



Implementation of rulings for nature conservation

Court of Justice of the European Union
case studies





Implementation of rulings for nature conservation: Court of Justice of the European Union case studies

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Acronyms

| | |
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| BD | Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Birds Directive) |
| CAP | Common Agricultural Policy |
| CJEU | Court of Justice of the European Union |
| EC | European Commission |
| EIA | Environmental Impact Assessment |
| EIAD | Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment Directive) |
| HD | Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive) |
| IBA | Important Bird and Biodiversity Area |
| RBMP | River Basin Management Plan |
| SAC | Special Area of Conservation |
| SEAD | Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment Directive) |
| SPA | Special Protected Area |
| TFEU | Treaty on the Functioning of the European Union |
| WFD | 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 (Water Framework Directive) |

Summary

Legal proceedings before the Court of Justice of the European Union (CJEU), both in form of infringement proceedings and as preliminary references, have been a key tool for nature conservation. They have set important precedents for interpreting and applying the Birds and Habitats Directives (jointly referred to as 'BHD' or 'Nature Directives') and have helped in shaping the EU's environmental *acquis*. This report analyses the implementation and enforcement of selected cases concerning the Nature Directives to assess whether the judgments have led to the required improvements on the ground.

The findings of the case studies from 11 Member States are summarised in an overview table below.

The main findings of the analysis of the implementation and enforcement of key CJEU cases concerning the Nature Directives are:

- The implementation of CJEU judgments is mixed. In some cases, harmful activities continue and no remedial action is taken, despite judgments to the contrary. This not only endangers protected species and habitats and the Natura 2000 network, but also questions the respect for the rule of law.
- Follow-up activities, including Art. 260 TFEU proceedings, are often necessary to ensure that harmful activities are stopped, habitats are actively restored and properly managed.
- Therefore, to make the commitment in the 2030 Biodiversity Strategy to prioritise implementation and enforcement of the Nature Directives a reality, the European Commission must monitor cases after the judgment and take adequate follow-up activities to ensure the full implementation of the EU environmental law *acquis* –in theory and in practice.
- The Commission should set up a public database monitoring the steps taken by Member States to implement environmental law judgments and the related follow-up inquiries by the Commission.

Summary table of the case studies¹

| Judgment | Member State | Consequence for project or activity? | Effects on Natura 2000-site? | Impact in national law and practice? | Additional Commission follow-up? ² |
|---|--------------|---|---|---|---|
| C-209/02, EC v Austria, (Wörtschacher Moos) | Austria | Harmful development was remediated | Positive, affected species appear to have recovered | Positive, reinforcing the importance of the Nature Directives | No |
| C-141/14, EC v Bulgaria, (Kaliakra and Belite Skali) | Bulgaria | Harmful activities continue | Some improvements but overall remain negative | Continued non-compliance weakening perception of EU law | No |
| C-96/98, EC v France, (Marais Poitevin) | France | Reduction of harmful activity | Continued gradual degradation of the habitat | Limited | No |
| C-226/08, Stadt Papenburg v Germany, (Papenburg) | Germany | Harmful activity continues | Continued degradation of site but restoration & management measures planned | Limited | (Yes, related pilot procedure) |
| C-43/10, Nomarchiaki Aftodioikisi Aitolokarnanias and Others (Acheilos river) | Greece | Harmful development partially completed | Continued threats to site due to uncertainty regarding project plan | Limited, failed to prevent harmful projects | No |
| C-117/00, EC v Ireland, (Red Grouse) | Ireland | Harmful activity reduced | Some improvements | Limited, raised awareness about harmful activity | Yes |

¹ The traffic light colour-coding in this table indicates whether the follow-up was positive (green), intermediate (yellow) or negative (red).

² Only Art. 260 TFEU notices for failure of MS to comply with judgment are included; EU pilot procedures are included in brackets.

| Judgment | Member State | Consequence for project or activity? | Effects on Natura 2000-site? | Impact in national law and practice? | Additional Commission follow-up? ² |
|---|-----------------|---|--|--|---|
| C-304/05, EC v Italy, (Skiing area) | Italy | Harmful development completed prior to judgment | Limited improvements, repetition of harmful development appears likely | No change in practice | Yes |
| C-127/02, Waddenvereniging and Vogelbeschermingvereniging, (Cockle Fisheries) | The Netherlands | Harmful activity was terminated | Positive, but affected species and habitats have not yet (fully) recovered | Positive, case set an important legal precedent | No |
| C-441/17, EC v Poland, (Białowieża) | Poland | Harmful activity partially terminated | Damage remains and risks of further deterioration | Positive for public perception of Nature Directives and role of EC | No |
| C-239/04, EC v Portugal, (Castro Verde) | Portugal | Harmful development completed prior to judgment | Improvements, yet not most effective measures were taken | Limited, similar practices continue; weak perception of EU law | Yes |
| C-355/90, EC v Spain, (Santoña) | Spain | Harmful developments removed or modified | Positive, damage appears remediated | Positive, important precedent | No |

Introduction

Legal proceedings before the Court of Justice of the European Union (CJEU), both in form of infringement proceedings and as preliminary references, have been a key tool for nature conservation. They have set important precedents for interpreting and applying the Birds and Habitats Directives (jointly referred to as ‘BHD’ or ‘Nature Directives’) and have helped in shaping the EU’s environmental *acquis*. Often, this was only possible due to the time-consuming and persistent efforts of environmental NGOs. A successful CJEU ruling for nature conservation is thus a great win. However, less is usually known about the actual effects of the judgments on the species and habitats in question. This report therefore analyses the implementation and enforcement of cases concerning the Nature Directives to assess whether the judgments have led to the required improvements on the ground.

The report comprises selected case studies from 11 Member States. The main body of this report is comprised of a case-by-case analysis. For each case, it first provides the background to the case, followed by a short excerpt of the operative part of the judgment and thirdly the outcome of the follow-up of the case. The last section of the report analyses the overall findings and seeks to draw some conclusions from this research. Based on the findings, recommendations are provided to ensure that all CJEU cases can be termed a win for nature conservation – both in law and in practice.

Methodology

The aim of the research project is to assess what actions have been taken by the Member States to comply with key CJEU judgments on nature conservation and what the impact of the cases has been on the ground. We examine whether the cases enhanced the protection of the Natura 2000 site concerned, triggered a wider change in practice, or were simply superseded by a different destructive development.

The research focuses on rulings dealing with the protection and management of Natura 2000 sites (Art. 6 HD, Art. 4 BD). Transposition, designation, hunting and species protection cases are not included unless they also have a direct bearing on the protection and management of the sites.

All cases including the BHD in the operative part of the judgment were searched for through the CJEU’s database.³ Discounting for doubles, this resulted in 128 cases as of September 2019.⁴ The cases were then screened to select those dealing with the protection and management of Natura 2000 sites (Art. 6 HD and Art. 4 BD), excluding pure designation, species protection and hunting cases.

This narrowed down the selection to 35 cases in 12 Member States. Where several cases per Member State were found, one focus case was selected based on the perceived relevance and prominence of the case.

NGO partners involved in the cases or working in the affected regions were consulted to gather information about the effects and impacts of the CJEU judgments. To guide the research and to obtain comparable results, a short questionnaire with three main questions was set up.⁵ The questions were either discussed during telephone interviews or partners provided written responses to the

³ <<http://curia.europa.eu/juris/recherche.jsf?language=en>> (all websites last visited 8 April 2020).

⁴ See Annex II.

⁵ See Annex I.

questionnaire. Desk-based research complemented the input by the partners, also with a view to include further references and sources.

Originally, the Belgian *Port of Antwerp* case⁶ was included in this report. The claimants of this preliminary reference challenged an agreement between conservation NGOs and the port of Antwerp for an integrative nature conservation and port development plan. However, this case was subsequently taken out of this report as the goal of the case was in fact not to protect habitats but rather to use the Nature Directives as a means to an unrelated end with negative implications for the perception of the Natura 2000 regime. As the aim of the case was not to ‘obtain a win for nature’ the case did not provide insights into how such wins in the form of CJEU rulings are then implemented in practice. As a result, it was excluded from this report.

⁶ C-387/15, *Orleans and Others*, 21 July 2016 (*Port of Antwerp*)

Austria: C-209/02, Commission v Austria, 29 January 2004, (Wörschacher Moos)

Background

The case concerned the expansion of the Ennstal golf course by building two new holes in the Wörschacher Moos SPA⁷ that threatened the habitat of the corncrake (*crex crex*). The corncrake population in the Wörschacher Moos is considered to be a key population of the species in the alpine area⁸ and the only population in the Central Alps likely to reproduce.

In May 1999 the government of the province of Styria authorised the creation of two new holes in Wörschacher Moos SPA. Following this decision, in November 1999, the Commission sent a letter of formal notice stating that based on the complaint received and the expert report, there was a “strong probability that the expansion in question would have adverse effects upon the existing corncrake population” meaning that Austria had failed to comply with its obligations under Art. 6(3) and (4) HD.

Several further studies concluded that the expansion of the golf course would create significant potential risks for the corncrake population, leading to the loss of feeding and resting areas, destroying functional links between different corncrake zones and overall the deterioration and destruction of the corncrake habitat. The conditions attached to the 1999 authorisation were dismissed as being of uncertain effect, inappropriate to avoid negative effects within a margin of safety and only partially effective. Overall, the conclusion was that the creation of the two holes could threaten the continued existence of the corncrake. Therefore, alternative sites were suggested.

