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## 10 **Problems associated with the transposition of European nature protection law into national law**

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### 10.1 **Introduction**

Over the years, the EU has developed a rather ambitious system of nature protection law. During its implementation, several problems were encountered on Member State level. The following three questions were formulated in order to delineate them and find solutions to them:

- What are the challenges for national law posed by EC nature protection law?
- How have the challenges been met in practice?
- How could EC nature protection law be made more effective, in particular in relation to the Wadden Sea?

### 10.2 **What are the challenges for national law posed by EC nature protection law?**

EC nature protection law is framed in the form of directives. In principle, these are not directly applicable by the national authorities but must first be transposed into national law. Therefore the first difficulty is that unwilling Member States are able to slow the process down by delaying transposition. But even where national legislation has been adapted to the directives, often national authorities have not enforced the law accordingly.

The reasons behind the implementation difficulties are manifold. One reason is that there are older national traditions of nature preservation law and practice.

Four elements of these traditions are noteworthy:

- 1 The first concerns the level of decision-making: there has never been any doubt that it is a state's sovereign right to designate (or not to designate) an area as a nature protection area. In some states (such as Germany) this competence even belongs to the regions. This has not excluded that in some areas (e.g. the Alps, the large rivers and the Wadden Sea) international cooperation has influenced the national or sub-national authorities, although the fact that the competence of decision-making rests with the state has never been questioned.
- 2 The second facet of national traditions is related to the legal fettering of the actual decision-making on the establishment of nature protection areas: it has everywhere been a matter of political discretion with only weak legislative guidance. In the normal situation, the nature protection laws provide the authorities with the power to establish protected zones and propound a typology of different zones and the char-

- acteristics of the related protection regimes. But the primary decision whether and where to establish what kind of zone is normally not bound by material criteria.
- 3 The third element of national traditions is concerned with the handling of projects which if realised will impair the protected area: it has usually been needed to adapt smaller projects (e.g. the conversion of land use from forestry to agriculture) to the protection goals – or to forbid them, if this was not possible. By contrast, and most noticeably, large projects which were found to be of political priority have often led to annulment of the protective status. The effect of nature protection areas has therefore sometimes been paradoxical: whilst protected areas have widely been preserved against small-scale development, this very fact has often made them attractive areas for large projects.
  - 4 The fourth aspect is related to the constitutional status of nature protection. In traditional constitutional law, the exploitation of nature is regarded as part of the basic right of property and entrepreneurship, and the protection of nature is perceived as an encroachment on this right. Consequently, it is the necessity of nature protection which must be justified, not the need for nature exploitation. Nature conservation organisations have so far been forced to legitimise nature protection measures for their intrusion on property interests. By contrast, property owners have never been under constitutional duty to legitimise property exploitation for its intrusion on nature interests.

These national traditions have been confronted with quite a different approach of the EC nature protection law. It is based on the vision of a European common heritage of habitats safeguarded by institutional means superimposed on the national systems.

The characteristics of the EC concept are the following:

- 1 With regard to the level of decision-making, the Member States have the duty to create protected areas, and the Commission is given certain powers of supervision in this respect. Although the Commission cannot establish protected areas (the final decision is taken by the Member State concerned), it is entrusted to play an active part inducing the Member States to comply if they refuse to designate the relevant territories as protected areas.<sup>1</sup>
- 2 As to the legal fettering of the actual decision-making, it is of the utmost importance that EC law has established a binding framework of criteria for the identification of the protectable sites. The approach is of unheard radicality: only protection-related considerations count, and only in that respect is a certain margin of appreciation accepted. In contrast, economic and social reasons are rejected, the rationale being that the Birds<sup>2</sup> and the Habitats Directive<sup>3</sup> by confining the sectoral criteria to the most valuable habitats have already set priorities over societal needs.

1 See Article 5.2 and 5.1 Habitats Directive.

2 Council Directive 79/409/EEC on the Conservation of the Wild Birds, OJ L 103.

3 Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L 206.

