



# EU Nature Conservation Law: an introduction

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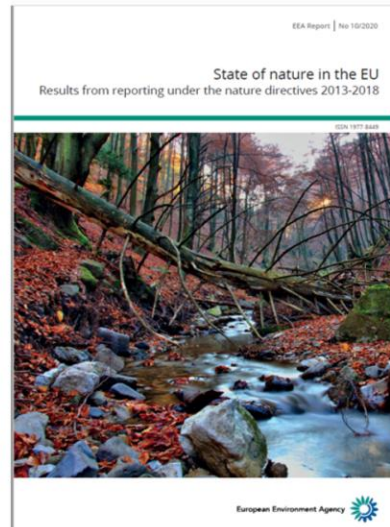
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The presentation is an introduction to EU Nature Conservation Law. It is one of the main issues on judicial litigation, both at the European and at the national level, under the Habitats and the Birds Directives. The main goal here is to raise awareness of the key judicial aspects.

## Why is the status of nature in the EU worsening?

- > Around half of the **species** have a good EU status, which is slightly **less** (5 %) than during the last reporting period (2008-2012).
- > The proportion of **species** with poor and bad status has **increased** by 7 % in the last 6 years to reach a total of 39 %.
- > Only 15 % of **habitat** assessments have a good conservation status, with 81 % having poor or bad conservation status
- > The share of habitats with bad conservation status has **increased** by 6 %.
  - > Source: EEA report October 2020 →



Despite the European legislation being considered one of the best ones in the world for nature conservation.

# EU Nature Conservation

- > Brief historical background
- > Brief institutional context
  - 191 TFEU → aim
  - 192 TFEU → legal basis
  - 193 TFEU → harmonisation forms
- > Habitats Protection
  - Natura 2000 Network
    - Birds & Habitats Directive
- > Species Protection
  - Birds Directive
  - Habitats Directive
- > Not covered:
  - Trade in Endangered Species (CITES - Regulation 338/97)
  - Invasive alien species (Regulation 1143/2014)
  - SEA and EIA (see Sobotta)

## Historical background

- > From a legal perspective, till end XIXth century nature was mainly seen as an 'enemy' of men, thus justifying affecting species and habitats
- > Some species were protected for agricultural purposes
- > Beginning of XXth century → birds protected for their intrinsic value (e.g. 1902 Paris Convention; 1912 Dutch Birds Act)
- > From 1960s → from species protection to habitats protection (e.g. 1967 Dutch Nature Management Act; 1979 Birds Directive)
- > Today: towards ecosystem management approach

Naturally, this movement started at the national level and then progressed to the European level.

Additionally, over time, the legal protection evolved from protecting species to protecting habitats, which means also evolving from protecting from direct threats to indirect threats as well.

So, today, this group of legislation, either looking at species or at habitats conservation, do so because of their intrinsic value, not because of their use to humankind. Nature conservation is actually the only European law field that is not anthropocentric in nature, lead by ecology. All other areas have at least some relation with human health.

## Brief Institutional Context

- > Environmental policy is a shared competence (Article 4 TFEU)
  - Important for subsidiarity principle (e.g. in context of landscape protection and soil protection)
- > EU can act to achieve goals set out under 191 TFEU → high level of protection of the environment
- > Mostly by means of ordinary legislative procedure (COMM initiative; QMV within Council; co-decision Council and EP) under 192 TFEU
- > Based on minimum harmonisation under Article 193 TFEU

The shared competence means that the Member States retain their legislative power until the EU decides to exercise its legislative power. So, on top of the other principles that the UE has to comply with, it also has to comply with the subsidiary principle.

