time. Since it is obligatory under Article 4(4) of the Habitats Directive, on expiry of the relevant time limit, the decision to classify a site may in no circumstances be made subject to any agreement between private parties. Finally, the status of 'SCA' only strictly speaking becomes operative once the requisite conservation measures have been applied to it.

In line with the interpretation which evolved for SPAs, Member States cannot invoke 'economic, social and cultural requirements and regional and local characteristics' under paragraph 3 of Article 2 of the Directive in order to oppose the classification of a site of Community importance.

This conclusion is supported by three arguments. First, the selection of SPAs must be made having regard, on the one hand, to 'relevant scientific information' and, on the other hand, to the criteria set out in Annex III. Secondly, paragraph 3 of Article 2 providing that 'measures taken pursuant to this Directive shall take

[77] Annex III, heading 2, of the Habitats Dir. Sites 'of Community importance' are defined in the Directive (Art. 1(k)).

[78] n. 3 above, Art. 4(3).

[79] Commission Dec. 2002/11/EC adopting the list of sites of Community Importance for the Macaronesian Biogeographical Region [2001] OJ L59/16 and 2004/69/EC adopting the list of sites of Community Importance for the Alpine Biogeographical Region [2003] OJ L14/21.

[80] n. 3 above, Art. 20.

account of economic, social and cultural requirements and regional and local characteristics' cannot be regarded as a self-standing derogation from the obligations imposed on Member States by Article 4 of the Habitats Directive and, in consequence, cannot in any way subordinate the obligation to classify sites as SCAs to economic, social, or cultural interests.[81] Finally, Article 6 of this Directive already provides for a specific derogatory regime for activities that would prejudice the conservation of the classified area (see below Section IV. D).

As regards the definition given to SCAs, their designation requires the adoption of 'a statutory, administrative and/or contractual act' which, as has been noted, was not provided for under the Birds Directive.[82] Even though this is only a simple definition, it gives rise to various interpretative difficulties.

The reference made in this provision to an administrative act poses a great difficulty stemming from its status as more easily revocable than a statutory provision, as the Directive sets in place a protection regime which cannot be dependent on inappropriate decisions taken by the competent authorities. Furthermore, an administrative act may conflict with a statutory act higher up in the hierarchy of norms, such as a development plan envisaging an industrial zone on a site notified to the European Commission; a statutory regime by contrast guarantees heightened legal certainty. Finally, the defining feature of a statutory enactment is the ability to invoke it against third parties by virtue of its publication in the Member State's Official Journal. However, in order to be able to be invoked against third parties it would appear to be indispensable that the areas notified to the Commission be published in the Official Journal[83] and that the maps delineating its boundaries be of 'unquestionable binding force'.[84]

Although contractual arrangements are more attractive to public authorities due to their flexibility (voluntary agreements concerning pollution abatement, agro-environmental measures), the reference to the legal institution of the contract must also be tempered by some reservations. It is true both that the process is not incompatible with Article 249 EC, which does not require that the implementation of directives necessarily be undertaken using unilateral measures, and also that the Habitats Directive expressly provides for the contractual option.[85] However this procedure is not completely devoid of any pre-conditions. The mere recourse to contracts is not sufficient to guarantee respect for the Directive, as the protection regime would then be subordinated to the good faith of the parties. The ECJ has accordingly held that measures of a voluntary and purely indicative nature do not confer any particular legal status on a designated area.[86] Moreover, contracts also offer fewer legal guarantees than enactments, not being enforceable

[81] Opinion of Advocate General Fennelly in *Lappel Bank*, n. 31 above, para. 71.

[82] n. 3 above, Art. 1(1).

[83] The French Council of State has held that where notification of the existence of an SPA has not been officially published, its existence cannot be invoked in a challenge to an act authorizing the extension of a port, see C.E., *Sepronas*, no. 161403 of 6 Jan. 1999.

[84] Case C 415/01, *Commission* v. *Belgium*, see n. 31 above.

[85] n. 3 above, Art. 1(1).

[86] Case C-96/98, *Poitevin Marsh*, n. 31 above, paras. 25 and 26.

against third parties whose activities can throw the conservation of the area into jeopardy. Having said this however, the conclusion of contracts with the holders of real rights and organs of State charged with the protection of the environment can well be envisaged, especially where this is done in order to improve the management of a site which has been designated by a statutory act. Should this occur, such agreements should be fully compatible with the application of the protection regime and be sufficiently binding to implement the Directive.[87]

vi. Autonomous Character of the Classification Procedure

Due to a lack of coordination between the two classification procedures, SPAs for wild birds must, on the one hand, be classified in accordance with objective ornithological criteria, whilst SCAs for natural habitats must on the other hand be classified in accordance with the procedure described above. Where habitats or species of Community interest are to be found on a site which meets all the objective ornithological criteria in order to be classified as an SPA, it should also be classified as an SCA. Thus, the fact that a Member State may have classified large parts of its territory as SPAs in order to fulfil its obligations flowing from the Birds Directive does not exempt it from the obligation to designate additional territories as SCAs if they meet the criteria laid down by the Habitats Directive, because each State must contribute to the constitution of the Natura 2000 network 'in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1'.[88]

By contrast, the designation of numerous SCAs under the Habitats Directive will not exempt the authorities from the obligation to classify as SPAs all ornithological sites that satisfy the objective criteria set out in Article 4(1) and (2) of the Birds Directive.

In order to avoid the constitution of two distinct networks of protected areas, and the legal and administrative problems this would entail, Community law provides for the integration of SPAs for wild birds classified according to the Birds Directive into the Natura 2000 network, without however harmonizing the respective classification procedures.[89]

C. De-classification of SPAs Established to Preserve Bird Habitats

Initially, according to Article 4(2) of the Birds Directive, the designation of the most suitable territories by Member States had the effect of rendering inviolable the boundaries of SPAs.[90] The ECJ, however, relativized the scope of the intangibility principle in conceding, in the *Leybucht* case that the boundaries of

[87] Case C-255/93, *Commission* v. *France* [1994] ECR I-4949.

[88] n. 3 above, Art. 3(2).

[89] It is also clear from the preamble to the Habitats Directive, in particular paras. 7 and 15, as well as Art. 3(1) and Art. 7, that there is a close link between the Birds and Habitats Dirs.

[90] *Leybucht*, n. 31 above, para. 20.

SPAs may be reviewed, and even decreased. In allowing this derogation however, the ECJ set out the type of justifications that would support a reduction in the surface area of the protected area, namely the presence of compensatory measures[91] and the proportionality of the derogation in relation to its objective.[92]

In exceptional cases, the ability to review the boundaries of the area must be interpreted in a particularly strict manner; only 'exceptional grounds corresponding to a general interest which is superior' to the ecological interests pursued by the Birds Directive, for example a risk of flooding, permit modifications to be made to the protection regime.[93]

Even though the ratio of this judgment is only applicable nowadays to suitable ornithological sites that have not yet been classified by Member States, it still plays an essential role in questions relating to the boundaries of protection areas. In fact, both *Santoña Marshes* and *Lappel Bank* have extended the scope of the jurisprudence relating to the 'superior general interest' to cover the first two paragraphs of Article 4 (obligation to classify SPAs).[94]

Article 9 of the Habitats Directive expressly provides for the possibility of de-classifying SCAs, but does not extend this to SPAs for the protection of bird habitats. Because the ECJ in *Commission* v. *Germany* considered the issue of the reduction of the surface areas of SPAs only within the context of Article 4(4) of the Birds Directive, its findings cannot be applied to Article 4(1) and (2). Indeed, on their entry into force, paragraphs 2, 3, and 4 of Article 6 of the Habitats Directive replaced, for classified SPAs, Article 4(4) of the Birds Directive, the very provision upon which the ECJ's reasoning was founded.