Judgment

[26] Having regard to the content of those expert's reports and in the absence of evidence to the contrary, the inevitable conclusion is that at the time of the adoption of the decision of 14 May 1999, the Austrian authorities were not justified in considering that the planned extension of the golf course in question in the present case, coupled with the measures prescribed by that decision, was not such as significantly to disturb the corncrake population in the 'Wörschacher Moos' SPA and would not adversely affect the integrity of that SPA.

The Court (Second Chamber):

*Declares that, by authorising the proposed extension of the golf course in the district of Wörschach in the Province of Styria despite a negative assessment of its implications for the habitat of the corncrake (*crex crex*) in the 'Wörschacher Moos' special protection area situated in that district and classified as provided for in Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Republic of Austria has failed to fulfil its obligations under*

⁷ Natura 2000 Standard Data Form, 'NSG Wörschacher Moos und ennsnahe Bereiche' <<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=AT2212000&release=2>>.

⁸ Land Steiermark, 'Wachtelkönig Ennstal' <<https://www.verwaltung.steiermark.at/cms/beitrag/11836393/74838052/>>.

Article 6(3) and (4), in conjunction with Article 7, of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

The two new golf courses/holes had already been built and opened for use in August 2000.⁹ As a result of the judgment, the construction of the two was reversed and the area restored to its prior state. This nature restoration has been carried out on the basis of a new environmental impact assessment.¹⁰ Therefore, the harmful extension project was stopped due to the CJEU's judgment.

An impact assessment was carried out in 2005 to assess the environmental impact of the expansion of the golf course in an alternative site.¹¹ As a result, a permit for six new holes/courses was then granted in 2005 and the work finished in 2007.¹² The golf course now advertises with being Europe's sole golf course in a Natura 2000 area.¹³

What has happened to the Natura 2000 site(s) involved?

Today, the area of the Wörschacher Moos is managed in accordance with the ecological needs of the corncrake.¹⁴ The area is monitored and documented as a breeding area and in the last four years a small population of 3-4 breeding couples is documented in the area where the golf course had been. In the last years, the area has become a continuously occupied corncrake territory with a stable population.

The damage of the project has been restored through the reversal of the golf course project. In addition, compensation and restoration measures have been taken. The management of meadows is carried out through contractual conservation management agreements and specific funding measures for the protection of key species are in place.¹⁵ Programmes to delay mowing¹⁶ and measures to

⁹ Golf- und Landclub Ennstal (GLC Ennstal), 'Clubgeschichte' <<http://www.glcennstal.at/die-anlage/geschichte.html>>.

¹⁰ Land Steiermark (n.8)

¹¹ Ibid.

¹² EnnstalWiki, 'Golf- und Landclub Ennstal' <http://www.ennstalwiki.at/wiki/index.php/Golf-_und_Landclub_Ennstal>

¹³ GLC Ennstal (n.9).

¹⁴ Cf. Land Steiermark, Managementplan (Kurzfassung) 'Europaschutzgebiete im Ennstal zwischen Pruggern und Selztha' (2009) <https://www.verwaltung.steiermark.at/cms/dokumente/11680779_74835791/ec5e9534/MP_Kurzf_Ennstal_lowres.pdf>.

¹⁵ Cf. Naturschutzbund Steiermark, 'Artenvielfalt auf den Naturschutzbundflächen in der Region Ennstal-Ausseerland' <https://www.naturschutzbundsteiermark.at/files/stmk_homepage/Downloads/Brosch%C3%BCre_190x255_40s_201804.pdf>.

¹⁶ Land Steiermark, 'Nr. 41 Ennstal zwischen Liezen und Niederstuttern' <<https://www.natura2000.steiermark.at/cms/beitrag/12596738/138816479/>>.

promote the creation of fallow strips and the sowing of flowering strips on intensive meadows or arable land are in place.¹⁷

The site has not been significantly harmed by other similar activities or projects since the judgment.

What has been the impact of the judgement in law and practice within the Member State beyond the site/project?

In June 2006, a new Natura 2000 site, “Ennstal zwischen Liezen und Niederstuttern”, was established to complete the protection of the corncrake and other endangered bird species in the area.¹⁸ Every project in the area is undergoing a preliminary examination. Regular surveys of selected BHD-bird species have been conducted since 2008. The corncrake is carefully surveyed and every project is evaluated and investigated to protect the breeding areas of the main protected species.

Along with the recreation of iris meadows on the former golf course, capacity and knowledge for the restoration of such sites was developed. This knowledge now also benefits other projects where iris meadows are created.

Overall, the CJEU judgment seems to have been taken seriously as it was perceived as an embarrassment for the Austrian state. The judgment was helpful for the project itself as the new golf course part was restored as a result to take the protection of the corncrake population into account. Generally, the case demonstrated and reinforced the importance of the Nature Directives for nature conservation in Austria, also in light of the different federal state nature conservation laws.

The judgment also had an impact upon the public perception, establishing the corncrake as the epitome of nature conservation hindering project developments. For instance, when a road project in the Natura 2000 area was abandoned for a range of reasons, in the public perception the project was dropped due to the corncrake. Thus, the corncrake is being perceived as the embodiment of nature conservation in the Ennstal, resulting also in some controversy.¹⁹

¹⁷ Naturschutzbund Steiermark (n.15).

¹⁸ Natura 2000 Standard Data Form, ‘NSG Wörschacher Moos und ennsnahe Bereiche’ (n.7).

¹⁹ E.g. Naturschutzbund Steiermark, ‘Der Wachtelkönig im steirischen Ennstal’ (2004) <https://www.zobodat.at/pdf/Naturschutzbrief_2004_203_3_0001.pdf>.

Bulgaria: C-141/14, Commission v Bulgaria, 14 January 2016 (Kaliakra and Belite Skali)

Background

The issue of this case related to the insufficient designation of the Kaliakra SPA and the impact of several wind farms on the protected habitats.

In December 2007, the Kaliakra region was established as an SPA,²⁰ yet the protection area covered only two-thirds of the territory previously designated as an Important Bird and Biodiversity Area (IBA) by BirdLife International. To its west, the Belite Skali SPA was set up.²¹ The Kaliakra IBA is of fundamental importance for a number of bird species and is home to over 300 bird species, 95 of which are listed in Annex I of the Birds Directive, over 100 are of European concern in terms of conservation and 17 are under threat on a global scale. The Kaliakra IBA further “holds the last big and comparatively well-preserved steppe habitat in the Dobrudzha” and the biggest cliffs along the Bulgarian Black Sea Coast.²² As the site is located on the Via Pontica, the second biggest migration flyway in Europe, the region is also of exceptional importance for migratory birds as every autumn large numbers of birds, including globally threatened species, pass over Kaliakra which reaches furthest into the sea in that region.²³

After complaints by the Bulgarian Society for the Protection of Birds (BSPB) regarding the insufficient scope of the area covered by the Kaliakra SPA and the adverse effects of several wind farm projects on the protected habitats, the Commission sent a letter of formal notice in June 2008. A second and third letter was sent in December 2008 and September 2011. In June 2012, the Commission sent a reasoned opinion, arguing that Bulgaria had breached Art. 4(1), (2) and (4) HD and Art. 6(2) and (3) BD as well as provisions of the Environmental Impact Assessment Directive (EIAD).

The dispute involved several wind farms. For the *Kaliakra*, *St Nikola* and *EVN* windfarm, all located in the Kaliakra SPA, BSPB identified the destruction and deterioration of steppe habitats, barrier effects, bird collision and large-scale displacement as the main impact for the period of 2007 to 2015.²⁴ The three farms have been operational since 2009, 2010 and 2012 respectively. For all three wind farms, no attempts to relocate them at an alternative location have been made.²⁵

²⁰ Natura 2000 Standard Data Form, ‘Kaliakra’
<<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=BG0002051>>.

²¹ Natura 2000 Standard Data Form, ‘Belite skali’
<<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=BG0002097>>.

²² Natura 2000 Standard Data Form, ‘Kaliakra’ (n.20).

²³ Ibid.

²⁴ Council of Europe, Standing Committee for the Convention on the Conservation of European Wildlife and Natural Habitats, ‘Wind farms in Balchik and Kaliakra –Via Pontica (Bulgaria) – Report by the Complainant’, (6 September 2017) <<https://rm.coe.int/wind-farms-in-balchik-and-kaliakra-via-pontica-bulgaria-report-by-the-/168073fe65>> (CoE ‘2017 Report by the Complainant’).

²⁵ Ibid.

For the wind farms *Disib*, *Longman Investment* and *Vertikal Petkov*, no monitoring or mitigation requirements applied.²⁶ Impacts between 2007 and 2015 appear to be displacement of the red-breasted goose from its foraging areas in Kaliakra SPA and documented bird collisions, both also due to the cumulative effects with other turbines.²⁷

Judgment

The Court (Seventh Chamber) declared that:

1. *by failing to include all the territories of the important bird areas in the special protection area covering the Kaliakra region, the Republic of Bulgaria has failed to classify as special protection areas the most suitable territories in number and size for the conservation, first, of the biological species listed in Annex I to Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and, secondly, of the migratory species not listed in that annex but regularly occurring in the geographical sea and land area where that directive applies, with the result that that Member State has failed to fulfil its obligations under Article 4(1) and (2) of that directive;*
2. *by approving the implementation of the projects ‘AES Geo Energy’, ‘Disib’ and ‘Longman Investment’ in the territory of the important bird area covering the Kaliakra region which was not classified as a special protection area, although it should have been, the Republic of Bulgaria has failed to fulfil its obligations under Article 4(4) of Directive 2009/147;*
3. *by approving the implementation of the projects ‘Kaliakra Wind Power’, ‘EVN Enertrag Kavarna’ and ‘Vertikal — Petkov & Cie’, and of the ‘Thracian Cliffs Golf & Spa Resort’, in the territory of the special protection areas covering the regions of Kaliakra and Belite Skali respectively, the Republic of Bulgaria has failed to fulfil its obligations under Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;*
4. *by failing, first, to assess properly the cumulative effect of the projects ‘Windtech’, ‘Brestiom’, ‘Eco Energy’ and ‘Longman Investment’ in the territory of the important bird area covering the Kaliakra region which was not classified as a special protection area, although it should have been, and, secondly, by none the less authorising the implementation of the ‘Longman Investment’ project, the Republic of Bulgaria has failed to fulfil its obligations under Article 4(2) and (3) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment and point 1(b) of Annex III to that directive, and under Article 2(1) of that directive, respectively;*

²⁶ Ibid.