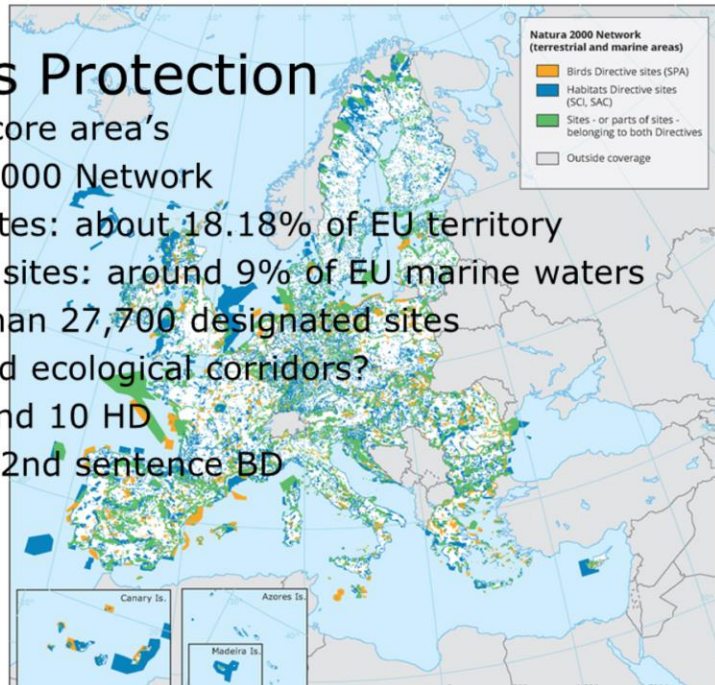
The fields of landscape protection and soil protection are highly unregulated at the European level, because they are considered to have a more local characteristic than the others covered by the European nature conservation legislation.

The Birds Directive, for instance, was established by following the procedure under article 192 TFEU. The Habitats Directive, though, was adopted before the Maastricht Treaty, and, therefore, following a different procedure. Still, they are both based at the goal to achieve a high level of protection of the environment.

Being based on the minimum harmonization under Article 193 means that the European legislation cannot prevent the Member States to provide for higher levels of environmental protection.

# Habitats Protection

- > Focus on core area's
  - Natura 2000 Network
    - Land sites: about 18.18% of EU territory
    - Marine sites: around 9% of EU marine waters
    - More than 27,700 designated sites
- > Buffers and ecological corridors?
  - Artt. 3 and 10 HD
  - Art 4(4) 2nd sentence BD



The different colors in the map are the so-called Natura 2000 sites.

Around the world, there are different models on how nature may be protected. The one used in the EU focuses on core sites, the very core part of the territory where ecological characteristics are present. Alternatives would be to focus on buffer zones (so bigger areas), or on the conjunctions between various areas. But back then the political consensus could only be built to focus on core areas of protection, so there are only a few protections around buffers and conjunctions. For the core sites, there is a strong legal regime! And those core sites form the Natura 2000 Network.

# Habitats Protection

- › Article 4 Birds Directive:
  - MS select relevant sites based on ecological considerations
  - COM evaluates selection and nominates the site as SPA
  - MS implement Commission's decision
- › Actions affecting integrity of the site are prohibited, unless justified
  - No economic grounds for justification (Case *First Corporate Shipping* (C 371/98))
- › Legal regime of Article 4 BD replaced by Article 6 HD as soon as MS's implement Commission's decision on SPA classification

By now, most of the areas, if not all, have been designated. But the first step is the the Member States map the areas that fit the European requirements, etc.

So, Under the Birds Directive, the characteristics are tools linked to birds protection, so the area is designed as a site if it is important for the protection of a bird species in need of protection. So, in the BD the link between species protection and site protection is much closer than the one we will see under the HD.

The Member State also have to take national measures to make sure that the protection will be followed. If the national implementation fails, then the EU law could work directly in order to protect the site.

No human actions affecting the integrity of the site are allowed. But, of course, justification is possible. Justification cannot, however, refer to economic grounds, as also ruled by the Court on Case C-371/98). Spain and Italy had to adjust their national regime to obey to that.

Those discussions happened within the framework of the HD.

## Habitats Directive

- › Article 4 establishment of protection regime of a site
  - From Sites of Community Importance (SCI) by Commission to Special Areas of Conservation (SAC) status at MS level
  - Ecological criteria dictate selection!
    - Eg. Case *Comm v. Spain* (C 355/90), Case *Lappel Bank* (C 44/95)
  - No room for economic, social and cultural requirements or regional and local characteristics when designating a site
    - Case *First Corporate Shipping* (C 371/98)
  - All Important Birds Areas must be designated
    - Case *Comm. v. Netherlands* (C 3/96)
- › Article 5 empowers the Commission to propose to the Council a SCI in case a MS fails to do so
- › SAC status can only be lost for ecological reasons, not for wrongdoing MSs (Case *Cascina Tre Pini* (C 301/12))

The procedure for protection is very similar to the one under the BD.