Therefore, a total or partial de-classification of an SPA is only possible in accordance with the procedure foreseen under Article 6(3) and (4) of the Habitats Directive, which only covers very specific types of project. Where a Member State does not act within this derogative framework, it will fall foul of the inviolability principle laid down by the ECJ in *Leybucht*.[95]

D. De-classification of SCAs Established to Preserve Natural Habitats and the Habitats of Species of Community Interest

Although the classification procedure is characterized by a minutely regulated collaboration between Community and national authorities, the de-classification procedure of the SCAs is worded in particularly murky language. It is only possible in the context of a periodic assessment of the contribution of the objectives pursued by the Directive and where it is 'warranted by natural developments noted as a result of the surveillance' by Member States.[96] It would for example be possible for an estuary whose most basic ecological functions had

[91] ibid., para. 26. [92] ibid., para. 27. [93] ibid., para. 22.
[94] *Santoña Marshes*, n. 31 above, paras. 18, 19, 35, and 45 and *Lappel Bank*, n. 31 above, para. 41.
[95] *Leybucht*, n. 31 above, para. 20. [96] n. 3 above, Art. 9.

fallen victim to the natural phenomenon of silting. By contrast, the demographic or economic development of localities adjacent to the SCA cannot justify its de-classification since the Directive only refers to 'natural evolution'. It is thus incumbent on the State requesting the de-classification to prove, within the context of the surveillance tasks with which it is charged,[97] that the site has lost its interest due to some natural phenomenon. At the end of the periodic assessment, the Council, acting on the basis of a proposition of the Commission, must rule on the request for de-classification.

IV. The Conservation Regime for SPAs and SCAs

The scientific selection of sites in the Natura 2000 network is only meaningful where it leads to the implementation of an appropriate legal regime which provides for the respect of the appropriate qualitative objectives, setting out both incentives and binding measures.

Generally speaking, the SPAs must be subject to special conservation measures under Article 4(1) and (2) of the Birds Directive. These measures will relate to a pro-active management of the ornithological sites. The SCAs for their part require, according to Article 6(1), the adoption of 'necessary conservation measures' specifically tailored to the ecological requirements of the relevant species and natural habitats (A).

However, the obligation to classify the SPAs implies also the requirement to adopt, in accordance with the requirements laid down by the Court of Justice, a specific legal status for ornithological sites. This obligation is founded on Article 4(1) and (2), and has not been altered by the Habitats Directive. It applies to all ornithological sites that have not yet been classified as SPAs, thus effectively applying to a large surface area of the territories of the Member States (B).

Moreover, the Birds and Habitats Directives provide for a preventive regime applicable to all areas protected by the Natura 2000 network. For any SPAs that have already been classified, the protection regime, which had previously been defined by Article 4(4)(1) of the Birds Directive, has now been replaced by Article 6(2)–(4) of the Habitats Directive. This new regime therefore applies both to SPAs and SCAs (C).

Finally, the derogation mechanisms will also be analysed in some depth (D).

A. General Conservation Measures for SPAs and SCAs

i. Conservation of SPAs

The maintenance of the biological interest of semi-natural ecosystems not only requires preventive measures such as prohibitions, but also more pro-active management measures. Though not referring to a 'management' of sites,

[97] ibid., Art. 11.

Article 4(1) and (2) of the Birds Directive (which is still in force) requires, in fairly non-specific terms, that Annex I species and regularly hosted migratory species be subject to 'special conservation measures concerning their habitat'. The ECJ has on several occasions expressed the view that such measures are not limited to the classification of the ornithological site as an SPA.[98] In fact, in order to attain the objective of an enduring conservation—that is, ensuring the survival and reproduction of such species in their area of distribution—it is incumbent on States to manage the habitats of these species so that they can be maintained in a state corresponding to their ecological requirements pursuant to Article 2 of the Directive. On several occasions, the ECJ has found that the 'protection' regime of the SPAs cannot be limited to mere prohibitions.[99]

The conservation of the habitats of Annex I bird species and of migratory species thus requires the adoption of management measures (pruning, water level controls, extensive grazing, clearing of undergrowth, the acquisition or leasing of lands, and so on) which are indispensable in respecting the result-based obligation placed on Member States.

ii. Conservation of SCAs

In contrast with the Birds Directive, the Habitats Directive attempted to clarify somewhat the form that conservation measures should take. In addition to the binding preventive norms intended to protect the classified habitat (such as the decree of classification), the framers of the Directive required the adoption of 'necessary conservation measures' for habitats located within an SCA.

'Conservation' is understood as the 'series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status'.[100] The 'conservation status' of a natural or species habitat is taken to be 'favourable' where a number of conditions are satisfied (stable or increasing natural range, maintenance of specific structure and functions, viable populations) (Article 1(e)). Since every site contributes to the consistency of the Natura 2000 network, the conservation status at general site level proves to be equally indispensable.[101] For example, even though the disappearance of about 10 hectares of peat-bog from an SCA in the grand scheme of things at EC level does not threaten the future of this type of habitat on the European continent, such a loss does however jeopardize the consistency of the network by compromising the conservation status of the habitat on the particular site.

[98] *Santoña Marshes*, n. 31 above, paras. 28–32; *Seine Estuary*, n. 31 above, para. 2; *Poitevin Marsh*, n. 31 above, para. 22; Case C-451/01, *Commission* v. *Belgium*, n. 31 above, paras. 16–17.

[99] On the inadequacy of certain types of protection status, see *Santoña Marshes*, n. 31 above, paras. 28–31 and *Seine Estuary*, n. 31 above, para. 25. On the inadequacy of agro-environmental measures, see *Poitevin Marsh*, n. 31 above, paras. 26–7.

[100] n. 3 above, Art. 1(a).

[101] *Managing Natura 2000 Sites—The Provisions of Article 6 of the Habitats Directive 92/43/EEC* (Luxembourg: European Commission, 2000), 19, published on the Internet at: http: //www. europa. eu.int/comm/environment/nature/.

'Special conservation measures' relating to the habitats of an SCA consist, where applicable, in the development of 'appropriate management plans specifically designed for the sites or integrated into other development plans', as well as in the adoption of 'appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites'.[102]

Ratione materiae, the 'conservation measures' required under the first paragraph of Article 6 may be either positive (plans for spreading, grazing incentives, subsidies, delayed pruning, hedgerow maintenance) or negative (prohibitions of soil contour modifications, deforestation, picking or harvesting wild species). For example, subsidies may prove to be an effective means of guaranteeing the conservation of habitats generated through traditional agro-pastoral activities (chalk grasslands, moors, irrigated hay fields, hedgerows, and so on) which require the maintenance of an extensive agriculture.