- 3 As to the realisation of projects in the protected zones, the strategy of simply removing the protective regime has been suppressed. The status of a protected area can only be annulled if the area no longer fulfils the nature-related criteria requiring protection.<sup>4</sup> Any project which will nevertheless be realised within the framework of protection is subjected to a two-step test. First it is assessed on the basis of a special impact study whether the project would significantly damage the area. If so, the project cannot be realised. Only exceptionally can it be realised if compelling reasons of prevailing public interest so require and no alternative solution is available.
- 4 As for the constitutional status of nature protection, the EC approach has – as far as highly valuable habitats are concerned – reversed the property-friendly constitutional bias. Within the protected areas any exploitative property interest must now be legitimised in relation to nature. Therefore, nature conservation organisations no longer have to defend nature in order to restrict property rights, as nature is protected as such and persons or organisations wishing to infringe on nature have to show that the property rights are important enough to justify impairment of nature.

### 10.3 How have the challenges been met in practice?

If we consider the tensions between EC and national approaches it is no wonder that the Member States have delayed or even obstructed the due implementation of the EC nature protection directives, and that the EC has had and will have to elaborate strategies (e.g. the direct applicability of the directives) in order to put pressure on the reticent Member States. I will illustrate this implementation struggle by discussing a case which is relevant to an area not far from the location of our conference: the case of the Ems river dam.

The small city of Papenburg, which is located 40 km upstream of the Ems estuary, is home to a large shipyard specialised in building big cruise ships. With the gradual increase of the size and draught of these ships, the firm has faced difficulties in getting its ships moved into deep waters. To begin with, the Ems was dredged deeper and deeper, a process which threatened to turn the formerly rich estuary into a muddy, fast-flowing canal. As it was felt that the deep dredging was insufficient to satisfy the need of the ever larger ships, plans were drawn up to construct a dam downstream in order to be able to deepen the water by closing the sluices. Later on, the planning authorities envisaged and even propagated as a first concern that the dam should also be used to protect the upstream river and land against high tides.

The dam is nearing completion. But the appeal by BUND – a nature protection association – against the construction permit it is still pending. The *Verwaltungsgericht*

<sup>4</sup> Article 9, sentence 2, Habitats Directive.

Oldenburg rejected the action in May 2001. Upon appeal against the judgement the case is now being considered by the Oberverwaltungsgericht Lüneburg.

The BUND has submitted two major arguments:

- 1 The area where the dam is to be constructed has been designated a Special Protection Area (SPA) under the Birds Directive. The dam will, as a construction, reduce the protected area which in itself is a significant impairment of the protection goals.
- 2 Whilst the upper part of the Ems has been designated as an estuary (i.e. a Special Area of Conservation (SAC) under the Habitats Directive), the lower part where the water is to be dammed was not designated. This omission was due to the simple fact that it would enable the construction of the dam, although the lower part qualified as well – or even more – as an estuary. The dam will significantly impair this estuary by, for example, disturbing its salinity level thereby destroying water organisms and salty grassland on which some bird species feed.

The defendant – the District Authority of Oldenburg – supported by the shipyard as a third party, responded in the following manner:

- 1 Although the area had been notified as a SPA, the protection regime under the law of the state of Niedersachsen is yet to be established. Therefore the area is not a protected area. In any case the dam would not significantly disturb the bird population.
- 2 The lower part of the Ems does not qualify for designation as a SAC because due to the deep dredging history the quality of the natural habitat has declined. In any case there is no significant impairment because of the same low quality of the area.
- 3 Should nevertheless a significant impairment be found the project is necessary for two compelling reasons of the public interest: protection of human life against high tides, and the regional policy of securing employment in Papenburg.