Together, the areas under protection of the BD and of the HD, form the Natura 2000 Network.

All birds sites are also covered by the protection of the HD.

The fail of the MS to protect an area cannot be used as reason to declassify an area. This can only be done based on ecological reasons.

## Legal regime of protection

- > Article 6(1) → management measures
  - . All those measures aiming at achieving site's conservation objectives
- > Article 6(2) → preventive measures, both factual and legal
  - . Eg. Case *Grüne Liga Sachsen* (Case C 399/14) on bridge over the river Elbe
- > Article 6(3) → appropriate assessment and consent requirements for plan and projects potentially affecting the conservation status of the N2000 site
  - . Central role for the precautionary principle (eg. Case *Waddenzee* (C 127/02))
  - . Concept of mitigation measures (e.g. Joined Cases C-293/17 and C-294/17)
  - . Need of scientific certainty!
- > Article 6(4) → exceptions to Article 6(3) HD
  - . Imperative Requirements (including economic interests)
  - . No alternative (Case *Castro Verde* (C 239/04))
  - . Compensatory measures (e.g. Joined Cases C-293/17 and C-294/17)
  - . For priority habitats and species, prior advice from the Commission required
    - Commission generally positive about the request in her advices

Time has not been regulated under the nature conservation law, meaning there is no specification of deadline by which the conservation goals should be achieved. So, many MS are simply procrastinating.

Article 6(2) establishes that no action negatively affecting an area can be taken, even if those actions occur outside of the area. It applies to broad kinds of actions, while 6(3) applies to two specific kinds of actions: plans and projects. 6(3) sounds like a permit regime, but there are no specific actions required for permission. What is required is an individual assessment of a specific project, although very commonly there is a need for a specific permit. This is where a lot of case law has been constructed, especially because the grounds are exclusively ecological, and there may even be a disagreement among ecologists. So, some MS even have experts to assist on those cases.

### Mitigation x Compensatory measures

Mitigation measures are those that prevent the negative effects from taking place. So, they are placed into force prior to the implementation of the intervention.

Compensatory measures usually take place after the damage has occurred, or adopted prior, but only have effects after the damage occurred.

The CJEU case law establishes that a measure can only be considered a mitigation measure if it is certain that it will produce effect before the damage occurs. So, a very narrow interpretation, which is not always followed at the national level and also explains why the goals are not being achieved.

Art. 6(4) allows for derogation and, unlikely of which happens with the BD, it explicitly mentions economic interests. But, of course, there is need for an imperative reason! And there must be no alternative to achieving the goal.

# Species protection

- › Separate and independent set of rules from those on habitats protection



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Although the two pillars are separated, they may overlap.

## Species protection under HD

- > Scope:
  - . All wild birds on EU territory under the BD
  - . All wild fauna and flora on EU territory
- > Some species mentioned in Annexes to the Directives benefit from a strict regime of protection
  - . Artt 5-8 BD
  - . Artt 12-15 HD
- > Other species protected by less stringent regimes:
  - . Check derogations in Artt. 6 and 7 BD
  - . Article 11 HD establishes only a monitoring duty for all species, including those not covered by specific protection regime

The scope is indeed very broad and pretty much all wild birds, fauna, and flora, are protected. But some species are “more equal” than others, with higher level of protection. It comes from the status of conservation of the species, so, the more endangered the species is, the higher it level of protection should be. But a change in status does not lead automatically to a higher protection. The Annexes have to be amended.

Also, historically, there are cases of species that are protected not because they are endangered themselves, but because they are very similar to endangered ones, so distinguishing the level of protection could lead to reduced effectiveness. This is particularly perceptible for birds hunting, because some of them are difficult to distinguish, especially from a distance.

## Strict protection regimes HD

- > Animal species under Art. 12 HD:
  - . animal species listed in Annex IV (a) in their natural range, prohibiting:
    - . (a) all forms of deliberate capture or killing of specimens of these species in the wild;
    - . (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
    - . (c) deliberate destruction or taking of eggs from the wild;
    - . (d) deterioration or destruction of breeding sites or resting places.
      - Even when not deliberative (*Case Comm. v. Germany* (C 98/03), *Case Comm. v. UK* (C 6/04))

HD focus on both direct and indirect harms.

