GERMANY

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I- COMPETENCES

Germany is a federal state with 16 Bundeslaender. The Bund has only a framework competence with regard to legislation related to nature protection. The Bund has produced a law on nature protection, the Bundesnaturschutzgesetz, which, although being a framework law, goes much into details leaving the Länder only a small margin for their own legislation. The Länder, in turn, have introduced their own nature protection laws. These laws repeat most of the provisions of the Bundesnaturschutzgesetz concretising broadly formulated terms and filling in gaps. This is true also in relation to the implementation of the Natura 2000 scheme. Hence, the Laender have adopted provisions on the obligation to notify relevant sites, establish a protection regime, monitor the sites and enforce the protection requirements when projects are submitted for authorisation.

Frame-work laws may, in exceptional circumstances, contain directly applicable provisions. This is also true in relation to the Natura 2000 provisions of the Bundesnaturschutzgesetz. Directly applicable are those provisions which address the role the Bund government has to play in the process of determination of SPAs. For instance, the law provides with direct applicability that the Bund government is competent to register the candidate sites identified by the Laender, submit these sites to the Commission and participate in the negotiations according to Art. 4 sec. 2 of the Habitat Directive.

In relation to the EEZ the Bund has an exclusive competence to legislate. Although this is not explicitly mentioned in the Grundgesetz, it is an unwritten competence founded on considerations of what is called „the nature of the matter" ("Natur der Sache").

As far as administrative enforcement of the nature protection laws is concerned this belongs in principle to the competence of the Laender administration. All of the Laender have established nature protection agencies on the district, regional and ministerial level, but nature protection law has also to be observed by any other Land authority dealing with matters touching upon nature protection.

As mentioned before the Bund has however administrative competences insofar as it registers candidate Natura 2000 sites and represents the German proposals in the Commissin procedures. In relation to the EEZ the Bund has the entire administrative competence. This means that the Bund is responsible not only for channelling candidate sites through the Community procedure but also for the primary identification of sites as well as the final establishment and implementation of the protective regime.

The Bund has established a Federal Agency for Nature Protection (Bundesamt fuer Naturschutz) for federal tasks of federal nature protection. In addition, the Federal Agency for Environmental Protection (Umweltbundesamt) has also competences related to nature protection. In relation to the Natura 2000 regime the Bundesamt fuer Naturschutz is responsible for providing scientific advice on the protectable sites. In addition, it is in charge of identifying sites in the EEZ qualifying for SPAs.

II- STATE OF TRANSPOSITION INTO NATIONAL LAW

Tableau of correspondence between the EC directives, the Bundesnaturschutzgesetz, and the Naturschutzgesetz of the Land Niedersachsen (ndsNatSchG)

Dir. 79/409, Dir. 92/43	German legislation	State of transposition
Art. 1 Dir. 92/43 (Definitions)	§ 10 BNatSchG	good
Art. 3 Dir. 79/409; Art. 3 Dir. 92/43 (Basic obligations)	§ 32 BNatSchG; § 34b ndsNatSchG	good
Art. 4 sec. 1 – 3 Dir. 79/409; Art. 4 Dir. 92/43 (Identification and notification of sites)	§ 33 BNatSchG	good
Art. 5 Dir. 92/43 (concertation)	-	transposition not necessary

Art. 4 sec. 4 Dir. 79/409; Art. 6 and 7 Dir. 92/43 (prevention of deterioration)	§§ 34 – 38 BNatSchG; § 34c ndsNatSchG	average
Art. 10 Dir. 92/43 (coherence)	§ 3 BNatSchG; not yet established in Laender laws	good
Art. 11 Dir. 92/43 (monitoring)	§ 55 ndsNatSchG (general power of enforcement of the law); § 42 bremNatSchG (honorary enforcement task force)	poor