To this last claim (that there was a compelling public interest in the project) the plaintiff responded:

- 1 In view of the Birds Directive only reasons of coastal protection, and not regional policy, could be accepted. In fact, coastal protection was a fake argument: the support of the shipyard is the only reason for building the dam. Coastal protection can, even at much lower costs, be achieved by improving the river dikes.
- 2 Although in view of the Habitats Directive regional policy was acceptable as a ground, the shipyard could move certain parts of its production downstream to where deeper waters are available. This was an alternative solution obviating the need to build the dam.

In its judgement the Court of First Instance found:

- 1 As for the Birds Directive, the area although not yet protected by national law was indeed a SPA. The protective regime required by the Directive was to be directly applied. However, the mere loss of land for the construction of a dam and road in a protected area is not seen as a significant deterioration. Effects on bird populations must be considered case by case. Only a few avocets nest along the route of the dam and road, and they will come back. The barnacle goose can be relocated to other

salty grassland. Most bird species living in the area do not feed on fish, so the depletion of the water body will have no effect on birds. By denying an impairment of the area, the court did not have to decide whether the project could be upheld for reasons of coastal protection.

2 As for the Habitats Directive:

- a The Ems is already deteriorated and therefore not worth protecting as an estuary.
- b Auxiliary argument no. 1: even if the estuary is worth protecting, the project will not have a significant impact, except for the destruction of five hectares of salty grassland.
- c Auxiliary argument no. 2: the project meets the test of serving compelling public interests:
  - regional policy and coastal safety are compelling public interests;
  - a reasonable alternative is not available:
    - as to the coast protection goal: the additional safety provided by the dam allows postponement of the improvement of the river dikes;
    - as to the regional policy goal: the removal of parts of the shipyard is beyond the scope of possible alternatives. It is legitimate that the planning concept is focused on improving the Papenburg region.

The case is an illustration of the strategies employed by Member States – Germany in this instance – to weaken the implementation of EC nature protection law, as well as of the counterstrategies offered by EC law.

With regard to the Birds Directive, the German authorities had stopped the process of establishing a protection regime in order not to hinder the project. However, the court – following earlier judgements of the European Court of Justice (ECJ) from the *Leybucht* case onwards – held that the protection regime required by the Directive was directly applicable. However, the court when assessing the impact of the project on the area adopted an individualising approach, asking whether the habitat of virtually every bird nesting in the area would be affected. Given the complexity of ecosystems this analysis strikes me as very unreliable. Much to be preferred is an approach which takes the destruction of a significant part of the area (six hectares in this case) as a significant impairment. Unfortunately, the court has refused to bring this question to the attention of the ECJ. This is all the more perplexing because there are ECJ judgements which can be read as supporting this latter approach.

In relation to the Habitats Directive, the German authorities had refused to establish the protection regime for an estuary. This obviously was done in order not to impede the damming of the river, but was justified by referring to the poor quality of the river. The court reacted to this by first of all accepting the general possibility of direct applicability of the protective regime required by the Habitats Directive. As under the Birds Directive, where *de facto* bird habitats are constructed, it is prepared to also construct a kind of *de facto* fauna or flora habitat, an interpretation which had previously been developed by the German *Bundesverwaltungsgericht*. However, the Oldenburg

court agreed with the submission of the defendant that the Ems was already too deteriorated to qualify for protection as an estuary – this is disregard of the obligation contained in Article 3 of the Habitats Directive to improve deteriorated conditions. After all, it was the same goal of supporting the shipyard which had caused the deterioration. Therefore the court when assessing the quality of the river could have denied the defendant the right to invoke conditions which he himself had induced. This was another question well suited for submission to the ECJ, but the court once more preferred to make its own interpretation.

The court seems to have understood the weakness of its interpretation, because instead of stopping at this point it proceeded further on the premise that there is indeed a *de facto* flora and fauna habitat. But this auxiliary line did not help the plaintiff either. It is finely constructed as a double safeguard. On the first level the existence of a significant impairment of the assumed protected estuary is denied, and on the second – where such impairment is hypothetically assumed – the court found that there is sufficient public interest to justify the project. Again, there was reason for preliminary proceedings:

- What is the yardstick for assessing significant impairment – the actual state (which was deteriorated) or some preservation and improvement goals? The court decided in favour of the first alternative.
- What is the regional scope of regional policy having the capacity of dominating over habitat protection – a small city, as in the case of Papenburg, or a somewhat larger region, such as the one extending the 20 km from Papenburg to the river mouth? The court adopted the narrow view.