Ratione loci, these measures are only applicable inside the SCAs and apply to these only; they are not relevant for SPAs for wild birds (see above section IV.A.*i*).

Ratione temporis, unlike the specific preventive regime[103] which will enter into force with the adoption of a list of Community sites,[104] conservation measures[105] apply only pursuant to a formal classification of the site by the Member State.

Finally, as far as the form of special conservation measures is concerned, Article 6(1) of the Habitats Directive offers some clarification. Measures can relate, 'if need be', to 'appropriate management plans specifically designed for the sites or integrated into other development plans'. If this is the case, then the aspects of the plan that do not relate to site management remain subject to an appropriate impact study as provided for in the Habitats Directive (see below sub-section E).

In any case, even where Member States do not adopt any management plan, they must in general terms take the 'appropriate statutory, administrative or contractual measures'.[106] Although no single type of measure is privileged above the others, it is incumbent upon Member States to make the choice between statutory, administrative, or contractual measures in accordance with the principle of subsidiarity. In the final analysis the measures must, to repeat, be 'appropriate', that is, tailored to the 'ecological requirements' of the species and habitats concerned, at the same time contributing to the conservation objective over the site. Member States' margins of appreciation therefore turn out to be somewhat limited, as they are bound by the result-based obligations[107] to adopt statutory measures as appropriate where contractual measures prove to be insufficient. In addition, if the State opts for a contractual measure, this does not allow it to refrain from adopting a statutory regime for the area aimed at specific prevention, which is required, as will be shown below, by paragraph 2 of Article 6.

[102] n. 3 above, Art. 6(1). [103] ibid., Art. 6(2). [104] ibid., Art. 4(5).
[105] ibid., Art. 6(1). [106] ibid.
[107] See further *Managing Natura 2000 Sites*, n. 101 above, 18.

B. The Specific Prevention Regime Applicable to SPAs

i. The Prevention Regime Initially Provided for under the Birds Directive

Initially, the Birds Directive provided for the application of a particularly strict prevention regime, Article 4(4)(1) providing that 'in respect of [special] protection areas . . . Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article'.

Since no specific mechanism for derogations is foreseen by the Directive, the ECJ held in *Leybucht* that Article 4(4)(1) of the Birds Directive could not be subject to any derogation other than on 'exceptional grounds' which 'correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive'. Economic and recreational requirements provided for under Article 2 of the Directive would not fall under this category, because this provision does not constitute an autonomous derogation from the protection regime established by the Directive.[108]

The protection of habitats would therefore appear to be almost absolute for sites which deserve classification as an SPA. A small chink in this *a priori* very protective legal cover was however opened up in the same case, with the ECJ admitting the possibility of taking into account compensatory measures. Although the consideration of socio-economic interests is in principle incompatible with Article 4(4), such exceptions can however be accepted where ecological compensation flows from the project, as long as this is justified by a superior general interest.

ii. Maintenance of the Initial Protection Regime for Sites Requiring an SPA Classification

In principle, before the entry into force of the Habitats Directive, the preventive regime of Article 4(4)(1) of the Birds Directive applied to all SPAs. Moreover, in a whole line of judgments the ECJ has insisted that Article 4(4)(1) of the Birds Directive was applicable irrespective of whether the relevant areas had been classified or not, since all such areas should have been classified in the first place.[109] In other words, the fact that a State may have refused to classify an appropriate site does not mean that the site is wholly devoid of protection under EC law.

The Habitats Directive introduced an important amendment to the protection regime provided for under the Birds Directive: Article 7 of the former Directive in fact provides that obligations stemming from Article 6(2)–(4) 'shall replace any obligations arising under the first sentence of Article 4(4) of Directive

[108] *Leybucht*, n. 31 above, paras. 21 and 22.

[109] See also *Santoña Marshes*, n. 31 above, para. 22; *Seine Estuary*, n. 31 above, para. 38; *Poitevin Marsh*, n. 31 above, para. 41. Moreover, Article 4(4) has direct effect. As far as national systems are concerned, see for Belgium, C.E., Wellens, no. 96.198 of 7 June 2001 (2002) 1 *Amén-Env.*, 74–7; for the Netherlands District Court Leeuwarden, 17 July 1998; for Germany, *Bundesgewaltgericht*, 19 May 1998, BVerwG.

79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognized under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later'.

Does this mean that the old protection regime (Article 4(4) of the Birds Directive) has been definitively repealed? By no means. According to the ECJ, Article 7 of the Habitats Directive does not provide for the substitution of the protection regime 'of areas classified pursuant to Article 4(1)' of the Birds Directive with Article 6(2)–(4) of the Habitats Directive.[110] According to the wording of Article 7, this substitution becomes operative 'from the date of implementation of this Directive or the date of classification' where the latter date is more recent.[111] This therefore means that 'areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the birds directive'.[112] Therefore, all sites still requiring a formal classification as SPAs fall under the initial protection regime and cannot be subjected to the more favourable derogatory regime provided for under Article 6(2)–(4) of the Habitats Directive.[113]

As a result, there are two distinct protection regimes: on the one hand the stricter regime provided for under the Birds Directive in its initial version remains applicable to ornithological sites that have not yet been classified as SPAs; on the other hand a more flexible regime implemented by the Habitats Directive applies both to SPAs which have already been classified as well as to future SCAs.[114]

The impact of the stricter regime is far from negligible since it currently applies to surface areas stretching into the tens of thousands of square kilometres. Whereas 2,403 SPAs covering a surface area of 162,450 square kilometres had been classified at the start of 1999 (covering some 7 per cent of the total surface areas of the territory of the fifteen Member States), 46 per cent of sites identified as part of the Natura 2000 network (including 1,082 Important Bird Areas) had still not been classified.[115] Considering the low percentage of sites classified as SPAs in particular countries (only four Member States had in 1999 classified more than three-quarters of their IBAs), the application of the stricter regime should incentivize the less active national authorities formally to classify their most suitable territories. This conclusion flows from the principle that a State cannot draw benefit from the non-observance of its Community obligations.

iii. The Entry into Force of the Preventive Regime for SPAs

Particular activities which are carried on in SPAs that significantly disturb the bird populations or that destroy their habitats were only outlawed with the entry into

[110] *Basses-Corbières*, para. 44. [111] ibid., para. 46. [112] ibid., para. 47.

[113] See also Dutch Administrative Law Division of the Council of State, 20 June 2001 (2002) 15–4 *Milieu & Recht* (annotation Verschuuren), 13439. [114] *Basses-Corbières*, n. 31 above, para. 50.

