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COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES  
COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES  
CÚIRT BHREITHIÚNAIS NA gCÓMHPHOBAL EORPACH  
CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE  
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# Natura 2000 in the Court of Justice

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# On the Advocate General

- Member of the Court
- Advises the Court by preparing Opinions
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background

# Outline

- Auditing Natura 2000
- Community Legislation
- Case law
- Site Designation
- Site Protection
- Species Protection
- Other issues

# Auditing Natura 2000

- The Court of Auditors shall examine whether all **expenditure** has been incurred in a **lawful** and **regular** manner and whether the **financial management** has been **sound**. (Article 248 II (1) ECT)

# Auditing Natura 2000

- Auditing Natura 2000 activities (cf. the report of the Court of Auditors on LIFE, OJ 2003 C292)
- Auditing the impact of Natura 2000 on other activities

# Directive 79/409

- Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 1)
- MS must designate and protect the best sites for endangered and migrating birds
- All European birds are protected from intentional killing, capturing and significant disturbance

# Directive 92/43

- Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 7)
- MS and COM must designate and protect a network of Sites for specific habitat types and species
- Certain species may not be (intentionally) harmed

# Other Directives

- Council Directive 85/337/EEC of 27 June 1985 on the **assessment** of the effects of certain public and private projects on the environment
- Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the **prevention** and **remediating** of environmental damage
- Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy
- Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers - '**cross compliance**'



# The Cases

- Non Transposition
- Conformity of Transposition
- Bad Application
- Preliminary references (Article 234 ECT)
- European Court Reports (ECR)
- <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>
- <http://eur-lex.europa.eu/>

# Conformity (Habitats)

- C-256/98 - France
- C-75/01 - Luxembourg
- C-143/02 - Italy
- C-407/03 - Finland
- C-441/03 - Netherlands
- C-6/04 - UK
- C-98/03 - Germany

# Bad Application (Natura 2000)

- C-374/98 - Basses Corbières
- Insufficient Proposals (C-67/99 - Ireland, C-71/99 - Germany, C-220/99 - France)
- C-209/02 - Golfplatz Wörschach
- C-209/04 - Lauteracher Ried
- C-239/04 - Castro Verde

# Bad Application (Species Protection)

- C-103/00 - *Caretta caretta*
- C-518/04 - *Vipera Schweitzeri*
- C-221/04 - Otters
- C-183/05 - Implementation Ireland
- C-342/05 - Wolfes (pending)

# Preliminary References (Habitats)

- C-371/98 - First Corporate Shipping (site designation)
- C-127/02 - Waddenzee (Protection regime)
- C-117/03 - Draggagi (provisional protection I)
- C-244/05 - Bund Naturschutz Bayern II (provisional protection II)

# Site Designation

- Natura 2000 is a network of sites designated under the Birds Directive and under the Habitats Directive
- Different designation procedures
- Similar protection regime for designated sites
- protection of undeclared sites differs

# Site Designation (Birds)

- Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species (annex I), taking into account their protection requirements in the geographical sea and land area where this Directive applies. (Article 4 (1) 4)
- Similar measures for all migrating birds

# Site Designation (Birds)

- MS enjoy a margin of discretion
- must respect ornithological criteria (most suitable in number and size)
- no economic or social considerations
- Judgments of 2 August 1993 in Case C-355/90 *Commission v Spain (Santoña marshes)* [1993] ECR I-4221 and of 11 July 1996 in Case C-44/95 *Royal Society for the Protection of Birds (Lappel Bank)* [1996] ECR I-3805.



# Site Designation (Birds)

- Commission
  - is informed about designation
  - enforces designation by infringement procedures (Article 226 ECT)
  - relies on reference lists (IBA)

# Site Designation (Birds)

- NGOs with support by Commission and MS published European reference lists of Important Bird Areas (IBA 1989 and 2000)
- specified selection criteria
- not authoritative but can serve as scientific evidence to demonstrate insufficient designations
- Judgment of 19 May 1998 in Case C-3/96 *Commission v The Netherlands (IBA List 1989)* [1998] ECR I-3031

# Site Designation (Habitats)

- Article 4 and Annex III of the Habitats Directive
- very specific rules and criteria
- specific habitat types and species (Annexes I and II)
- MS proposes sites (by 1995)
- COM selects sites (by 1998)

# Site Designation (Habitats)

- MS identifies and proposes an **exhaustive** list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Habitats Directive's objective (Judgment of 7 November 2000 in Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235)