In both respects the court took the narrower position but refused to submit this to the ECJ for a decision.

This case shows that national authorities are still practising their tradition of deciding about nature preservation in political terms. If economic or social reasons are deemed to have priority, administrative agencies have learned to be cautious when considering the establishment of protection zones. The courts have opposed this by constructing direct applicability of the protective regime of both the Birds and the Habitats Directive. But they have counterbalanced this strictness by two auxiliary means which have finally rescued almost all of the larger projects that have been subsumed to the test in Germany, including the Ems dam: constructing the notion of significant impairment rather ambitiously, they have often denied the existence of such impairment. Likewise, on the assumption of significant impairment they have constructed the public interest broadly giving priority even to the local interests of a small city, and they have kept the alternative solutions test low-key, thus narrowing down the scope of testable variants. All this may be defensible as viable interpretations, but it is hardly defensible that the courts have done this without asking the ECJ to rule on the matter. If even the courts have adopted a strategy of minimising the implementation of EC nature protection law, it is the avoidance of preliminary proceedings which characterises the court strategy.

## 10.4 How could EC nature protection law be made more effective, in particular in relation to the Wadden Sea?

Below are two possible remedies. The first has a more technical legal character, while the second aims at a more fundamental solution.

### 10.4.1 *Improving the control mechanism*

What kind of remedy is proposed normally depends on what kind of analysis of the situation it is based on. To propose a more effective control mechanism would be based on the analysis that the Member States' authorities, being involved in the short-term struggle to increase employment, are inclined to support the interests of nature exploitation rather than those of nature protection. In contrast, the Commission – being somewhat remote from such entanglement – can more easily strike a balance in favour of long-term nature protection interests. Based on this hypothesis, it is logical to suggest that the influence of the EC law and institutions should be strengthened.

One possibility is to further streamline the direct effect of the Birds and Habitats Directives. As mentioned, this doctrinal means of making EC law more effective has already been acknowledged in relation to the Birds Directive. The Habitats Directive, however, still awaits clarification in this respect.

I believe there is not one single construction of direct effect, but at least four of them depending on what the factual situation is to which the directive shall directly be applied.

- 1 In the first situation, a candidate area has not been designated but the term for designation (or implementation of the Directive) has not yet expired. In relation to the Habitats Directive, this situation has become academic because both the implementation term for the Directive itself and the term for designating Special Areas of Conservation have expired. The case will nevertheless be treated here, because it may arise again with regard to future directives. Prima facie there cannot be direct effect in this case precisely because the terms have not expired. But ECJ jurisprudence has developed the doctrine of anticipatory effect. Even before the terms for transposition have expired, the Member States must desist from rendering impossible the later realisation of what the directive wishes to accomplish. They are not allowed to create enduring facts which preclude the later nomination of the area for special protection.
- 2 In the second situation, a candidate area has not been notified although the term for such has expired. This case is relevant only in relation to the Habitats Directive, because the Birds Directive does not set a specific deadline for notification. Here, the non-abiding Member State has clearly violated the requirements of the Directive. If direct effect does apply this can be justified on the basis of a sanctioning effect which should be based on Article 10 EC Treaty. Just as in the first case for all candidate areas, and even those which are not the 'best suited', a standstill requirement applies.

The sanctioning effect expires once the EC list of Sites of Community Importance (SCI) has been compiled and notified.