[115] Third Report of the European Commission on the application of the Birds Directive COM(2002)146, 25 Mar. 2002.

force of the Birds Directive, either on 16 April 1981 for the first nine Member States, or on the date of accession for the other States which have subsequently joined the Community.[116]

C. The Specific Prevention Regime Applicable to SCAs

i. Conservation of Habitats—A Result-Based Obligation

In accordance with the principle of prevention of Article 174(2) EC, the adoption of a preventive regime including prohibitions (on building or the modification of the contours of soil or vegetation) binds Member States insofar as they are obliged to take 'appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive'.[117]

References to 'avoid' and 'could be significant' reinforce the anticipative nature of this regime. It is more sensible to pre-empt potential damage than to repair actual damage.

The ECJ has on several occasions offered clarifications relating to the implementation of Article 6 of the Habitats Directive,[118] in particular in *Commission* v. *France*.[119] In this case, Advocate General Fennelly noted that, even if States were not obliged to adopt a general provision establishing a specific protection regime in the SCAs,[120] they would in any case have to adopt measures in order to satisfy the conservation objectives set out in the Directive. Therefore the provision is nothing less than a result-based obligation binding the Member States.

ii. The Entry into Force of the General Preventive Regime for SCAs

The obligation enshrined in Article 10 EC, according to which States must abstain from any measures which could jeopardize the attainment of the objectives of the Treaty, requires States to refrain from acting whilst the development of the list of sites of Community importance is in progress.[121] It is evident from several judgments handed down by the national courts that a national authority cannot approve a project which would have the effect of destroying any site which *a priori* satisfies the criteria of Annex III of the Habitats Directive, as this would be

[116] *Santoña Marshes*, n. 31 above, paras. 49 and 56.

[117] n. 3 above, Art. 6(2). Note that according to the ECJ, Art. 6(2) cannot be applicable concomitantly with Art. 6(3), *Waddenzee*, n. 31 above, para. 38.

[118] The following cases deal with the transposition of Article 6 of the Habitats Directive: Case C-374/98, *Commission* v. *France* (*Basses-Corbières*), n. 31 above; Case C-324/01, *Commission* v. *Belgium* [2002] ECR I-11197; Case C-75/01, *Commission* v. *Luxembourg* [2003] ECR I-1585; Case C-143/02, *Commission* v. *Italy* [2003] ECR I-2877.

[119] Case C-256/98, *Commission* v. *France* [2000] ECR I-2487.

[120] para. 14 of the Opinion of Advocate General Fennelly in C-256/98, *Commission* v. *France*, n. 119 above.

[121] *Managing Natura 2000 Sites*, n. 101 above, paras. 12–13.

tantamount to impeding the diligent execution of Community law obligations by the State. The obligation, in respect of sites likely to fall under the Natura 2000 network, to refrain from any harmful activity which would compromise the site's inclusion in this network applies up until the Commission's adoption of the list of sites of Community importance.[122]

Some ill-intentioned people might however be able to take advantage either of the inevitable delay in the implementation of a definitive protection regime by national authorities, or of the absence of classification pursuant to the adoption of the Community list in order to eliminate the biotic, abiotic, or geographical characteristics of a habitat which would have been selected by the Commission to form part of the Natura 2000 network. In order to moderate the impact of the announcement which the initiation of the definitive classification procedure under the applicable national laws would have and in order to avoid sites pending classification being ruined, Community law provides for two types of provisional protection regime for prospective SCAs. On the one hand, sites included in the list of sites of Community importance, established on the basis of national lists, are subject to all intents and purposes to the protection regime operative after the definitive classification of a habitat at the end of the classification procedure.[123] On the other hand, a provisional protection regime is established for the duration of the bilateral negotiations between Commission and Member State for sites hosting a priority natural habitat or species which Member States have not proposed for the Natura 2000 network.[124] In such cases, States cannot rely on the absence of classification in order to avoid the constraints which are part and parcel of the protection of their sites.

In accordance with Article 10 EC, Member States must implement the protection regime even before the list of sites of Community interest has been passed by the Commission because the provisional protection must become enforceable against third parties on the same day as the entry into force of the Commission decision.

iii. Species and Habitats Covered by the General Prevention Regime

Article 6(2) is framed in such terms as to appear to cover the deterioration of any natural or species habitat inside the SCA, rather than simply the habitats for which the site has been classified.[125] The ECJ confirmed this interpretation in

[122] For Germany see *Bundesgewaltgericht*, 19 May 1998; BVerwG. For Belgium see C.E., *asbl 'L'Erablière' et commune de Nassogne*, no. 94.527 of 4 April 2001; C.E., *asbl 'L'Erablière' et autres*, no. 96.097 of 1 June 2001. For the Netherlands see the judgments of 11 July 2001, no. 200004042/1, 29 Jan. 1999, and 26 Oct. 1999. For Greece, see Council of State judgment no. 225/2000. This general trend in the case law was however not followed by the Irish Supreme Court in *Murphy* v. *Wicklow County Council* v. *Minister for Arts, Heritage, Gaeltocht and the Islands*, 13 Dec. 1999.

[123] n. 3 above, Art. 4(5). [124] ibid., Art. 5(4).

[125] The text requires that States take measures to avoid the deterioration 'of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated'. The Spanish and Dutch versions of the Directive confirm that the phrase 'for which the areas have been designated' must refer back to the term 'species'. The Commission's commentary on Article 6(2) however states that measures covered by Article 6(2) 'only apply to the species and habitats for which the site was classified' (n. 74, p. 26). The Commission should therefore review its interpretation, which is mistaken.

Commission v. *Luxembourg*, in which it held that a provision of Luxembourg law, which made 'express reference to certain types of biotope only does not appear to be capable of ensuring, as is required by Article 6(2) of the Directive, that all natural habitats and habitats of species found within SACs are protected against acts liable to deteriorate them'.[126] The scope of this ruling is considerable, the provision embracing *a priori* the totality of habitats present within the boundaries of the area. Taking the example of an area classified solely on the strength of the presence of a peat-bog, such a choice would not permit public authorities to refrain from protecting adjacent moors within the same area even if these areas did not play a role decisive role in the selection of the site.

On the other hand, it is clear from the text that disturbances to be avoided are only those involving species for which the site was classified as an SCA.

iv. Geographical Range of Prevention Measures

Although prevention measures provided for under Article 6(2) need not ensure the protection of habitats and the species present within the concerned site, it is possible that they may have to cover particular activities carried on outwith the site, in the light of the result-based obligation contained in Article 6(2) of the Habitats Directive.[127] This means that national authorities would have to fix boundaries broader than those of the site, within which particular activities would have to be regulated (for example, the spreading of manure or the maintenance of landscape features supporting nature walkways). It follows that activities carried on outwith the area but which potentially threaten it should be regulated or even prohibited.

v. Nature of the Activities Covered by the General Prevention Regime

In line with Article 4(4) of the Birds Directive,[128] Article 6(2) of the Habitats Directive obliges Member States to avoid degradations and disturbances, irrespective of their origin. This provision forms part of a preventive approach which should lead national authorities to adopt a binding regulatory framework intended to cover the whole set of human activities capable of causing, on the particular site, habitat deteriorations or significant disturbances to species.