Directives 79/409 and 92/43 were transposed by certain provisions in the Bundesnaturschutzgesetz and the nature protection laws of the Bundeslaender. The most recent version of the Bundesnaturschutzgesetz was promulgated on March 25, 2002 (Bundesgesetzblatt I, p. 1193), the most recent version of the ndsNatSchG on January 27, 2003 (nds. GVBl. 2003, p. 39)

Translation of the core provisions

(1) Basic obligation to create protective regime

§ 32 BNatSchG:
(1) §§ 32 – 38 aim at establishing and protecting the European Ecological Network „Natura 2000", and in particular the areas of European significance and the European Bird Protection Areas.
(2) The Laender are to fulfil their obligations under Directives 92/43/EEC and 79/409/EEC, and in particular through the adoption of legislation in accordance with §§ 33, 34, 35 sentence 1 No. 2 and § 37 sec. 2 and 3.

(2) Identification and notification of sites

§ 33 BNatSchG
(1) The Laender select those areas which are to be notified to the Commission under Art. 4 sec. 1 Directive 92/43/EEC and Art. 4 sec. 1 and 2 Directive 79/409/EEC in accordance with the requirements of this provision. They seek the consent of the Federal Ministry for the environment, nature protection and reactor safety; this ministry involves the other concerned ministries. The Federal Ministry for the environment, nature protection and reactor safety notifies the selected areas to the Commission. It informs the Commission at the same time about assessments on financial contributions of the Community which are necessary in order to fulfil the obligations under Art. 6 sec. 1 Directive

92/43/EEC including the payment of financial compensation for agriculture.
(2) The Laender declare those areas which have been included in the list of areas of Community significance according to Art. 4 sec.4 Directive 92/43/EEC and the European Bird Protection Areas as protected elements of nature preservation and landscape protection according to § 22 sec. 2 (which contains the types of protected areas, G.W.)
(3) The declaration of protection determines the protection goal in acordance with the preservation aim and fixes the necessary boundaries of the area. It shall inform whether prioritary biotopes or species shall be protected. It is to be secured through appropriate orders and prohibitions that the requirements of Art. 6 Directive 92/43/EEC are met. Protective measures which go further can be applied.
(4) The establishment of a protected area is dispensable insofar as equivalent protection is provided for the area through legal provisions, administrative guidelines, the powers of a public or pro bono entity, or through a contractual agreement.
(5) In an area which was announced as identified area of Community significance or European Bird Protection Area according to § 10 sec. 6 BNatSchG any project, measure, change or disturbance significantly impairing the area with regard to its elements of importance for the maintance goals shall be prohibited until the area is being put under a protection regime. In a concertation area any project, measure, change or disturbance significantly impairing a prioritary biotope or prioritary species occuring in the area shall be prohibited.

(3) Prevention of Deterioration

§ 34 BNatSchG
(1) Prior to its authorisation or implementation any project must be submitted to an impact assessment in relation to the specific preservation goals of an area of Community significance or European Bird Protection Area. With regard to protected areas according to § 22 sec. 1 (i.e. the types of protective regimes G.W.) the criteria of assessment must be based on the general protection goal and the related concrete provisions.
(2) If the impact assessment finds that the project may significantly impair the specific preservation goals or general protection goal of an area n the sense of sec. 1, the project is not allowed.
(3) Other than provided by sec. 2 a project may exclusively be authorised or implemented 1. insofar as it is necessary for compelling reasons of the public interest including interests of a social or economic nature, and 2. if reasonable alternatives of realising the goal pursued by the project at another site or with less impairment are not given.

(4) If prioritary biotopes or species exist in the area affected by the project only those interests can be regarded as compelling reasons of the public interest which serve to protect human health, public security including defense and civil protection, and dominantly favorable effects of the protect on the environment. Other reasons in the sense of sec. 3 can only be considered if the competent authority has, through the Federal Ministry of the environment, nature protection and reactor safety has obtained an opinion of the Commission.
(5) If a project shall be realised according to sec. 3, if only in connection with sec. 4, those measures have to be required which are necessary in order to secure the ensemble of the EUropean ecological network Natura 2000. The competent authority, through the Federal Ministry of the environment, nature protection and reactor safety, informs the Commission about the measures taken.