“(d)” omits the word “deliberate”. Any kind of negligence in this case, culpable or not, is prohibited. Also established by the Court of Justice in several cases.

Art. 13 – focuses on plants and the same kinds of measures are provided.

## Exceptions under HD

- › Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):
  - (a) in the interest of protecting wild fauna and flora and conserving natural habitats;
  - (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
  - (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
  - (d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
  - (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

We should remember that economic considerations can take place.

Art. 16 also requires an assessment of the ecological implications of the exceptions to the status of nature conservation.

“(e)” is especially interesting when read together with the previous slide.

It was written thinking about fairs, in which only a small amount of animals are displayed. But the Court of justice also extended this interpretation to include the possibility of removal to a different location to prevent harm.

## Species protection under BD

- > Article 5 BD prohibition of:
  - (a) deliberate killing or capture by any method;
  - (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
  - (c) taking their eggs in the wild and keeping these eggs even if empty;
  - (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
  - (e) keeping birds of species the hunting and capture of which is prohibited.
- > Article 6 BD → prohibition of sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognisable parts or derivatives of such birds.
- > Article 7 BD → hunting allowed for Annex II species
- > Article 8 BD → prohibition of use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species
- > Article 9 BD – exceptions to Artt. 5-8

BD also brings provisions regarding hunting, which is not present in the HD. Hunting is allowed for annex II species (some only for specific regions, other European-wide).

Exceptions follow those that we have seen under the HD.

## Vaste number of cases under both directives!

- › Directive 79/409 → [link](#)
- › Directive 2009/147 → [link](#)
- › Directive 92/43 → [link](#)

Remember that the BD was recodified, so when looking for cases on EUR-lex, search for both numbers.

## Why does conservation status worsen then?

> Law in the book vs law in action



Simple reason: human nature tends to think on terms of anthropocentric needs, putting human interest first and nature protection second.

Observation: during the 60's, there was a process of centralization of the legislation about nature protection in the Netherlands, and the indicated motif was that they noted a number of mayors granting authorization to kill certain species because of personal taste.

## Why does conservation status worsen then?

- › For some species, improvements are noticeable (eg. wolfs)
- › Mostly due to wrongful application, firstly by competent authorities
- › But also from the judiciary!
- › Article 267 TFEU → sincere judicial cooperation, but:
  - Problems in the upload phase
  - Problems in the download phase

# Problems with the uploading phase in the context of art. 6 HD

In all analysed jurisdictions (IT, NL, DE, UK, FR, BG) we could retrieve examples of cases in which national courts wrongly interpreted Article 6 HD and failed to make a reference to the ECJ.

Squintani, L., Zijlmans, J. M., Annink, D., Rakipi, J., Hoffman, S., Tasset de Landtsheer, L., ... Senoner, A. (Accepted/In press). Mitigation and Compensation Measures under the Habitats Directive in Selected Member States. *European Energy and Environmental Law Review*, 28(1), 2-1

[link](#)



*European Energy  
and Environmental  
Law Review*

2	Legal Effectiveness in Transboundary River Management L. M. J. J. van der Meulen
15	Energy and Environmental Law: A Review of the Habitats Directive
37	Energy Energy and Environmental Law: A Review of the Habitats Directive
45	Energy and Environmental Law: A Review of the Habitats Directive

Wolters Kluwer

Although there is a general tendency of national courts to follow CJEU judgments, in certain cases – and now he refers to Sweden – it is not always the case.

# Problems in the downloading phase: categories of (non) cooperation:

| 19

- > Bogojević (2017):
  - *interchanged* dialogue,
  - *gapped* dialogue,
  - *interrupted* dialogue and
  - *silenced* dialogue
- > Squintani & Rakipi (2018):
  - *full* cooperation,
  - *fragmented* cooperation, and
  - *presumed* cooperation
- > Squintani & Annink (2018):
  - *withdrawn* cooperation
- > NEW; Squintani & Kalisvaart (2020):
  - *suspended* cooperation



# Map of judicial cooperation





university of  
 groningen

Thanks for listening!

For questions: [l.squintani@rug.nl](mailto:l.squintani@rug.nl)