Any type of activity, whether past, present, or future, is capable of falling within the scope of Article 6(2). Accordingly, any commercial activity in progress must be regulated in order to avoid the deterioration of a nearby site. In the same way, any long-standing pollution damaging the area should be cleaned up.

[126] Case C-75/01, *Commission* v. *Luxembourg*, n. 121 above, para. 118.

[127] An analogy can be drawn with long-distance pollution caused by nitrates, Case C-396/00, *Commission* v. *Italy* [2002] ECR I-3949.

[128] The wording of Art. 6(2) of the Habitats Dir. is almost identical with that of the original Art. 4(4) of the Birds Dir. which it replaced insofar as it applies to protected areas, except that it makes no mention of the obligation to avoid 'pollution'.

From what moment do 'deteriorations' or 'disruptions' fall under the preventive regime of Article 6(2) of the Habitats Directive, which has now replaced, for classified SPAs and SCAs, the old Article 4(4) obligations of the Birds Directive? Must all harm caused to the area be punished? Is any disruption of a protected species outlawed or only that which is significant? Ruling on the old regime applicable to SPAs (Article 4(4)(1) of the Birds Directive), the ECJ did not offer a clear response to these questions.[129] As for the new regime implemented by the Habitats Directive, the position appears to be clearer. According to a literal interpretation of Article 6(2) applicable both to SPAs which have already been classified as well as to SCAs still to be classified, a distinction should be drawn between:

— on the one hand, the obligation to avoid the 'deterioration of natural habitats and the habitats of species', irrespective of its nature;
— on the other hand, the obligation to avoid 'disturbances of species', where such disturbances are significant.[130]

As far as habitats are concerned, the ECJ and the national courts must punish all forms of deterioration of classified areas or sites that should be subject to classification, without the Commission or the plaintiffs having to prove the significant nature of these deteriorations.[131] This reasoning would appear to be logically justified. Where a site has been considered, from a scientific point of view, to be particularly appropriate for the survival of an animal species or the maintenance of a habitat and where for this reason it forms part of the ecological coherence of the Natura 2000 network, any deterioration of the area represents a substantial risk for the survival of species living there, and can thus be considered as 'significant', unlike other disruptions (such as hunting or recreational activities) which are only temporary. For example, if hunting proved to be excessive, it would always be possible to ban it in order to facilitate the recovery of the affected populations.

Should this interpretation be confirmed, it would be able to solve the apparent contradiction in Article 6 between sub-section 2, which seems to exclude any

[129] See the significantly varying reservations of the ECJ in *Santoña Marshes*, n. 31 above, paras. 36, 41, 46, and 53.

[130] The English, German, and Dutch versions of Art. 6(2) of the Birds Dir. confirm that the term 'significant' refers only to disturbances of species and not to the deterioration of the habitats. It would therefore follow that the term 'significant' only relates to disturbances caused to the species, assuming that Art. 5(d) of the Habitats Dir. obliges Member States to take measures necessary to establish a general protection regime, including in particular the prohibition of intentional disturbances of all bird species, wherever such disturbance has a 'significant' effect in the light of the objectives of the Directive.

[131] A difficulty in interpretation is caused by the extent to which the following paragraph of Art. 6 provides that the effects have to be significant in order to be subject to an impact study. In Case C-117/00, *Commission* v. *Ireland* [2002] ECR I-5335, the ECJ found that overgrazing of the peatlands of an SPA was leading to a deterioration of the habitats of several species included in Annex I of the Birds Dir. It did not however consider the degree to which such deterioration was significant.

deterioration (irrespective of its effect), and sub-section 3, which provides for impact studies of plans or projects 'likely to have a significant effect' on the site.[132]

vi. Direct Effect of Article 6(2)

Direct effect is the most efficient weapon for punishing delays in the implementation of these obligations. It would appear that in *Leybucht* and *Santoña Marshes* Article 4(4)(1) of the Birds Directive was deemed to be sufficiently clear and unconditional to have direct effect in domestic law. This reasoning applies *mutatis mutandis* to Article 6(2) of the Habitats Directive, the wording of which is nearly identical. For several years, national courts have accepted the direct effect of Article 4(4) of the Birds Directive[133] and, more recently, Article 6(2) of the Habitats Directive.[134] Finally, in a particularly well-argued opinion in *Waddenzee*, Advocate General Kokott confirmed this view.[135] The ECJ did not rule on this issue in its decision handed down on 7 September 2004.

D. Derogations from the General Conservation Regime—Impact Studies

Under the influence of Article 4(4)(1) of the Birds Directive, the ECJ held, perhaps in a somewhat overbearing manner, that the protection regime could be subject to derogations if they were justified by fundamental interests, although these did not include economic and recreational requirements.[136] Building on these rulings, Community lawmakers provided expressly in the Habitats Directive for the possibility of Member States derogating from the Article 6(2) prevention regime, discussed above in sub-section C.

In order to preserve classified habitats from development or other activities likely to alter their ecological integrity, Article 6(3) of the Habitats Directive provides for a *sui generis* prospective impact study of the environmental effects

[132] It is probably the case that a plan or project *likely* to cause a deterioration (in the above sense) of a habitat would fall under the category of plans or projects likely to have or having a significant effect on the site. The impact of such a plan or project on the site would therefore have to be considered in an appropriate assessment. Were this to confirm the risk of deterioration, then the plan or project would have to be considered as harming the 'integrity of the site' (according to the Commission, the concept of integrity appears to be understood as an 'intact or complete state' (n. 74, p. 36)). The plan or project would in this case, in the absence of any derogation, have to be rejected.

[133] For Belgium see n. 109 above.

[134] For the UK see *R* v. *Secretary of State for Trade and Industry ex p. Greenpeace*, High Court (QB) 5 November 1999. For Belgium see C.E., 4 Apr. 2001, no. 94.527, *ASBL L'Erablière et crts*. For the Netherlands see Pres. Rb. Leeuwarden, 21 Oct. 1997 and 28 Apr. 1997; Rb. Leeuwarden 17 July 1998; Rechtbank Breda, 6 Nov. 2000 (2001) 3 *Milieu & Recht*, 64–70, obs. J. Verschuuren. For Germany see BVerwG, 19 May 1998. See the other cases mentioned by Verschuuren, n. 3 above, 313.

[135] paras. 121–37. Cf. however the Opinion of Advocate General Fennelly in Case C-256/98, *Commission* v. *France* [2000] ECR I-2487, para. 16.

[136] *Leybucht*, paras. 23 and 24; Opinion of Advocate General Van Gerven in *Santoña Marshes*, n. 31 above, para. 46; *Santoña Marshes*, n. 31 above, paras. 19 and 50.

applicable to 'any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects'.

i. Substantive Limits of the Impact Study Procedure

Whilst plans and projects which are directly related to or necessary for the management of a site are not subjected to an impact study (for example, the wood-cutting foreseen in the management plan for a Natura 2000 forestry site), all other plans or projects capable of having a significant effect on the area must be assessed in accordance with procedures set in place by the Member States. Amendments of territorial management plans allowing for the operation of a rubbish dump[137] and annual permits to fish molluscs in an SPA qualify as 'plans or projects' for the purposes of this provision.[138]

The concept of 'plan' must be interpreted broadly due, on the one hand, to the wording of Article 6(3) covering 'any plan or project', and, on the other hand, to the conservation objectives on the strength of which SCAs are set up.[139] Therefore, only plans and projects which are 'likely' to have a 'significant' effect on the area need be subject to this assessment procedure.