III- TRANSPOSITION INTO REALITY

1- Procedure of selection of sites

As mentioned earlier the selection of sites is a competence of the Laender. The Laender have applied procedures of selection differing in details but following a general pattern which can be shown using the example of the Land Brandenburg:

Reports were compiled by the Land Ministry of Environmental Protection on those areas which qualify for SPAs. The reports were based on knowledge and views collected from the local nature protection agencies, scientific institutions, and the central Land agency for nature protection.
Further scientific expertise from national or European sources was taken into consideration. Documents which have become influential include - in relation to bird protection - the International Bird Areas Lists (IBA- Lists) 2000 and 2002 and - in relation both to bird and habitat protection - a report on protectable sites compiled by the Federal Agency for Nature Protection.[1] The nature protection associations provided additional case-related evidence.
The reports were discussed in public hearings on the district level.
Negotiations with the other ministries (notably economy and transport) which informally reported back to the Bund Ministries of Economy and Transport.

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[1] A SYMANK et alii, *Das europaeische Schutzgebietssystem Natura 2000*, BFN Handbuch zur Umsetzung der FFH-Richtlinie und Vogelschutzrichtlinie, Bonn-Bad Godesberg 1998 (ISBN 3-89624-113-3).

Revision of the areas listed.
Decision of the Land government on the bird and habitat protection areas to be designated.
Submission of the lists to the Federal Ministry of Environment.
Involvement of other Federal Ministries including Economy and Transport.
Negotiations with the Land about controversial cases.
Submission of the agreed lists to the European Commission.

2- State of notification

The notification has been completed with only some information lacking. The Bund was in 2002 positive that the full information would be provided by spring 2003, a deadline fixed by the Commission. Should the deadline not be met the Commission said it would file a complaint for the imposition of a fine on Germany. Even now (10/2003) the Commission is not yet satisfied. It has refused to provide subsidies for nature protection projects as a sanction.

3- State of Complaints; ECJ judgements

In planning procedures concerning valuable sites environmental associations and environmentalists very often argue that the Natura 2000 requirements of the Bird and Habitat Directives had not been respected. In many cases they also file complaints at the Commission asking for instigating a treaty vioaltion procedure. I have no overall information how often this has been done, and how many complaints are pending. In the case of Brandenburg, for instance, there were, in September 2002, about 10 cases pending in which the Commission had taken the first step according to Art. 226 EC, i.e. asking the Bund for comment on the complaint.

The ECJ has issued 2 judgements on German violations of the Natura 2000 scheme. In the first decision (judgement of 11 Dec. 1997, Case C 83/97) the Court determined that Germany had failed to adopt the necessary laws and administrative provisions for transposing the relevant EC Directives into national law. In the second decision (judgement of 11 Sept. 2001, Case C-71/99) the Court proclaimed that Germany had failed to submit to the Commission the lists required by Art. 4 Dir. 79/409 and Art. 4 Dir. 92/43.

As for the legislation Germany has meanwhile fulfilled its duties. As for the notification of candidate areas Germany did not immediately follow suit to the judgement. The Commission therefore informed Germany that they were considering to ask the ECJ for imposing a fine on

Germany. In addition the Commission announced that regions with sites qualifying as SPAs should not receive financial aid from the structural funds as long as the submission of candidate areas was not complete.

This caused the authorities to speed up the procedure. In spring 2002 Germany has finally submitted a list which was deemed complete. However, at meetings under Art. 4 sec. 2 Dir. 92/43 it was determined that more sites will have to be nominated.

As to procedures under Art. 234 it seems that there is no one single case where a German court has asked the ECJ for a preliminary ruling concerning the Natura 2000 regime. In general German courts have been very reticent to use this procedure, although they have developed quite innovative doctrinal concepts especially related to the direct effect of the Directives.