²⁷ Ibid.

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

The wind farm projects continue to operate in the same way as before the ruling and no appropriate assessment or EIA was carried out after the ruling. Further, the government did not adopt any concrete measures to implement the judgment from January 2016 to July 2017,²⁸ arguing that all possible measures had already been taken. In July 2017, the government stated that wind farms in the area will not be removed but proposed an integrated management plan to be elaborated for the three Natura 2000 sites in the area (Kaliakra SPA, Belite Skali SPA and Complex Kaliakra SCI).

A parallel complaint under the Bern Convention on the Conservation of European Wildlife and Natural Habitats remains open²⁹ and there remain shortcomings in the implementation of the Standing Committee's Recommendation No. 2000 (2018).³⁰

What has happened to the Natura 2000 site(s) involved?

As a result of the judgment, in July 2017,³¹ the site designation was updated to expand the SPA.³²

However, the integrated management plan appears insufficient to adequately address the real impacts on the sites. According to BSPB, the plan itself does not have clear goals and its measures are insufficient and some even inappropriate so that it cannot ensure the implementation of the CJEU judgment.³³ An Early Warning System to address bird collision is part of the plan, however, this cannot mitigate or avoid the displacement and barrier effects which are the major issues for birds in the area, especially for the wintering geese. A positive development was the drafting of a species action plan for the Red Breasted Goose.

In addition, the Ministry of Environment issued a 2-year ban on any activities that could lead to the destruction and deterioration of habitat in the Pontho-sarmatian steppe habitats in the Complex Kaliakra SCI.³⁴ However, there appear to be discrepancies between the areas listed in the order and the actual location of steppe habitats, leading to the exclusion of several patches of steppe habitats.³⁵

²⁸ Ibid.

²⁹ Council of Europe, Standing Committee for the Convention on the Conservation of European Wildlife and Natural Habitats, 'Application of the Convention - Summary of case files and complaints: Open and possible files' (28 November 2019) <<https://rm.coe.int/090000168098de6d>> (CoE, 'Open and possible files')

³⁰ Council of Europe, Standing Committee for the Convention on the Conservation of European Wildlife and Natural Habitats, 'Recommendation on the windfarms planned near Balchik and Kaliakra, and other wind farm developments on the Via Pontica Route (Bulgaria)' (30 November 2018) <<https://rm.coe.int/recommendation-on-the-windfarms-planned-near-balchik-and-kaliakra-and-/16808e84ed>> (CoE, 'Recommendations')

³¹ RSPB, 'Our Work: Kaliakra' <<https://www.rspb.org.uk/our-work/our-positions-and-casework/case-work/cases/kaliakra/>>.

³² CoE, 'Open and possible files' (n.58).

³³ CoE, '2017 Report by the Complainant' (n.24).

³⁴ Ibid.

³⁵ Ibid.

In the beginning of 2019, a small-scale project on restoration of steppe habitats was initiated by the Kavarna municipality.³⁶ However, the areas selected for restoration were in fact steppe habitats in good conservation status that did not require external interventions other than grazing management. In addition, the project included the digging up of soil and stone removal, which in fact had a negative impact upon the habitat. Yet, despite these issues and without an appropriate assessment, the project was approved by the Ministry of Environment. Because the selected area was in a good condition to begin with, no real effect on destroyed or deteriorated steppe habitats is expected.

Further, steppe habitats and arable land which was also used as a foraging area for geese was turned into orchards with the help of CAP funding. In August/September 2016, large areas of Kaliakra steppe habitat were burned and cleared with the plan to turn it into orchards based on a prior land-use decision. While the further destruction of the steppe area was stopped, no restoration measures were taken.

Based on an on-the spot appraisal that had been asked for by the Bern Convention's Standing Committee in May 2018,³⁷ a 'Recommendation on the Windfarms Planned near Balchik and Kaliakra, and other Wind Farm Developments on the Via Pontica Route' was issued by the Committee in November 2018, *inter alia* recommending monitoring and conservation measures.³⁸ According to BSPB, as of December 2019, the implementation of these recommendations had begun, yet significant shortcomings and gaps remained for the full and effective implementation thereof.³⁹

Overall, the damage done by the wind farms has not been remediated or restored and insufficient management or conservation measures are being taken. Further, it seems that some of the proposed measures are in fact inadequate or insufficient to fully implement the judgment. BSPB has called for the removal, real restoration of steppe habitats and re-location of approved but not implemented projects to avoid further cumulative impacts. As long as the wind farms remain, the restoration of the foraging habitats for wintering red-breasted geese is not to be expected. Similarly, the migratory corridors will continue to be fragmented by the wind farms. The early warning system may mitigate bird collisions; however, it does not mitigate broader displacement and barrier effects caused by the wind farms. Despite the big delay in implementation and the insufficiency of the measures, the European Commission does not seem to have taken any stronger actions to ensure the implementation of the judgment.

³⁶ Ministry of Environment and Water, 'Minister Dimov inspected the implementation of a project for the restoration of the Ponto-Sarmatian steppes' (21 June 2019) <<https://www.moew.government.bg/en/minister-dimov-inspected-the-implementation-of-a-project-for-the-restoration-of-the-ponto-sarmatian-steppes/>>.

³⁷ Council of Europe, Standing Committee for the Convention on the Conservation of European Wildlife and Natural Habitats, 'Wind farms in Balchik and Kaliakra –Via Pontica (Bulgaria): Report of the On-the-Spot Appraisal' (4 September 2018) <<https://rm.coe.int/09000016808cdc98>>.

³⁸ CoE, 'Recommendations' (n.30).

³⁹ Council of Europe, Standing Committee for the Convention on the Conservation of European Wildlife and Natural Habitats, 'Wind farms in Balchik and Kaliakra –Via Pontica (Bulgaria) – Report by the Complainant' (26 August 2019), <<https://rm.coe.int/090000168096e23a>>.

What has been the impact of the judgement in law and practice within the Member State beyond the site/project?

No changes of the legislation appear to have been the result of the case. There are also no known judgments that followed the CJEU's decision in related cases. There also appears to have been no change in practice relating to wind farms.

To the contrary, regrettably, the fact that the government did not implement sufficient measures and that the Commission did not adopt a stronger stance after the ruling to ensure the compliance with EU law actually reduced the credibility and the respect of Natura 2000 and relevant legislation in Bulgaria. The Commission is perceived as too tolerant and soft and the absence of further court referrals or more severe measures as an acceptance of the non-implementation of EU legislation, making EU law and the CJEU appear weak.

There also appears to be a lack of political will by the Bulgarian government as there are similar implementation issues with other Natura 2000 rulings such as a 2018 decision on the designation of the Rila SPA⁴⁰ where, despite a Council of Ministers decision in April 2019, no designation orders have followed.

⁴⁰ Case C-97/17, *EC v Bulgaria (Rila)* (26 April 2018).

France: C-96/98, Commission v France, 25 November 1999 (Marais Poitevin)

Background

The Poitevin Marsh is the second largest wetland of France, located on the borders of Pays-de-la-Loire and Poitou-Charentes at the Atlantic coast.⁴¹ Between 1979 and 1990, half of the grasslands of the marsh disappeared and since then, the incremental reduction of the wetland has continued.⁴²

In December 1992, the Commission sent France a letter of formal notice, claiming that the 4,500 hectares classified as an SPA were insufficient to meet the ornithological requirements and that the hydraulic and agricultural management of the Marsh led to the deterioration of habitats. In addition, France had failed to adopt the protection measures to ensure the survival and reproduction of protected species. In November 1995, a reasoned opinion followed where the Commission found that France was failing to fulfil its Art. 4 BD obligations by failing to adopt measures to conserve bird habitats or to prevent the deterioration of habitats in the Marsh. In addition, the by then 26,250 hectares classified as SPA were still not found to be enough as they represented only a third of the Marsh area of ornithological interest. Further, the Commission argued that systemic drainage and intensive cultivation without appropriate measures to prevent deterioration had been threatening the ecosystem of the Poitevin Marsh. Lastly, the proposed route of the A83 motorway across the Marsh was also perceived as incompatible with the Birds and Habitats Directive.

France had classified a further 3,540 hectares as SPA but argued that due to the drainage and cultivation of the Marsh, it was no longer possible, except in marginal respects, to designate new areas under the existing environmental circumstances.