The 'significant' nature of the impact of the plan or project must be interpreted objectively in light of the particular characteristics and environmental conditions of the protected site.[140] Accordingly, any activity compromising the conservation objectives which apply to the area is assumed to have a significant effect.[141] For example, the loss of 100 square metres of chalk grasslands can have significant implications for the conservation of a small site hosting rare orchids, whereas a comparable loss in a larger site (such as a steppe) does not necessarily have the same implications for the conservation of the area.[142]

Since the impact study regime covers plans and projects 'likely' to affect a site the conductor of the impact study must be able to identify, according to the precautionary principle, even those damages which are still uncertain.[143] Similarly, the text expressly requires that the cumulative effects of more negligible impacts be taken into account. This would be the case, for example, where permanent prairies were adapted to the cultivation of wheat, which, growing over a large area, would have significant effects on a site such as the Poitevin Marsh.

[137] Belgian Council of State, *Wellens*, n. 109 above.

[138] C-127/02 *Waddenzee*, n. 31 above, paras. 21–9.

[139] Opinions of Advocate General Fennelly in Case C-256/98, *Commission* v. *France*, n. 135 above, para. 33 and Advocate General Kokott in *Waddenzee*, n. 31 above, para. 30.

[140] Ruling on the same issue, the President of the Court of Leeuwarden (Netherlands) found, in a judgment of 28 Apr. 1997, that this condition was satisfied due to the possibility of cumulative effects of bore holes in the vicinity of a major ornithological site (Pres. Rb. Leeuwarden, 28 Apr. 1997 (1997) 10 *Milieu & Recht*, 214, obs. Backes).

[141] *Waddenzee*, n. 31 above, para. 48. See also the opinion of Advocate General Kokott in *Waddenzee*, para. 85.

[142] *Managing Natura 2000 Sites*, n.101 above, p. 36.

[143] *Waddenzee*, n. 31 above, para. 44.

Plans and projects covered by Article 6(3) must, finally, be authorized by an express act, subject to various conditions, which determines the rights and obligations of the parties involved.[144] This means that a notification mechanism would not satisfy the requirements of the Habitats Directive. In fact, the authorities must expressly mark their agreement on the project or plan. Similarly, implicit authorization regimes which would render moot any impact studies are incompatible with the requirements of Article 6(3).[145]

ii. Geographical Range and Objectives of the Impact Study Regime

The geographical range of the impact study is not limited to activities carried on in classified areas, but must also cover any plan or project located outwith the site which is likely to have a significant effect on the conservation status of the classified area. Thus, even more distant polluting activities located for example upstream from a classified wetland must be subject to an impact study.

iii. Content and Objective of the Appropriate Assessment

The Natura 2000 assessment procedure must be 'appropriate' having regard to the conservation objectives of the particular site.[146] It must therefore identify the specific, and not abstract, effects of the plan or project on every habitat and species for which the site was classified. The cumulative effects of the project with other proposed or existing projects must also be taken into consideration. Since it is important to consider the possibility of alternative solutions to the plan or project (required under sub-section 4), the assessor must also determine whether such solutions do in fact exist, including the alternative of blocking the project entirely. He or she must also propose an appropriate compensation package depending on the circumstances of the case.[147]

It is therefore not necessary to take into consideration all the environmental impacts of the project (effects on cultural heritage or human health) as it need only 'be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives'. The objective of the assessment is thus much more limited than that provided for under Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment (EIA Directive).[148] Nonetheless, nothing stands in the way of the establishment of a more targeted general assessment regime where the activity or infrastructure affects an SPA or SCA.

144 Opinion of Advocate General Kokott in *Waddenzee*, n. 31 above, para. 98.

145 Here an analogy can be drawn with the Court's jurisprudence on so-called tacit permits, Case C-360/87, *Commission* v. *Italy* [1991] ECR I-791, paras. 30–1; Case C-131/88, *Commission* v. *Germany* [1991] ECR I-825, para. 38.

146 n. 3 above, Art. 6(3). On the concept of appropriate evaluation, see the Opinion of Advocate General Kokott in *Waddenzee*, n. 31 above, paras. 95–8.

147 *Managing Natura 2000 Sites*, n. 101 above, 38.

148 [1985] OJ L175/40. In *Commission* v. *France* n. 38 above (Case C-348/01), the Court held that the object of the French impact study regime was not sufficiently '*appropriate*' having regard to the conservation objectives of the sites (para. 40).

iv. Effects of a Negative Assessment

The ECJ expressed the view in the *Waddenzee* case that the national authorities could authorize the plan or the project only on the condition that they were convinced that it would not adversely affect the integrity of the site concerned.[149] Accordingly, 'where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorization'.[150]

v. Relationship between the Impact Study Procedure under the Habitats Directive and that Required under the EIA Directive

Many projects—mainly those related to transport infrastructure—are likely to fall under both the Habitats Directive and the EIA Directive. Concerns over legal certainty should have led Community lawmakers to include the specific habitats impact study requirements in the EIA Directive. However, other than the reference in Annex III of the EIA Directive (setting out the criteria which Member States must follow when selecting the Annex II projects for which an impact study should be conducted in relation to the areas classified under the Birds and Habitats Directives), no integration between the two impact study regimes was provided for, however.

In contrast with the EIA Directive, it is not possible for a Member State to pass a restrictive list of plans or projects which have to be submitted to the Article 6 regime. National laws implementing the EIA Directive cannot therefore be viewed as correct implementations of Article 6(3) because, on the one hand, the EIA Directive only applies to a limited number of projects set out in its two Annexes, whilst the Habitats Directive applies to a potentially unlimited number of projects and, on the other hand, plans do not fall under the impact study regime of the EIA Directive.

The Habitats Directive does not apply to any specific type of activity, nor does it establish any quantitative thresholds.[151] The ECJ has accordingly denied to France the right to disregard the obligation to assess in respect of particular projects on account of their low cost or objectives.[152] According to the ECJ, Article 6(3) 'cannot authorize a Member State to enact national legislation which allows the environmental impact assessment obligation for development plans to be waived because of the low costs entailed or the particular type of work planned'.[153] The fact that a Member State chooses to implement Annex II of the Directive using thresholds also therefore obliges it to adopt a complementary regime for habitats part of the Natura 2000 network.

States must also ensure that the assessment of the impacts of the project or plan fulfils the requirements of the two Directives. The strictest procedural obligations must therefore apply, mandating for instance the public consultation of those

[149] *Waddenzee*, n. 31 above. [150] ibid., paras. 56–7.
[151] *Managing Natura 2000 Sites*, n. 101 above, 27.
[152] Case C-256/98 *Commission* v. *France* [2000] ECR I-2487, para. 39. [153] ibid.

affected, which is obligatory under the EIA Directive, but only a facilitative option under the Habitats Directive.