- 3 In the third situation, a candidate area has not been notified but no term for notification applies. This is relevant in relation to the Birds Directive. With regard to the Habitats Directive the case is relevant only in relation to those Member States which have fulfilled the primary notification duty according to Article 4.1 sentence 1 and now have to consider amending the list of protected habitats. Here, direct effect applies when the regular conditions presupposed by direct effect are given. What these are is a much-debated question of general doctrine to which I must refer.<sup>5</sup>
- 4 Finally, in the fourth situation a candidate area was notified but a national protective regime has not yet been established. In this case Article 4.5 explicitly provides for direct application of the protection regime as required by Article 6.2 – 6.4 of the Habitats Directive.

Besides streamlining the direct applicability of the Birds and Habitats Directives protection regimes, the control mechanism could be strengthened by establishing a Community inspectorate. The inspectors would be entrusted with powers to monitor the Member State's practice on the spot. This suggestion may sound untrendy because it reinforces command and control devices. But consider the normality of Community inspections in the economic sphere, for example with regard to the rules on competition and on financial aid provided by Member States. There is no reason to regard the fairness of competition as more important than the survival of habitats.

#### 10.4.2 *Integrating economics and nature: the European biosphere reserve*

Control is indispensable, but will always encounter implementation resistance unless it gets to grips with the fundamental structures pressing for nature exploitation. The more fundamental problem is that economic welfare and ecological concerns are perceived as opponents. Nature protection is regarded as hostile to human welfare and is therefore often overruled. It is the great idea and hope of sustainability concepts that this opposition of economics and nature can be bridged.

Raising this issue we should immediately be aware of the potential misuse of the concept if it is employed to one-sidedly relativise nature protection in favour of economic and social concerns. It then serves merely to disguise untamed economic growth. In fact, sustainability means creating new forms of economic exploitation compatible with nature preservation, such as organic fishery, agriculture, forestry, tourism, etc. along with the fostering of markets for organic products and services, and the reorientation of consumption patterns.

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5 See Jan Jans' contribution in this volume and my article: Die Dogmatik der Direktwirkung von EG-Richtlinien und ihre Bedeutung für das EG-Naturschutzrecht, Zeitschrift für Umweltrecht 5/2002.

In relation to land use, the concept of a biosphere reserve may be invoked with its combination of a core protective zone, a zone of sustainable economy and a buffer zone. I believe – and here I finally arrive at that concern which brought us here today – the biosphere reserve should also be considered as a frame for the Wadden Sea Area. The actual state of protective regimes is already close to this model. For instance, the Wadden Sea National Park of Lower Saxony uses the zoning concept characteristic of the UNESCO concept of biosphere reserves. But the approaches the states and regions having jurisdiction over the Wadden Sea apply are still very different. A general idea is still lacking. The biosphere reserve could provide this much-needed general guidance, all the more because it would be a structure overarching the national sovereign rights of the relevant coastal states. However, there is no such thing as a European biosphere reserve. But it could be created by new law. Several variants of organisation are imaginable.

One is to use international law. In relation to the Wadden Sea this would mean that a trilateral agreement would have to be concluded which establishes a joint organisational structure of a Trilateral Biosphere Reserve Wadden Sea. Of course this agreement would have to respect the framework of the Birds and the Habitats Directive. The other option is to build on EC law. The Birds and the Habitats Directive could be revised to provide the concept of a European biosphere reserve, in addition to the already existing and to be retained concept of more strictly protected bird, flora and fauna habitats. The advantage of this solution is that regions other than just the Wadden Sea could be made biosphere reserves. European funding mechanisms could be directed to such status.

A compromise variant is to concentrate on the Wadden Sea as a first step but nevertheless to take the EC route. This means that the three states concerned acting on the basis of accelerated integration in accordance with Article 40 EC Treaty would use the Community organs to produce an EC legal act establishing the European biosphere reserve 'Wadden Sea'.

What option should be chosen needs more in-depth study. I myself tend to favour the European route. Karel van der Zwiep may prefer the trilateral convention which he has long propagated. But I know him to be open to any solution which helps to foster his problem child: the Wadden Sea.