Judgment

[39] It is clear [...] that the nature reserve of Saint-Denis du Payré and the common land of Poiré-sur-Velluire, which form part of the Marais Poitevin intérieur SPA, are at present drying out. So far as the SPAs of the Baie de l'Aiguillon and the Pointe d'Arçay are concerned, the documents before the Court show that marine-farming construction and embankment works have been extended in those areas, thereby disturbing bird life.

The Court (Fifth Chamber):

Declares that, by failing, within the prescribed period, to classify a sufficient area in the Poitevin Marsh as special protection areas, by failing to adopt measures conferring a sufficient legal status on the special protection areas classified in the Poitevin Marsh, and by failing to adopt appropriate measures to avoid deterioration of the sites in the Poitevin Marsh classified as special protection areas and of certain of those which should have been so classified, the

⁴¹ Natura 2000 Standard Data Form 'Marais Poitevin' <<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=FR5200659>>.

⁴² Coordination pour la défense du Marais Poitevin, 'Marais poitevin, une espace en crise' <<http://marais-poitvin.org/politiques-agricoles-destructrices/>>.

French Republic has failed to fulfil its obligations under Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

Little progress has been made regarding the inadequate measures to protect the SPA. The large-scale destruction of the wetland has greatly reduced since the 1999 judgment. However, this is only partly due to the judgment, and partly because the land best suited for farming has already been turned into farmland.

Marsh meadows are still destroyed every year in the Poitevin Marsh. LPO estimates the loss to be at least several tens of hectares every year, yet it is likely that more grassland is disappearing as the estimation is based on the observation of conservation NGOs. While the authorities generally carry out field observations, very few cases give rise to a procedure.

Similarly, underground drainage continues on the Poitevin Marsh and is estimated by LPO to take place in several tens of hectares per year. The French authorities generally do not follow up on the various cases of destruction identified by environmental NGOs. 16 cases of irregular drainage (of 600 ha), conducted illegally in Charente-Maritime since 2012, have led to legal proceedings brought by the authorities. As a result, 16 farmers were charged and must now implement the decision and conduct impact studies in line with the BHD and WFD.

The activities that gave rise to the 1999 judgment are still ongoing but are developing on a smaller scale and in a more insidious manner. In 2002, the Commission sent a new reasoned opinion to France, due to France's failure to implement the decision, threatening with a financial penalty.⁴³ In 2005, the Commission then considered that France has remedied the shortcomings identified by the CJEU and closed the case.⁴⁴

What has happened to the Natura 2000 site(s) involved?

The Natura 2000 area was increased in size to reach 68,023ha in 2003. This includes 9,647ha of maritime surface area as the land area of the entire Marais Poitevin wetland is about 59,000ha, 59% of the estimated entirety of the 100,000ha wetland. The area is however very fragmented and includes pastures with a plot-by-plot division that lacks ecological and hydrological coherence. Moreover, large areas of polders hosting Annex I HD species such as the Eurasian harrier *circus pygargus* are not covered by the Natura 2000 site.

⁴³ European Commission, 'Commission acts against ten member states for non-implementation of Wild Birds and Habitats Directives' (16 July 2002) <https://ec.europa.eu/commission/presscorner/detail/en/ip_02_1060>.

⁴⁴ Coordination pour la défense du Marais Poitevin, 'Le contentieux européen' <<http://marais-poitevin.org/le-contentieux-europaen/>>.

No active management, conservation, compensation or restoration measures have been adopted or implemented in the Natura 2000 site. Farmers have used voluntary agri-environmental measures in the Marsh since 1991, yet these are not protection measures.

Overall, the wetland of the Poitevin marshland continues to deteriorate, despite protection designations (e.g. as *parc naturel régional*) suggesting the contrary. While this is no longer taking the form of large-scale destruction, a slower, more gradual deterioration through the destruction of grasslands and drainage continues.

The 2002 Plan for the Marais Poitevin, known as the Roussel Plan,⁴⁵ provided for the reclamation of 100,00ha of grasslands. However, this measure was abandoned by the State a few years later. Instead of the restoration or remediation of deteriorated habitats, the gradual small-scale destruction of the Marsh is continuing.

In 2004, a 9km long road (RD10a) was created between Moreilles and Puyravault and despite being located in a Natura 2000 site, it was not subject to any compensation. In addition, in 2016, a clay extraction quarry on 45 ha of Natura 2000 meadows in the commune of Moreilles was authorised without compensation. In a case brought by LPO and the Coordination for the Defence of the Marais Poitevin the Court held that the destroyed area of 45ha was not significant in relation to the size of the Natura 2000 site. Work is now in progress. In November 2008, 11ha of natural marsh meadows in the Natura 2000 site were cleared and an aerial drainage system was installed.⁴⁶ This work was carried out without authorisation and led to a criminal fine of €2,000 and €150 per day of delay.⁴⁷ In addition, LPO and the Coordination pour la Défense du Marais Poitevin, who had filed a civil claim, were awarded €3,000 in damages each.⁴⁸

What has been the impact of the judgement in law and practice within the Member State beyond the site/project?

There were no legislative changes as a result of the judgment. There appears to be a lack of implementation of planned actions in favour of wet grasslands and biodiversity.

⁴⁵ 'Plan d'Action pour le Marais Potevin Engagement de l'Etat' <http://www.epmp-marais-poitevin.fr/wordpress/wp-content/uploads/plan_action_gouvernemental_pour_le_MP_2002.pdf>.

⁴⁶ LPO, 'Quelques jugements' <<https://www.lpo.fr/questions-juridiques/actions-juridiques>>.

⁴⁷ Ibid.

⁴⁸ Ibid.

Germany: C-226/08, Stadt Papenburg, 14 January 2010

Background

The case concerned maintenance dredging works in the river Ems to enable ships to pass to the North Sea. In May 1994, permission to deepen the river Ems was granted to enable the transfer of ships between a shipyard near Papenburg (Meyer-Werft) and the North Sea. This included a permission to dredge the river, where required.

In February 2006, Germany indicated that the Unterems und Außenems (Lower and Outer Ems) could be accepted as SCIs under the Habitats Directive, leading the Commission to include the site in the draft list of SCIs. In February 2008, the town Papenburg sought to prevent Germany from agreeing to include the site as a Natura 2000 site, arguing that this would breach its administrative autonomy. Due to the shipyard, the economic developments of the town Papenburg depended heavily on the Ems remaining navigable for large ships. It therefore feared that the inclusion of the Unter- and Außenems as a Natura 2000 site would lead to a requirement of Art. 6(3) and (4) HD assessments for every future dredging operation. The Verwaltungsgericht Oldenburg therefore referred questions relating to whether the economic interest of the municipality could be taken into account and whether ongoing maintenance work (the future required dredging) that was authorised prior to the inclusion of the site as a Natura 2000 site, must undergo an appropriate assessment under Art. 6(3) HD.

Judgment

The Court (Second Chamber) ruled:

1. *The first subparagraph of Article 4(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006, must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of sites of Community importance drawn up by the European Commission.*
2. *Article 6(3) and (4) of Directive 92/43, as amended by Directive 2006/105, must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the timelimit for transposing Directive 92/43, as amended by Directive 2006/105, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of sites of Community importance pursuant to the third subparagraph of Article 4(2) of that directive.*

If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to

be one and the same project for the purposes of Article 6(3) of Directive 92/43, as amended by Directive 2006/105.

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

No Art. 6(3) HD appropriate assessment for maintenance dredging in the river Ems followed. Instead, in further approvals for the transfer of new cruise ships with the help of tugboats from the Meyer shipyard, the dredging has always been considered as part of the baseline situation.⁴⁹ Therefore, the impacts of the dredging works and the connected hydro-morphological changes continue to have negative effects upon the river Ems. The effects of developments and the connected dredging are cumulative negative effects.

In principle, a distinction is drawn between maintenance dredging to maintain a certain depth for regular ships to navigate the Ems and demand-dredging to temporarily deepen the river for one-off transfers of newly built large cruise ships from the shipyard to the North Sea. As the latter has to start months before the cruise ship transfer and with two to three ships per year being transferred from the shipyard via the Ems, lately only demand-dredging has been taking place.

Mitigating measures, such as transferring ships in winter when the impacts are lower, could have been considered as part of an appropriate assessment. Yet, due to the jobs and economic considerations connected with the shipyard, there has not been political will to attempt to minimize the environmental impacts of the ship transfers as this would interfere with the production schedule of the shipyard.

Other impacts and terms of the ship transfers are also subject to disagreements between the environmental NGOs and the shipyard. For instance, there continues to be a debate regarding the salt and oxygen levels of the river Ems, with the shipyard seeking to lower the standards to enable it to convey its ships fully independently of the ecological state of and impact on the Ems.

What has happened to the Natura 2000 site(s) involved?

The area Unterems und Außenems was designated as an SPA in November 2013.⁵⁰ However, the river Ems continues to be in a very bad status. The damming and dredging carried out for the ship transfers negatively impacts the protected estuary habitats as well as the salt and oxygen levels of the river Ems. Due to the extensive developments along the Ems from a free-flowing river to a straight waterway, significant sludge and sediment problems continue to affect the river and the habitats.⁵¹ While some smaller projects to e.g. support the fish population were carried out, these had limited effects due to the overall poor state and lack of oxygen of the Ems. As a result of the continued deterioration

⁴⁹ E.g. Niedersächsischer Landesbetrieb für Wasserwirtschaft, Küsten- und Naturschutz, 'Gehobene wasserrechtliche Erlaubnis zur Überführung von zwei Kreuzfahrtschiffen über die Ems in Verbindung mit zwei Probestaus in der zweiten Septemberhälfte 2012 und 2014' <https://www.nlwkn.niedersachsen.de/startseite/wasserwirtschaft/zulassungsverfahren/oberirdische_gewasser_und_kustengewasser/emssperrwerk/ubersicht_zulassungen/emssperrwerk-104066.html>.