# Site Designation (Habitats)

- COM establishes a European list by **selecting** sites from MS proposals to ensure a favourable conservation of habitats and species on a European scale

# Site Designation (Habitats)

- Significant delays, in particular because of MS proposing insufficient sites
- Biogeographic seminars (COM + MS + NGOs for each biogeographic region) assessed whether proposals were sufficient (not exhaustive)
- COM selected all sites unless they had neither habitats nor species (Data forms)

# Site Protection (Habitats Dir.)

- Applies to Habitat and Bird sites (Article 7)
- Article 6 (2) general prevention of deterioration and disturbance
- Article 6 (3) authorisation of projects that will not adversely affect the integrity of the site
- Article 6 (4) justification of impacts

# Article 6 (2)

- Member States shall 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.
- Man-caused impacts
- Natural developments (see C-6/04 - UK, point 34)
- may require review of permits (see C-6/04 - UK, point 58)



# Article 6 (3) 1

- Plan or project likely to have a significant effect on the site (C-127/02, C-98/03, C-6/04)
- appropriate assessment of its implications for the site (C-127/02, C-209/04 Opinion, C-239/04)

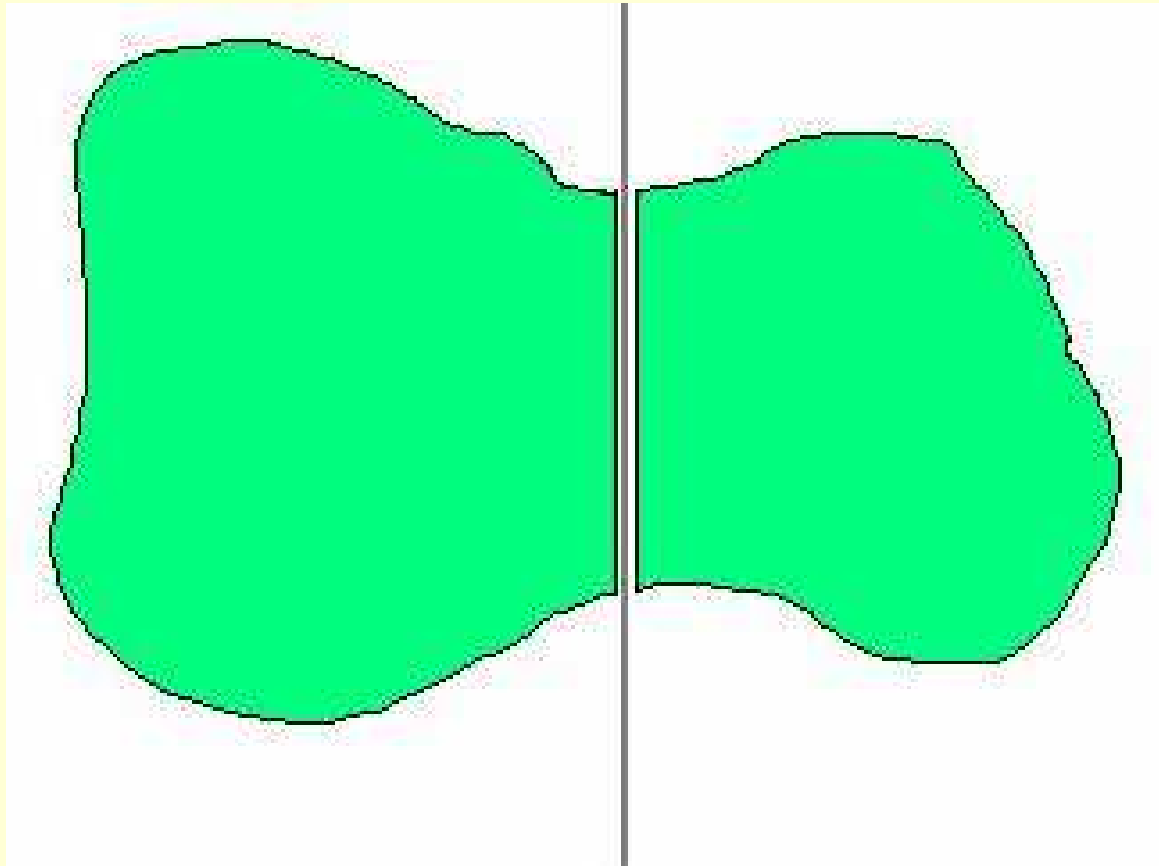
# Article 6 (3) 1 - screening

- Expression of **precautionary principle**: assessment necessary where there are doubts as to the existence of significant effects
- plans or projects may not be restrictively defined
- preliminary consent already requires assessment (e. g. land use plans)