The optimum solution for Member States would probably consist in applying the terms of Article 6(3) of the Habitats Directive to all decision-making arrangements falling within their competence by means of which a particular authority, under the terms of the Directive, 'agrees' to the execution of a plan or project, with the exception of plans and projects 'directly connected with or necessary to the management of the site'. The best way of excluding plans directly connected with or necessary to the management of the site would be to require authorities to specify for every site the rules which determined whether particular plans and projects satisfied this criterion or not.

vi. Relationship between the Impact Assessment Procedures required under the Habitats Directive and under Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment

The national rules implementing the provisions of Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment (SEA Directive)[154] are also insufficient to implement the particular assessment regime provided for under the Habitats Directive. Particular projects affecting natural habitats either are or can be put beyond the reach of the SEA Directive (military, civil protection, financial, or budgetary operations). Furthermore, the assessment provided for by this Directive appears not to be sufficiently targeted, obliging States to oversee the production of a report on the environmental implications of prospective plans and programmes, a report which must *inter alia* contain an analysis of the 'environmental problems which are relevant to the plan or programme including, in particular, those relating to the SPAs or SCAs'.[155]

vii. Direct Effect of Article 6(3)

This provision has direct effect on account of the way in which it is framed.[156]

E. Derogations from the General Conservation Regime—Conditions for the Operation of the Derogation

i. Impact of Article 6(3) of the Habitats Directive on Decisions Taken by National Authorities

Article 6(3) provides that 'in the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the

[154] [2001] OJ L197/30. [155] n. 3 above, Art. 5(1) and Annex I.
[156] C-127/02 *Waddenzee*, n. 31 above, paras. 62–70.

competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned'. The wording of this provision implies that where the significant impact on the site of plans or projects is assessed, it is additionally necessary to obtain the authorization or express and motivated approval of the relevant authority.[157] The correct implementation of Article 6(3) of the Habitats Directive therefore requires Member States to set up a legal framework covering such plans and projects (whether specific or not: the amendment of legislation applying to listed installations would be sufficient). Accordingly, land consolidation, drainage, or contour modification operations impinging upon the conservation of SPAs and SCAs are all to be submitted to an assessment and authorization, even if they would not otherwise be submitted to such procedures under national law.

In order for the project to be authorized, Article 6(3) requires that the competent authority additionally ensure that 'it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public'. In other words the authorization can only be passed where the assessment demonstrates the absence of risks for the integrity of the site. If there is uncertainty over the subsequent manifestation of risks, the term 'ascertain', in line with the precautionary principle, would require the competent authority to refrain from issuing the authorization. Where there is any reasonable doubt over the absence of any effects, authorities must refrain from issuing authorizations. In accordance with the logic of the precautionary principle authorities can, if need be, order additional investigations in order to remove the uncertainty.[158]

ii. Derogation Mechanism Following Negative Findings in the Assessment

It may, however, transpire that the appropriate assessment clearly shows that the project threatens the integrity of the site. In principle no authorization can be issued. An exception is however provided for by Article 6(4), which recognizes, according to Advocate General Kokott, the principle of proportionality.[159] Optimum protection of the environment is assured by both procedural and substantive guarantees contained in Article 6(4) of the Directive. Projects can only be implemented where there are no alternative measures (iii) and where their completion is justified by specific interests (iv). Finally, even where a challenged project is accepted, Member States must mitigate its impact (v) and implement compensatory measures.

[157] ibid., para. 98.

[158] See also the Opinion of Advocate General Kokott in *Waddenzee*, n. 31 above, paras. 99–111. For an application in Dutch law, see *Pres. Rb. Leeuwarden*, 28 Apr. 1997 (1997) 10 *Milieu & Recht*, 214, obs. Backes. See also Verschuuren, n. 4 above, 309. On the precautionary principle, see N. de Sadeleer, *Environmental Principles* (Oxford: Oxford University Press, 2002).

[159] Opinion of Advocate General Kokott in Case C-127/02, *Waddenzee*, n. 31 above, para. 106.

iii. Absence of Alternative Solutions

In its jurisprudence on the application of Article 4(4) of the Birds Directive, the ECJ had already demonstrated an awareness of the existence of alternatives.[160] Similarly the Habitats Directive makes the issuance of authorizations dependent on the absence of alternative solutions.[161] Member States must therefore be able to demonstrate, where appropriate, that the impact study has found there to be no viable alternative.

Considering the useful effect of the Directive, it is appropriate to give, having regard to the useful effect of the Community norm, a broad interpretation to the obligation to seek out the least damaging alternative for the conservation of the site.[162] As soon as it becomes possible for the Member State to achieve the same objective in a way which causes less damage to the conservation of the protected habitat, the initial project must be abandoned in favour of the alternative project. This means that it should not be possible to invoke the higher costs of alternative projects as a reason for excluding less damaging projects, except where the costs are disproportionately high.[163]

iv. Balance of Interests

In addition to the obligation to adopt the least damaging alternative possible, the advantages of the project must be carefully balanced against its damaging effects for the conservation of natural habitats. The proportionality principle plays a key role in this balancing of interests: a project justified by a fundamental interest with only a relatively minor negative impact will be more readily accepted than a particularly damaging project whose public interest is marginal. A fundamental distinction must however be established between habitats whose protection is deemed to be important and those where it is not.

For non-priority habitats and species, 'imperative reasons of overriding public interest, including those of a social or economic nature' will justify the execution of the project. In including 'reasons of a social or economic nature', the intention of the Council of Ministers was to avoid the application of the concept of 'superior general interest' being limited only to public health and safety issues, as the ECJ had found in the *Leybucht* case.[164]

[160] On the alternatives to the routing of a new road through a wetland area, see the Opinion of Advocate General Van Gerven in *Santoña Marshes*, n. 31 above, para. 46.

[161] Annex III of Dir. 85/337/EEC provides 'where appropriate' that the developer study 'an outline of the main alternatives' [1985] OJ L175/40.

[162] On the obligation to privilege the alternative which is least prejudicial to ecological interests, see Case C-10/96, *Ligue royale belge pour la protection des oiseaux ASBL and Société ornithologique AVES ASBL* v. *Région Wallone* [1996] ECR I-6775, para. 18. Cf. however the Commission's favourable opinion of 24 Apr. 2003 on the construction of a railway line in Northern Sweden where the available alternatives did not entail higher costs.

[163] The European Commission considers that economic criteria do not take precedence over ecological criteria when selecting 'alternative solutions'. Cf. *Managing Natura 2000 Sites*, n. 101 above, 43.

[164] *Leybucht*, n. 31 above, paras. 22–4.