⁵⁰ Natura 2000 Standard Data Form 'Unterems und Außenems' <<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=DE2507331>>.

⁵¹ WWF, 'Masterplan Ems – Dokumentation der Ereignisse' (2015) <https://niedersachsen.nabu.de/imperia/md/content/niedersachsen/wwf_hintergrund_masterplanems_final_3_.pdf>

of the Ems, in 2014, the Commission threatened to start infringement proceedings. This additional pressure from the Commission led to the adoption of the 2050 Masterplan for the river Ems in March 2015, also resulting in the Commission dropping its pilot procedure in April 2016.⁵²

The 2050 Masterplan to protect the Ems is a compromise agreement between the environmental NGOs, the federal state Niedersachsen, the Meyer shipyard, the transport ministry and the local districts.⁵³ It aims to restore the ecological balance of the river and its habitats while continuing to ensure the required depths for the transfer of ships to the North Sea. The plan includes a range of measures such as the development of tidal control to address the sludge issue, the purchase of 700ha for nature conservation, fish ladders and the removal of river bank reinforcement structures.⁵⁴ While some of the measures still require years to be completed, environmental NGOs hope that, after years of disputes with limited practical effects, this agreement will improve the situation of the Ems and its habitats.

What has been the impact of the judgement in law and practice within the Member State beyond the site/project?

As similar practices of maintenance dredging without an appropriate assessment continue to take place in other rivers, such as the Elbe and Weser, it appears that the effects were limited. Similarly as for the Ems, maintenance dredging is only taken in as prior harm as part of the baseline assessment.⁵⁵

⁵² Niedersächsische Staatskanzlei, 'Masterplan Ems 2050: EU-Kommission verzichtet auf Vertragsverletzungsverfahren' (14 April 2016) <<https://www.stk.niedersachsen.de/startseite/presseinformationen/masterplan-ems-2050-eu-kommission-verzichtet-auf-vertragsverletzungsverfahren-142527.html>>; Planfeststellungsbeschluss für den Ausbau der Bundeswasserstraßen Ems und Dortmund-Ems-Kanal durch die bereichsweise Anpassung der Unterems und des Dortmund-Ems-Kanals (29 February 2012) <<https://www.yumpu.com/de/document/read/6738464/pdf-datei-165-mbyte-wasser-und-schifffahrtsdirektion-nordwest>>

⁵³ 'Vertrag: Masterplan Ems' <https://www.bund-niedersachsen.de/fileadmin/niedersachsen/publikationen/wasser/010a-Masterplan_Ems.pdf>.

⁵⁴ Masterplan Ems, 'Maßnahmen' <<https://www.masterplan-ems.info/massnahmen/>>.

⁵⁵ Cf. BUND, 'Ems, Weser, Elbe – für alle gilt dasselbe ...Flussvertiefungen und ihre Folgen' <https://www.bund-niedersachsen.de/fileadmin/niedersachsen/publikationen/wasser/BUND_Broschuere_Flussvertiefung.pdf>.

Greece: C-43/10, Nomarchiaki Aftodioikisi Aitolokarnanias and Others (Acheloos river), 11 September 2012

Background

The case relates to the derivation of the river Acheloos and its impact upon the Acheloos estuary Natura 2000 site, one of the most important wetlands in Greece.⁵⁶ It is an important area for migratory birds and home to a rich diversity of endemic plant and animal species.⁵⁷

The disputed project provided for the partial diversion of the upper water of the river Acheloos to the Thessaly plain in East Greece, through the Pindos mountain chain.⁵⁸ The aim was to serve irrigation needs, electricity production but also the supply of water to towns and cities in that region. The driving force behind this derivation project was the need to irrigate the Thessaly plain because the management of water resources in that district depleted most of the aquifer and surface water resources. The project included a tunnel of 18.5km in length to channel water from the Acheloos to Thessaly as well as dams, reservoirs and associated works.

The idea for this derivation project dates back to the 1950s and construction works began in the 80s. Plans that were initially approved with environmental permits in 1991 and 1992 were annulled in 1994 on the ground that they were not based on a comprehensive study of the environmental impact. Instead, there was a need to prepare an overarching environmental impact assessment. After a single assessment was drawn up and approval granted in December 1995, the constructions and operations of works continued. An action for annulment of the decision was upheld in 2000, another approval granted in 2003 and annulled again in 2005. In August 2006, Law 3481/2006 was adopted, approving the project and leading to instructions to the company that was awarded the contract to carry out the work to continue doing so despite the annulment of the contract award through the 2005 judgment. Environmental NGOs sought the annulment of the entire project, challenging the 2006 law and its related measures in the Greek Supreme Administrative Court which then referred several questions relating to the compatibility of the 2006 law with the WFD, SEAD, EIAD and HD.

Judgment

The Court (Grand Chamber) declared:

6. The areas which were listed in the national list of sites of Community importance transmitted to the European Commission pursuant to the second subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and were then included in the list of SCIs adopted by Commission Decision 2006/613/EC of 19 July 2006 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Mediterranean biogeographical region were entitled, after

⁵⁶ Natura 2000 Standard Data Form 'Delta Acheloou, Limnothalassa Mesolongiou - Aitolikou, Ekvoles Evinou, Nisoi Echinades, Nisos Petalas' <<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=GR2310001>>.

⁵⁷ Environmental Justice Atlas, 'Acheloos River Diversion, Greece' <<https://ejatlas.org/conflict/acheloos-river-diversion>>.

⁵⁸ Ibid.

notification of Decision 2006/613 to the Member State concerned, to the protection of that directive before that decision was published. In particular, after that notification, the Member State concerned also had to take the protective measures laid down in Article 6(2) to (4) of the directive.

7. Directive 92/43, and in particular Article 6(3) and (4) thereof, must be interpreted as precluding development consent being given to a project for the diversion of water which is not directly connected with or necessary to the conservation of a special protection area, but likely to have a significant effect on that special protection area, in the absence of information or of reliable and updated data concerning the birds in that area.

8. Directive 92/43, and in particular Article 6(4) thereof, must be interpreted as meaning that grounds linked, on the one hand, to irrigation and, on the other, to the supply of drinking water, relied on in support of a project for the diversion of water, may constitute imperative reasons of overriding public interest capable of justifying the implementation of a project which adversely affects the integrity of the sites concerned. Where such a project adversely affects the integrity of a site of Community importance hosting a priority natural habitat type and/or a priority species, its implementation may, in principle, be justified by grounds linked with the supply of drinking water. In some circumstances, it might be justified by reference to beneficial consequences of primary importance which irrigation has for the environment. On the other hand, irrigation cannot, in principle, qualify as a consideration relating to human health and public safety, justifying the implementation of a project such as that at issue in the main proceedings.

9. Under Directive 92/43, and in particular the first sentence of the first subparagraph of Article 6(4) thereof, for the purposes of determining the adequacy of compensatory measures account should be taken of the extent of the diversion of water and the scale of the works involved in that diversion.

10. Directive 92/43, and in particular the first subparagraph of Article 6(4) thereof, interpreted in the light of the objective of sustainable development, as enshrined in Article 6 EC, permits, in relation to sites which are part of the Natura 2000 network, the conversion of a natural fluvial ecosystem into a largely man-made fluvial and lacustrine ecosystem provided that the conditions referred to in that provision of the directive are satisfied.

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

After the CJEU decision, a Council of State decision (n° 26/2014, plenary session) followed in 2014 and the entire derivation plan with its various projects was annulled due to the missing appropriate assessment.⁵⁹ The EIA could not establish that the integrity of the habitats would not be endangered as the relevant data was lacking. A problem in the monitoring of water resources meant that the latest data was not available and it was thus not possible to establish the lack of a serious environmental

⁵⁹ Ibid.

impact. The principle of sustainable development was another ground for the annulment of the project. The Council of State established that the principle of sustainable development was breached regarding the sustainable management of water resources, habitats, wild fauna, the EIA and the protection of the cultural environment.⁶⁰

Although the Council's decision was very clear that the project could not go on, the situation on the ground was very different. The hydropower dam project in Mesochora was almost ready; the hydropower dam project in Sykia was partially constructed; a 17.4 km tunnel that would change the course of the river was constructed but not finalized. As of 2014, no more works could be done except some work in the tunnel to secure the construction.

In 2017, a permit was granted following an EIA for the start of one hydropower project (Mesochora). While in the past, the permitting was carried out for the plan as a whole, in 2017 a permit was then provided for one project only, without linking it to the overall derivation plan, applying the so-called 'salami-slicing' tactic.⁶¹ This approach was adopted despite a court ruling in 1994 that one overall EIA was needed to assess the plan as a whole which was then carried out in 2002. The permit for one aspect of the overarching plan, the Mesochora hydropower project, thus contradicted this approach. Residents of Mesochora and other supporters filed a case for the annulment of the Mesochora project before the Council of State and continue to voice their opposition to the project.⁶² The dam construction of the Mesochora project has already been completed but due to the ongoing legal disputes the plant is not in use so far and the reservoir remains empty.

In the meantime, in July 2019, there has been a change of government and the new government strongly supports the project, showing political will to restart this derivation project.⁶³

What has happened to the Natura 2000 site(s) involved?