# Article 6 (3) 1 - assessment

- Core mechanism of the Directive
- must precede its approval
- cumulative effects
- conservation objectives
- risk assessment must be as complete as possible in the particular circumstances of an individual case (C-236/01, point 107 [novel food])
- most reliable scientific evidence available and the most recent results of international research (C-236/01, point 113 [novel food])

# Article 6 (3) 1 - assessment



# Article 6 (3) 1 - assessment



# Article 6 (3) 1 - assessment



# Remediation Measures

- Relevant for assessment, not for screening
- Objective: to minimise impacts
- Adequacy: scientific question (effectiveness must be certain to justify exclusion of harm)
- Alternatives: other measures, modify project, compensation
- Equity: Value for money

## Article 6 (3) 2 - consent

- integrates precautionary principle
- Certainty that the project will not have adverse effects on the integrity of the site concerned (C-127/02, points 56)
- no reasonable scientific doubt remains as to the absence of such effects (C-127/02, points 59) [relies on assessment!]



# Article 6 (4) - Justification

- Negative assessment, i. e. no consent under Article 6 (3) 2 (adverse effects or uncertainty)
- absence of alternative solutions
- imperative reasons of overriding public interest
- compensatory measures
- case law still very limited

# Article 6 (4) - Justification

- C-239/04 - Castro Verde
- strict interpretation of derogation (point 35)
- compliance with conditions must be demonstrated by MS/authorities (burden of proof, points 36 and 39)
- alternatives must be examined if it cannot be ruled out immediately that they were capable of amounting to alternative solutions

# Article 6 (4) - Justification

- Opinions C-239/04 - Castro Verde and C-209/04 - Lauteracher Ried
- specific proportionality test
- do imperative reasons of overriding public interest demand the implementation of *this* alternative or can they also be met by *another* alternative
- requires comparative assessment of alternatives

# Article 6 (4) - Justification

- Opinion C-209/04 - Lauteracher Ried
- compensatory measures ensure coherence of Natura 2000
- assessment must specify adverse effects
- compensation must specifically address adverse effects

# Provisional Protection (Bird sites)

- Site should be SPA but is not
- Pollution or deterioration of habitats or any significant disturbances are prohibited
- Justification by economic, financial or social considerations impossible
- Case C-374/98 *Commission v France (Basses Corbières)*

# Provisional Protection (Habitat sites)

- Case law limited to proposed sites that have not yet been put on the list (C-117/03 - Draggagi, C-244/05 - Bund Naturschutz Bayern)
- Article 6 not applicable because designation is required
- However, no significant deterioration allowed
- Justification?

# Species Protection

- Articles 5 to 9 of the Birds Directive for all European birds
- Articles 12 to 16 of the Habitats Directive for species of Annex IV
- No deliberate killing, capturing or disturbance
- No deterioration or destruction of breeding sites or resting places (Habitats Directive)

# Species Protection (Deliberate)

- Intent to harm?
- Caretta case (C-103/00): use of Mopeds or Pedallos is deliberate disturbance
- Snares case (C-221/04): author of the action must accept the possibility of harm



# Species Protection (additional measures)

- Prohibitions sufficient?
- Caretta case: additional measures on site
- Viper case (C-518/04): coherent and coordinated measures
- Irish case (C-183/05): species action plans, information on species, monitoring

# Species Protection (Derogations)

- Article 16: absence of satisfactory alternatives + maintenance of species at favourable conservation status
  - to prevent serious damage (b)
  - public health and public safety, or for other imperative reasons of overriding public interest (c)
- Opinion C-342/05 on Wolf hunting

# Species Protection (Derogations)

- Favourable Conservation Status?
- Population, territory, habitats stable or increasing
- reference territory?
- Derogations in the absence of favourable conservation status?

# Favourable Conservation Status

- It follows from Article 1(e) and (i), read in conjunction with Article 2(1), of the directive that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies. (First Corporate Shipping, point 23, on site selection)

# Outlook

- Foundations of Natura 2000 and Species Protection have been laid
- Now European Nature Conservation needs to be implemented on the ground
- Role of the Court is limited