4- Decisions of national courts

a- Identification of areas

The directives have in many cases been referred to and applied by German courts. In relation to the obligation to compile and submit a list of candidate SICs the German Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) resounding jurisprudence of the ECJ has repeatedly held that the listing of sites for submission to the Commission must be based on scientific considerations. Social and economic considerations are to be neglected. The BVerwG has however added that the science-based judgement involves a certain margin of assessment with regard to the criteria proposed by Annex III Dir. 92/43, such as, for instance, the representativity of a local habitat for the distribution of the habitat in the wider country (BVerwG, judgement of 26 Oct. 2000, Case 4 A 18/99, Rep. 112, 140 et seq.). The case concerned the construction of a highway (the A 70) in the Land Thueringen. The plaintiff, a farmer part of whose land was to be expropriated for the project claimed that the project would destroy a valuable habitat. Interpreting the relevant law the Court says on p. 156:

The scope of a site is determined by the scientific criteria proposed by Annex III Habitat Directive. Political or economical considerations and any other considerations of expediency have no place. If it is determined by legislation that in a certain region there is need for a transport infrastructure project this cannot be of relevance for the geographical deliniation of a site. The Directive concedes the MS a margin of discretion only insofar as the catalogue of criteria contained in Annex III allows for different scientific assessments in the individual case. However, if from the scientific perspective there is no doubt that a

site fulfils the criteria, the site imposes itself to be listed, and indeed must be listed."

Looking at the factual situation the Court however found no evidence that habitats protected by Directive 92/43 were affected. The plaintiff had argued that the responsible administrative authority had not taken a close enough look at the facts. For instance, according to the plaintiff of the 100 red list birds affected by the project the authority had only mentioned 49. The Court reacted saying that although the facts must thoroughly be considered the authority did not have to go into every detail and produce a full account of every species to be found in the area: "The extension of research depends on the circumstances of the geographical area. From the scientific perspective a study going into any detail may prove superfluous. If certain species of fauna or flora are an indicator for the quality of the biotope and the living conditions of more species, or if certain structures of vegetation allow to extrapolate to the incidence of certain flora and fauna, it may be sufficient to only investigate the representative data." (p. 159)

In other cases the BVerwG has avoided to be conclusive on the facts but assumed that there was sufficient proof for a potential SIC. It nevertheless rejected the complaint also in these cases because it held either that the project at stake did not involve a significant deterioration or that there was a compelling public interest justifying the impairment. See for more details the answer to questionnaire 2.

b- Direct effect of the protective regime

The German Federal Administrative Court has extended the temporary protection regime to cases where a site qualifying as a protectable habitat according to the criteria of Annex III Dir. 92/43 was not notified by the authorities. In such so-called „potential FFH areas" the Court ruled no significant impairment is allowed which may prevent the later designation of the area as a Natura 2000 habitat. In developing this doctrine the Court referred to the judgement of the ECJ in the case of Inter-Environnement Wallonie (dated 18 Dec. 1997, Case C-129/96) where the ECJ said that a directive has a kind of advance-significance suppressing activities which may hinder the full realisation of its provisions after its full transposition into national law (see BVerwG, judgement of 19. May 1998, Case 4 A 9/97, Rep. 107, p. 1 et seq., at p. 22). The protection requirements in such cases are somewhat less strict than in the normal case, but in praxi the German courts nevertheless more or less apply the criteria established for judging projects in the normal case, i.e. the requirement that significant impairment is only allowed if

the project is necessary in the public interest and no alternative solution is possible. However, no active management duties are assumed.

Once the complete list of protectable sites has been accepted by the Commission the question will arise whether even further areas should be put under a special protection regime (see Art. 4 section 1 Sentence 4 Dir. 92/43). The question of direct effect will then arise anew. No court or administrative case law has been produced so far but the question has been discussed in academic journals.[2]

c- Active temporary management

The BNatSchG only requires active temporary management with regard to those sites which – in the case of habitats under Dir. 92/43 – have been introduced in the Natura 2000 list but not yet submitted to a detailed protection regulation, and which – in the case of bird habitats under Dir. 79/409 – qualify as EC bird protection areas without having been either notified or put under detailed protection regulation.