The river basin management plans (RBMPs), providing data on the state of the water and aquifer in both districts (Acheloos and Thessaly), were published in 2014.⁶⁴ According to the RBMPs, the needs of the Thessaly district exceeded its water resources so that the derivation of the Acheloos river was considered as necessary. The derivation project was permitted under the derogation of Art. 4(7) WFD. Environmental NGOs filed a case for the annulment of this plan to the Council of State in 2014.

In December 2017, the initial RBMPs were amended⁶⁵ and provided that the district of Thessaly can indeed secure its own water resources provided the water management was improved. Hence,

⁶⁰ WWF Greece, 'An ancient myth turned into a modern victory for nature' (22 January 2014) <<https://www.wwf.gr/blog/1417-an-ancient-myth-turned-into-a-modern-victory-for-nature>>.

⁶¹ WWF Greece, 'The Acheloos shame illustrated' (28.2.2017) <<https://www.wwf.gr/blog/1920-2017-02-28-12-37-37>>.

⁶² Mesochora - Acheloos SOS <<http://mesochora-acheloos-sos.blogspot.com>>.

⁶³ Ministry of Rural Development and Food, Press Release 'Meeting between Costas Skrekas and President and Managing Director of Public Power Corporation for the Mesochora dam' (25.11.2019) <<http://www.minagric.gr/index.php/el/the-ministry-2/grafeiotypou/deltiatypou/9221-dt251119b>>.

⁶⁴ River Basin Management Plans <<http://wfdver.ypeka.gr/en/management-plans-en/approved-management-plans-en/>>.

⁶⁵ River Basin Management Plans <<http://wfdver.ypeka.gr/en/management-plans-en/1revision-approved-management-plans-en/>>.

according to the RBMP, the management of water resources of the Thessaly district should be prioritised to ensure that water needs could be met with resources from the same district. However, the provisions of the first RBMP relating to the derivation of Acheloos project were kept in force (in a footnote in the plan). Environmental NGOs filed an application for the annulment of the amended RBMPs mainly on the grounds of violation of Art. 4(7) WFD. The project developer also filed a case against the amended RBMPs because the derivation project should have been explicitly included in the RBMPs.

Both cases were discussed before the Council of State in February 2019, but a decision has not been issued until April 2020.

What has been the impact of the judgement in law and practice within the Member State beyond the site/project?

The CJEU judgment may have slowed down the process but it has not prevented the projects from being realised. As the judgment only gave guidelines, the case did not help that much overall, also due to the strong political will to realise the projects. The judgment did however reinforce the importance of an appropriate assessment and the need for appropriate data to assess the impact.

Two infringement cases, *Lake Koroneia* and *Caretta caretta*, also illustrate the important role of the CJEU's judgments for environmental protection measures in Greece as well as the need for ongoing external pressure to overcome implementation deficits and contrary political will.

Despite years of ongoing deterioration and significant expenditure by the EU and Greece, the ecosystem of Lake Koroneia⁶⁶ continues to face a two-dimensional ecological crisis. Quantitatively, the depth of the lake is progressively declining while qualitatively, the water quality is deteriorating from eutrophic to hypertrophic. In 2013, the CJEU declared that Greece had failed to fulfil its Art. 6(2) HD obligations by failing to establish an urban wastewater treatment system and to prevent the deterioration of the habitat.⁶⁷ Already long before the judgment, a Master Plan for the restoration of the lake with various measures was adopted. Yet, in 2019, four restoration measures were still pending.⁶⁸ Today, 15 years after the start of the 'Koroneia Lake Restoration Master Plan', the main pressures for Lake Koroneia have changed. Industrial activities have closed down. New pressures, such as the Mavrorachi landfill site continue, causing the ongoing deterioration of the lake and causing the lake to dry out and mass fish deaths to occur, most recently in September 2019.⁶⁹ Therefore, the protection, rational management and restoration of Lake Koroneia can be seen as a typical case of maladministration and fragmented dysfunctional policy decisions that have led to its destruction. The Art. 260 TFEU formal notice that was issued by the Commission in November 2016⁷⁰ and the fines that

⁶⁶ Natura 2000 Standard Data Form, 'Limnes Koroneias - Volvis, Stena Rentinas Kai Evryteri Periochi' <<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=GR1220009>>.

⁶⁷ Case C-517/11, *Commission v Greece (Lake Koroneia)*, 7 February 2013.

⁶⁸ WWF, '15th annual environmental law review in Greece' (2019) <http://www.wwf.gr/images/pdfs/WWF_NOMO2019.pdf>.

⁶⁹ Ekathimerini, 'Thousands of fish dead in Koroneia lake as water levels drop to 60cm' (18 September 2019) <<http://www.ekathimerini.com/244684/article/ekathimerini/news/thousands-of-fish-dead-in-koroneia-lake-as-water-levels-drop-to-60cm>>.

⁷⁰ European Commission, Infringements Database <https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm>.

were imposed for Greece's non-compliance do not appear sufficient. The payments are still pending for Koroneia and more pressure by the Commission thus appears necessary for the full implementation of the ruling, to protect the rule of law and to end the slow environmental death of the lake and its habitats.

While in the case of the *Caretta caretta* turtles on the Kyparissias bay,⁷¹ the CJEU's decision that Greece was in breach of Art. 6(2) and (3) HD⁷² provided the necessary pressure for the adoption of a Presidential Decree on the protection of the area, leading to some harmful projects to stop, major deficits in the implementation of the law and thus the protection of the site and the turtles remain.⁷³ The European pressure seems to have been crucial, yet further follow-up action is needed. A parallel case under the Bern Convention with the involvement of several local NGOs continues.⁷⁴

⁷¹ Natura 2000 Standard Data Form, 'Thines Kyparissias (Neochori - Kyparissia)' <<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=GR2550005>>.

⁷² Case C-504/14, *Commission v Greece (Caretta caretta)*, 10 November 2016.

⁷³ Medasset, 'Kyparissia: Protection of an important reproduction habitat' <<https://www.medasset.org/our-projects/kyparissia/>>.

⁷⁴ Council of Europe, Standing Committee for the Convention on the Conservation of European Wildlife and Natural Habitats, 'Application of the Convention - Summary of case files and complaints: Open and possible files' (28 November 2019) <<https://rm.coe.int/090000168098de6d>>; Medasset, 'Update Report: Development Plans in Kyparissia Bay, Southern Kyparissia' (30 August 2019) <<https://www.medasset.org/technical-reports-position-papers-policy-recommendations/report-08-2019-southern-kyparissia-western-peloponnese-greece/>>.

Ireland: C-117/00, Commission v Ireland, 13 June 2002, (Red Grouse)

Background

The Owenduff Nephin Complex SPA provides one of the largest areas of blanket bog of Ireland, supporting a diverse range of bird species characteristic for these blanket bog and mountain habitats.⁷⁵ After Ireland's accession in 1973, CAP subsidies for the stocking of sheep in upland areas of the west of Ireland led to a heavy increase in upland grazing with significant social, economic and environmental impacts.⁷⁶ The subsidies encouraged the grazing on blanket bog and mountainous terrain with significant environmental impacts upon the upland areas such as the extensive erosion of peatland and the loss of feeding and nesting heather for the Red Grouse. Between 1980 and 1992, sheep numbers increased from 3.2 million to 8.9 million.⁷⁷ In the 1990s, an interim cut of 30% of ewe quotas for 1999-2002 was established.

In October 1997, the Commission sent Ireland a letter of formal notice for its failure to comply with Art. 3 and Art. 4(4) of the Birds Directive and Art. 6(2) of the Habitats Directive, emphasising the negative effects of overgrazing on the Owenduff-Nephin Complex. A reasoned opinion followed in April 1998.

The Commission argued that Ireland had failed to take the necessary measures to prevent the site's blanket bog from being damaged by overgrazing and that particularly the Rural Environmental Protection Scheme was inadequate to deal with this issue of overgrazing, within the SPA and beyond. The reduction of the mountain sheep quota by 30% for the winter of 1998/99 was deemed inadequate to protect all areas affected by overgrazing.

Judgment

[30] Overgrazing by sheep is in fact causing severe damage in places and is the greatest single threat to the site"

[31] [...] it is necessary for the Irish authorities not only to take measures to stabilise the problem of overgrazing but also to ensure that damaged habitats are allowed to recover.

The Court (Sixth Chamber):

Declares that, by failing to take the measures necessary to safeguard a sufficient diversity and area of habitats for the Red Grouse and by failing to take appropriate steps to avoid, in the Owenduff-Nephin Beg Complex special protection area, the deterioration of the habitats of the species for which the special protection area was designated, Ireland has failed to fulfil its

⁷⁵ Natura 2000 Standard Data Form, 'Owenduff/Nephin Complex SPA' <<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=IE0004098>>.

⁷⁶ Tony Murray, Cameron Clotworthy and Andrew Bleasdale, National Parks and Wildlife Service, Department of the Arts, Heritage and the Gaeltacht, Ireland, 'A Survey of Red Grouse (*Lagopus lagopus scoticus*) in the Owenduff/Nephin Complex Special Protection Area' (2013) <<https://www.npws.ie/sites/default/files/publications/pdf/IWM77.pdf>>.