However, it would not be viable to give too broad an interpretation to 'reasons of a social or economic nature' which would run the risk of depriving the protection regime of any substance. Although in *Lappel Bank* the ECJ took care not to make any express statements on the range of 'imperative reasons of overriding public interest, including those of a social or economic nature', paragraph 41 of the judgment ('economic requirements, as an imperative reason of overriding public interest') nonetheless indicates that a restricted interpretation of 'economic requirements' must prevail. In any case, it is evident from the wording of Article 6(4) that economic requirements cannot be directly equated with 'imperative reasons of overriding public interest'.[165] This means that the enlargement of a harbour or the construction of a road network cannot be authorized for the simple reason that it satisfies particular economic requirements (for example, job creation or local economic development), but rather because it is intended to satisfy an overriding public interest (for example, the opening up of a particularly isolated region, the necessity of substantially raising the standard of living of the local population).

On the other hand, the Member State's margin of appreciation is more limited where the area consists of so-called priority habitats or species[166] since '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'.[167]

Framed in restrictive language, these grounds are to be interpreted strictly insofar as they depart from the principle that authorizations not be granted to plans or projects when assessments demonstrate that they would have negative ramifications for the conservation of the site.[168]

It is therefore necessary to understand the phrase 'other imperative reasons of overriding public interest' as referring to a general interest superior to the ecological objective of the Directive. The fact that social or economic reasons are not expressly included in this second exception indicates that they are not covered by it. Therefore, Member States may not authorize the passing of a motorway through a nature reserve classified as an SCA host to priority species where the impact study shows that the project will damage the integrity of the site.

As far as projects justified by 'other imperative reasons of overriding public interest' are concerned, a favourable opinion from the Commission is in all cases required.[169] This requirement is drawn up in similar terms to Article 37 of the

[165] Any pre-eminence of economic over ecological interests in the context of modifications to special conservation areas must be tempered by Art. 2 EC which puts economic and environmental objectives on an equal footing.

[166] Neither the Birds nor Habitats Dir. however indicates whether wild birds are to be considered as priority species.

[167] n. 3 above, Art. 6(4).

[168] ibid., Art. 6(3).

[169] The Commission's practice seems to be *a priori* favourable to requests from Member States. See the commentary by A. Nollkaemper, 'Habitat Protection', n. 3 above, 271. The European

Euratom Treaty. According to the Commission's position on the Euratom Treaty, the approval required for development affecting priority sites does not have binding force.[170] However, a failure to request the Commission's opinion or the implementation of a project in spite of a Commission refusal would constitute a default on the obligations contained in the Habitats Directive, which should be punished both by the competent national or Community authorities as well as by the national courts.

v. Mitigation Measures

The conservation of the area having been established in principle, any derogations that can be made must be interpreted strictly. As Article 6(2) requires States to take appropriate measures to avoid the deterioration of natural habitats and the causing of significant disturbances to species in the areas, they must therefore mitigate as far as possible any negative impacts of any project authorized pursuant to an impact study.[171]

The adoption of mitigation measures also limits the importance of compensatory measures.[172] The German Federal Administrative Court held in a judgment of 19 May 1998 relating to the destruction of a wetland in the state of Schleswig-Holstein, falling *de facto* under Article 4 of the Birds Directive that, in accordance with the *Santoña Marshes* case, the State could only justify a project damaging the integrity of a site on the grounds of a general interest. Although the construction of a motorway did not constitute such an interest from an economic point of view, the adoption of adequate measures to avoid the negative impacts of the motorway on the site, in the court's view, allowed the authorities to circumvent this prohibition.[173]

vi. Compensatory Measures

If a project is justified because there are no available alternatives and it satisfies the interests outlined above, it can be implemented subject to the obligation to take 'all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. [The Member State] shall inform the Commission of the compensatory measures adopted'. These measures are intended to counteract the negative effects of the project and guarantee compensation exactly equivalent

Commission has in particular recognized the greater public interest in the extension of the port of Rotterdam (Opinion of 24 Apr. 2003), the construction of a railway opening up a region of Sweden (Opinion of 24 Apr. 2003), the extension of a coal mine (Opinion of 24 Apr. 2003). It did not however endorse a project to establish an industrial zone in Germany (Opinion of 24 Apr. 2003).

170 Case C-187/87, *Saarland* v. *Minister for Industry* [1988] ECR I-5013.

171 It should be noted that Dir. 85/337/EEC only provides for the adoption of mitigation measures where strictly procedural pre-requisites are satisfied (see Annex IV, sect. 5) [1985] OJ L175/40.

172 See the mitigation measures for the passage of the A20 motorway through the 'Peene' protection area (anti-noise barriers, headlight-blocking screens). Cf. Commission Opinion 96/15/EC of 18 Dec. 1995, para. 4.3.

173 *Bundesgewaltgericht*, 19 May 1998; BVerwG.

to the negative effects on the relevant habitat or species.[174] Their content therefore varies according to the contribution to the coherence of the Natura 2000 network of the site affected by the plan or project (for example, restoration of damaged sites, classification of new areas to make up for those lost). On the other hand, the mere designation of areas to be classified is insufficient to fulfil this last condition.[175]

V. Conclusion

Species whose habitats are not conserved are condemned to disappear. In this context the linchpin of the Birds and Habitats Directives is the Natura 2000 network. As has been noted however, there have been considerable delays in the establishment of this network, which is all the more unjustifiable at a time when the deterioration of many ecosystems has never been so marked. Nonetheless, over these past years the Commission has not spared any effort in taking court action against recalcitrant States and cutting their subsidies. A difference has also been noted between the ECJ's relatively strict interpretation of the texts and the European Commission's apparently more lax view on the granting of derogations for infrastructure projects in protected areas. Moreover, the legal machinery put in place to ensure the conservation of natural habitats is highly complex and understood by only a select elite of environmental law specialists. Three Directives provide for impact studies applying in a cumulative manner which means that special protection and conservation areas are subject to distinct yet complementary classification regimes.

However, even if the rules discussed above were to be correctly and quickly applied, they would probably still not be able to halt the diminution of biological diversity in Europe.

Initially, as the Natura 2000 network will cover little more than a fraction of the most spectacular natural and semi-natural areas of the European continent, it is therefore up to the Member States to make substantial efforts at conservation both in the areas forming part of the Natura 2000 network and outwith these areas.

This is surely the catch today in the application of protection regimes for species and their habitats. The numerous findings against Member States handed down by the ECJ on nature conservation represent only the tip of the iceberg. Many sites of ornithological importance have still not been classified under the Birds Directive adopted in 1979. Moreover, a significant number of important sites which have been designated appear to be protected only on paper, such as the

[174] *Managing Natura 2000 Sites*, n. 101 above, p. 46.

[175] The compensatory measures need not apply to sites which have already been proposed to the European Commission and are under examination. See further the judgment of the Belgian Council of State, *Apers et autres*, 30 July 2002, no. 109.563 of 30 July 2002.

national parks in the Amazonian rainforest. The absence of a political will, the lack of financial resources, the predominance of traditional interests over ecological interests, outdated systems of criminal law, the inability of environmental associations in many Member States to bring court actions, and the ambiguity of the applicable legal provisions are just a few of the factors undermining the application of harmonized Community rules.

Finally, if the populations of such a wide variety of species continue to decline, such a rarefaction will do more to favour an intensification of forestry and agriculture than to promote the efficacy of the Community rules intended to ensure the conservation of wild species and their habitats.