This legal situation has been left untouched by case law of the judicature.

d- Protective temporary management

Like in the case of active management the BNatSchG only requires protective temporary management with regard to those sites which – in the case of habitats under Dir. 92/43 – have been introduced in the Natura 2000 list but not yet submitted to a detailed protection regulation, and which – in the case of bird habitats under Dir. 79/409 – qualify as EC bird protection areas without having been either notified or put under detailed protection regulation.

This legal situation has been qualified by case law of the BVerwG. See sub e).

f- Court decisions on temporary protection duties

(1) Directive 79/409
The BVerwG has accepted direct effect of the protection requirements of Art. 4 sec. 4 Dir. 79/409 in cases where a site qualifying for special protection was neither protected according to national regulations nor notified to the Commission as protected (so-called factual bird protection

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[2] G. WINTER, *Die Dogmatik der Direktwirkung von EG-Richtlinien und ihre Bedeutung für das EG-Naturschutzrecht*, in Zeitschrift für Umweltrecht 2002.

areas) (see BVerwG judgement of 19 May 1998, Case 4 A 9.97, Rep. 107, p. 1 et seq., at p. 18 et seq.)

Following the ECJ judgement in the Les Corbières case (judgement of 7 Dec. 2000, Case C-374/98) the Court found that the rather strict criteria developed by the ECJ in the Leybucht case (judgement of 11 July 1996, Case C-44/95) are to be applied, i.e. not the somewhat weaker criteria of Art. 6 sec. 4 Dir. 92/43. This means that no public interest of an economical or social nature can justify a project involving significant impairment of a bird protection area.

Applying this principle the courts have, however, in most cases either denied that a project had a significant impact on the area, or accepted a public interest in the project as being prioritary. The judgement of the Verwaltungsgericht Oldenburg in the Ems river dam case may serve as an example. The dam was designed to protect against high tides from the sea as well as to make the Ems water body rise in order to allow ships constructed in Papenburg 40 km upstream to float into the deep sea. The dam was to be constructed right into a bird protection area, but the court said that neither the loss of ground for the building nor the cutting of the site into 2 pieces was a significant impairment. It asked for proof that the birds living on the site would be affected but found no evidence in this regard. (judgement of 16 May 2001, Case 1 A 3558/98).

(2) Directive 92/43

The BVerwG has developed a kind of direct effect of the protection regime required by Art. 4 sec. 3 and 4 Dir. 92/43. The basic idea is that the authorities have to see that the area qualifying for habitat protection is not impaired in a measure which excludes the final decision about its inclusion into the NATURA 2000 network. Although the Court constructs this regime of „potential FFH areas" to be somewhat less strict for designated or even not designated areas than for already finalised Natura 2000 SICs it more or less refers to the criteria established by Art. 4 sec. 3 and 4 Dir. 92/43 in such cases.

For instance the BVerwG held that the abatement of noise and accident caused by a city throughway was sufficient public interest to build a new road by-passing the city involving the impairment of a prioritary habitat qualifying for a SIC (BVerwG, judgement of 27 Jan. 2000, Case 4 C 2.99, Rep. 110, 302, 312 et seq.). The Court however developed some requirements for the proof of the danger to public health and refused to accept mere postulations in this respect.

In regard to what kind of alternatives must be checked the BVerwG only requires the checking of geographic alternatives. For instance, the relocation of the planned route of a road construction would have to be considered but not the choice of another mode of transport. An alternative solution is also not to be considered if it causes unproportionally high expenses. For instance, the argument sometimes promoted by objectors against road consruction plans that a valuable site may be tunnelled was rejected on the ground that this caused costs unproportional i relation to the loss of habitat. The courts did however not venture into calculating the value of this loss (see BVerwG judgement of 27 Jan. 2000, Case 4 C 2.99, p. 302 et seq., at p. 311).