⁷⁷ Environmental Protection Agency, 'Ireland's Environment 2008' <<https://www.epa.ie/pubs/reports/indicators/irlenv/43366%20EPA%20report%20chap%20131.pdf>>.

obligations under Article 3 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

Over time, sheep grazing has been reduced and steps have been taken to promote the recovery of the affected sites. However, this seems to have required additional pressure by the Commission who issued an Art. 260 TFEU formal notice based on a failure by Ireland to take the necessary measures to comply with the judgment in July 2004.⁷⁸

A 2004/5 resurvey of the commonage framework plans of the Owenduff-Nepin site⁷⁹ indicated that either no vegetation recovery had taken place or that the area had deteriorated in the interim.⁸⁰

In 2006, the Commission further requested Ireland to comply with the 2002 judgment, threatening with fines for its failure to take sufficient measures to recover vegetation in Irish uplands that were extensively damaged by the overstocking of sheep from the 1980s onwards.⁸¹ The Commission was concerned that four years after the judgment, Ireland had not carried out the necessary studies to assess the effectiveness and success of the sheep reduction measures.⁸²

As a result, in 2006, new management prescriptions were then introduced to the site, including a five month off wintering period, an obligation to join the Rural Environment Protection Scheme or a National Parks and Wildlife Service (NPWS) plan and an option not to graze lands within the site for a period of five years.⁸³ Consequently, more than 14,000 sheep were destocked and of the remaining sheep only half were allowed to return to the hill in the open period.⁸⁴

In 2009, the Commission then closed the case stating that Ireland had taken steps to reduce sheep numbers and has introduced further protective safeguards in the Owenduff-Nepin complex.⁸⁵ In 2010, the 2004/5 survey was repeated. Of the 76 sampling points, 44 had improved, 28 had no change, 2 had worsened and 2 had no previous data so overall, parts of the Owenduff-Nepin area showed recovery whereas other parts had not recovered sufficiently.⁸⁶ As a result, some restrictions on grazing

⁷⁸ European Commission, Infringements Database < https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm>.

⁷⁹ Murray et al (n. 107).

⁸⁰ EPA, 'Ireland's Environment 2008' (n.77).

⁸¹ European Commission, 'Commission asks Ireland to speed up protection of Irish nature sites' (13 October 2006) <https://ec.europa.eu/commission/presscorner/detail/en/IP_06_1394>.

⁸² Ibid.

⁸³ Tony Murray et al (n. 107).

⁸⁴ Ibid.

⁸⁵ European Commission, 'Environment: Commission closes two nature protection cases against Ireland' (29 January 2009), <https://ec.europa.eu/commission/presscorner/detail/en/IP_09_135>.

⁸⁶ Tony Murray et al (n. 107).

were removed, yet restrictions continued for 101 farmers in 2013 with farmers received a compensation package.⁸⁷ Between 2006 and 2013, this recovery was at a cost to NPWS of over EUR 3 million.

Ireland has since taken steps to reduce sheep numbers on Irish hills and has also introduced further protective safeguards in the Owenduff-Nepin Beg Complex and the Twelve Bens, where damage from overgrazing has been most serious. Nationally, 4,372 Commonage Framework Plans have been prepared, covering 439,840 ha.⁸⁸ Commonage Management was included in the agri-environment scheme in the 2014-2020 Rural Development Programme where Commonage Management Plans are set out with payments to farmers for agreement with the plans. These Plans, approved by the Department of Agriculture, are grazing density plans and there is no evidence that there is any linkage between them and the Conservation Objectives for the habitats in the Natura sites. Access to CMPs is limited to the Department of Agriculture and the Department of Culture, Heritage and Gaeltacht (Ministry for Nature) appears not to have any oversight over the development of the plans. Over 60% of Ireland's commonages occur in Natura land.⁸⁹ A survey of Red Grouse is overdue to get an accurate picture of the population and the implementation of the Red Grouse Species Action Plan is patchy and incomplete.

What has happened to the Natura 2000 site(s) involved?

While there has been a destocking of sheep, and some vegetation recovery, nationally, upland blanket bog and heath habitats continue to be in bad conservation status⁹⁰ and the Red Grouse remains red-listed. No updated information on the conservation status of the Owenduff-Nepin Beg Complex has been published to date. Overall, the lack of coherent conservation management and targeted agri-environment schemes for upland habitats and Red Grouse nationally suggests that meeting favourable conservation status at this site is unlikely in the near term.

What has been the impact of the judgment in law and practice within the Member State beyond the site/project?

It seems that the judgment raised awareness about the issue of overgrazing and led to an increase in the adoption of Common Management Plans, also beyond the Owenduff-Nepin site, but the ecological benefit of these plans has not been thoroughly examined. However, as the first major case on agriculture, there had been hope that this case would have had a more significant impact which is not the case.

⁸⁷ Ibid.

⁸⁸ EPA, 'Ireland's Environment 2008' (n.77).

⁸⁹ Based on information received by BirdWatch Ireland under Access to Information on the Environment legislation.

⁹⁰ NPWS, 'The Status of EU Protected Habitats and Species in Ireland' (2019), unpublished NPWS report

Italy: C-304/05, Commission v Italy, 20 September 2007 (Santa Caterina Valfurva skiing area)

Background

This case concerned the expansion of a skiing area for the 2005 World Alpine Ski Championships, involving particularly the widening of the 'Edelweiss' ski run, in the SPA Parco Nazionale dello Stelvio. The park hosts a large number of Annex I Birds Directive species as well as migratory birds.

In October 1999, a proposal for the development of the Santa Caterina skiing area and its facilities to hold the 2005 World Alpine Ski Championships was lodged with regional authorities. It provided for the creation of a ski run corridor in a forest area and the construction of a cable-car, a chairlift, a departure station, a ski stadium and car park, the modification to the 'Edelweiss' ski run, the construction of a bridge, a refuge, service routes, programmable artificial snow machines and a depot for vehicles.

In May 2000, based on a study by the architect of the project, the Region of Lombardy gave a favourable opinion regarding the environmental compatibility of the project, subject to several general and specific conditions. The study concluded that the environmental impact and resulting measures had only been examined in a summary manner, but that a morphological and environmental recovery project to replant the area after the completion of the work was necessary.

In September 2000 the Region of Lombardy instructed the Research Institute for Applied Ecology and Economics in Alpine Regions (IREALP) to draw up a report relating to assessment of the environmental impact of the project. The 2002 report does not contain an exhaustive list of the wild birds present in the area and refers to the key guidelines as being in progressive development with further knowledge anticipated through the implementation of the project.

In February 2003, almost 2,500 trees were felled in an area 50m wide and 500m long, the effect of which was to completely split up the habitat of birds present on the site. In December 2003, the Commission sent Italy a letter of formal notice, followed by a reasoned opinion in July 2004.

Upon referring Italy to the CJEU, the Commission asked the Court to declare that in relation to the skiing development project, Italy had failed to fulfil its obligations under Art. 6(2) – (4) HD and Art. 4(1) and (2) BD.

Judgment

The Court considered both the 2000 and the 2002 study to be insufficient for an appropriate assessment under Art. 6(3) as they fail to take all necessary considerations into account and themselves highlight the need for further analysis. Therefore, "both the study of 2000 and report of 2002 have gaps and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned."⁹¹

⁹¹ Case C-304/05, [69].

Knowledge of the implications of a plan or project is a necessary prerequisite for the application of Art. 6(4) HD as otherwise no condition for a derogation can be assessed.⁹² Thus, as the authorities did not have the relevant information, the authorisation granted in February 2003 did not comply with Art. 6(4) HD.

As 2500 trees were felled, destroying the breeding site of protected species, it is an inevitable conclusion that the works and their repercussions on the SPA were incompatible with the Art. 6(2) HD protective status.⁹³

The Court (Fourth Chamber) declared that:

— by authorising measures likely to have a significant impact on Special Protection Area IT 2040044, Parco Nazionale dello Stelvio, without making them subject to an appropriate assessment of their implications in the light of the area's conservation objectives;

— by authorising such measures, without complying with the provisions which allow a project to be carried out, in spite of a negative assessment of the implications and in the absence of alternative solutions, only for imperative reasons of overriding public interest and then only after adopting and communicating to the Commission of the European Communities all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected; and

— by failing to adopt measures to avoid the deterioration of natural habitats and habitats of species and the disturbance of species for which SPA IT 2040044, Parco Nazionale dello Stelvio, was designated,

the Italian Republic has failed to fulfil its obligations under Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in conjunction with Article 7 of that directive, and under Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

The skiing infrastructure was developed and delivered for the 2005 world ski championship as the judgment was only given in 2007.

The project was not adapted. A retroactive assessment was performed that attempted to mitigate the impacts. As the removal of the works impacting upon the site such as the bridge over the Frodolfo stream would have had a bigger impact, Legambiente had asked for compensation measures by restoring other degraded areas but attained very unsatisfactory results.

⁹² Case C-304/05, [83].

⁹³ Case C-304/05, [96].

The project continues to have negative impacts on very sensitive sites due to tourist frequentations, cable cabins at high altitude, concrete buildings and infrastructure in the valley such as a parking building, the bridge and ski slope.

What has happened to the Natura 2000 site(s) involved?

Compensation and mitigation measures have been taken but they have not been very effective so far as the more severe damage was caused at very high altitude (>2500 m) where ecosystem recovery requires a very long time. The damage has not been restored or remediated.

In November 2008, the Commission issued an Art. 260 TFEU formal notice regarding the implementation of the decision but closed the case again in September 2011.⁹⁴ In April 2010, the Italian authorities notified the Commission of a draft decree for the designation of the nature reserve further indicating in October 2010 that the designation should be completed by the end of 2010.⁹⁵

Currently, the area is preparing to host the Winter Olympic Games in 2026.⁹⁶ Part of the alpine skiing will take place near Bormino, bordering the SPA. At the moment, the exact location of the skiing events and potential new infrastructure is not clear, but the Italian NGO Legambiente is very concerned.

What has been the impact of the judgement in law and practice within the Member State beyond the site/project?

The 'bad practice' of having the winter sport event within the national park in 2005 had a severe impact on the political equilibrium in the park management which was performed by a consortium of the Italian Environment Ministry, the Region Lombardy and the autonomous territories of the Provinces of Trento and Südtirol. The poor conservation management caused a reputation loss that led to the disruption of the consortium and a substantial reset of the 'National Park institution'. As of 2020, the law establishing the Stelvio/Stilfser Joch National Park and its managing body has been deleted, the continued existence of the National Park is unclear and a very long, uncertain phase of re-designing the park management and conservation is ongoing.⁹⁷ This is a true debacle for one of the oldest national parks in the Alps, established in 1935.

The judgment has been followed in related national court cases. Legambiente won a difficult legal dispute against a new skiing infrastructure project in a nearby Natura 2000 site, the Vallaccia, in

⁹⁴ European Commission, Infringements Database < https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm >.

⁹⁵ European Commission, 'Statistical Annex Annex V to 28th Annual Report On Monitoring The Application Of Eu Law (2010)', Commission Staff Working Document SEC(2011) 1094 final (29 September 2011) <https://ec.europa.eu/info/sites/info/files/file_import/Statistical_annexes_3_2011_%5BSEC%282011%291094%5D_0.pdf>.

⁹⁶ <<https://www.olympic.org/milano-cortina-2026>>.

⁹⁷ Cf. Adnkronos, 'Il futuro dello Stelvio? Per Legambiente sarà un "patchwork" di parchi provinciali' (9 March 2015) <https://www.adnkronos.com/sostenibilita/in-pubblico/2015/03/09/futuro-dello-stelvio-per-legambiente-sara-patchwork-parchi-provinciali_xB04QRR87GpiAHmq0YmTrK.html>.

Livigno, only about 15km away.⁹⁸ The national court held that the planned project was not compatible with the protection of the site.

There has not been a change in practice relating to such activities or projects. In mountain areas, and especially where big winter sports events are planned, the security net of civil society is very weak and hasty decisions incompatible with the law are often tolerated.

⁹⁸ Legambiente, 'Villaccia Di Livigno: Stop Al Progetto Di Ampliamento Del Domimio Sciabile' <<https://www.legambiente.it/villaccia-di-livigno-stop-al-progetto-di-ampliamento-del-domimio-sciabile/>>.

Netherlands: C-127/02, Waddenvereniging and Vogelbeschermingvereniging, 7 September 2004 (Cockle Fisheries)

Background

The Wadden Sea is the biggest intertidal area and most important Natura 2000 site in the Netherlands. It has been designated as a Natura 2000 site (SAC and SPA)⁹⁹ for a large number of habitats and species, including many bird species.¹⁰⁰ Mechanical cockle fishing causes damage to the geomorphology, flora and fauna of the Waddensea's seabed and reduces the food stocks of birds that feed on shellfish.¹⁰¹ This type of fishing was allowed to take place for many years in large parts of the Wadden Sea, causing a decline in the bird populations for which the Natura 2000 site has been designated. This affected in particular oystercatchers and eider ducks that depend on cockles and other shellfish as their main food source.

Vogelbescherming Nederland brought a complaint to the European Commission in 1993 claiming that the Netherlands was in breach of the requirements of the Birds and Habitats Directives by allowing mechanical cockle fishing to take place in the Wadden Sea. The European Commission followed up on this complaint and initiated an infringement procedure against the Netherlands. The case was brought to the CJEU in 1998, but it was withdrawn by the Commission in 1999 due to mistakes made in the application.

Vogelbescherming and the Waddenvereniging subsequently challenged the mechanical cockle fishing licenses issued by the Government in the highest administrative Court in the Netherlands (the Council of State). The Waddenvereniging and Vogelbescherming claimed that the Government decisions that allowed this activity to continue in the Wadden Sea were contrary to the Birds and Habitats Directives, in particular the requirements contained in Art. 6(2) and 6(3) of the Habitats Directive. In 2002 the Council of State asked the CJEU for a preliminary ruling on questions concerning the interpretation of these provisions.

Judgment

The Court (Grand Chamber) ruled:

1. *Mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.*

⁹⁹ Natura 2000 Standard Data Forms, 'Waddenzee', <<https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=NL9801001&release=10>> and <<https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=NL1000001&release=10>>. See also: Natura 2000 site designation Wadden Sea: <<https://www.natura2000.nl/gebieden/friesland/waddenzee>> (in Dutch).

¹⁰⁰ General information about the Wadden Sea is available at: <<https://www.waddenzee.nl>> (in Dutch) and Wadden Sea World Heritage: <<https://www.waddensea-worldheritage.org>>.

¹⁰¹ Wadden Sea shell fisheries: <<https://www.waddensea-worldheritage.org/resources/shellfish-fisheries>>.

2. *Article 6(3) of Directive 92/43 establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of that directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).*
3. (a) *The first sentence of Article 6(3) of Directive 92/43 must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.*
 (b) *Pursuant to the first sentence of Article 6(3) of Directive 92/43, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.*
4. *Under Article 6(3) of Directive 92/43, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.*
5. *Where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of Directive 92/43, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.*

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

Mechanical cockle fisheries in the Wadden Sea stopped completely on 1 January 2005. This was the direct result of a political decision that preceded the judgment of the EU Court of Justice which was followed in subsequent rulings by the Council of State, the highest administrative court in the

Netherlands.¹⁰² The Council of State annulled the decisions granting permits for the mechanical cockle fisheries in the national court procedures initiated by the Waddenvereniging and Vogelbescherming. Mechanical cockle fishing has not been allowed to take place in the Wadden Sea or any other Natura 2000 site in the Netherlands since then.

The fishing companies received financial compensation, but the fishing vessels were not decommissioned. None of these vessels is currently involved in mechanical cockle fisheries in the Netherlands or abroad. The vessels that are still in operation are used for various purposes, including other types of shell fishing (e.g., *Spisula* and *Ensis*), transport of cockles that have been manually collected with a permit, as well as research and monitoring of shellfish stocks. One fishing vessel has been converted and is used annually to put the anchor piles of so-called mussel seed capture installations in the water and take them out again later in the year. A mussel-handling company operates another vessel. The remaining vessels have either been scrapped or sold abroad.

Mechanical cockle fisheries have been terminated, but there is still some manual cockle fishing taking place in the Wadden Sea under very strict conditions. A limited number of annual permits (currently 31) are issued on the basis of the Nature Conservation Act for handraking of cockles in designated areas. Annual harvest should not exceed 5 % of the overall cockle stock, which is controlled during annual surveys. Other types of fishing that take place in the Wadden Sea include mussel and shrimp fisheries, which are subject to requirements contained in the permits that have been issued for those activities.

What has happened to the Natura 2000 site(s) involved?

The Wadden Sea is still one of the most important wetlands in Western Europe. A considerable number of species and habitats for which the area has been designated as a Natura 2000 site are at or above their conservation objectives. However, the restoration objectives for habitats affected by mechanical cockle fisheries, such as permanently submerged sandbanks in the Wadden Sea, have not been achieved so far. The same goes for the conservation objectives of many breeding and non-breeding bird species. This includes oystercatcher and eider of which the populations in the Wadden Sea are continuing to decline, partly as a result of external factors.

Recovery of the habitats affected by the mechanical cockle fisheries is progressing slowly in particular in the western part of the Wadden Sea. Active conservation and restoration measures for the habitats and species involved are to be implemented on the basis of the management plan for the Wadden Sea 2016-2022.¹⁰³ According to the plan, food availability for eiders and oystercatchers is to be improved by further restoration of cockle and mussel beds in the (western) Wadden Sea and of mussel beds on the tidal flats.

¹⁰² J.M. Verschuuren, "Shellfish for Fishermen or for Birds? Article 6 Habitats Directive and the Precautionary Principle", in: 17 *Journal of Environmental Law*, 2005, pp. 265-283.

¹⁰³ Natura 2000 Management Plan Wadden Sea 2016-2022: <<https://www.bij12.nl/assets/Waddenzee-beheer-plan.pdf>> (in Dutch).

The Wadden Sea is subject to a large number of human activities of which many can negatively affect the species and habitats involved. Those activities are subject to the strict requirements contained in article 6 of the Habitats Directive. However, there is increasing pressure to allow new activities in the area that can individually or cumulatively have significant negative effects on the species and habitats in the Wadden Sea. Moreover, there are continued concerns about the impacts of existing activities such as shrimp and mussel fisheries.

What has been the impact of the judgment in law and practice beyond the site/project?

The Nature Conservation Act was amended to ensure that article 6 of the Habitats Directive is correctly transposed in the national legislation. The judgment of the Court in the cockle fisheries case has set a very important precedent. The case is cited in many judgments of competent national courts in the Netherlands. Its practical significance has been huge, because the strict interpretation by the Court of article 6(3) of the Habitats Directive is now applied to all plans and projects. That includes many (existing and new) activities that were previously not subjected to appropriate assessments in accordance with article 6(3), including other types of shell fishing. This has certainly contributed to preventing significant damage to the species and habitats in Natura 2000 sites in the Netherlands.

Although the case dealt with cockle fisheries in the Netherlands, the findings of the Court have much broader relevance. The importance of the judgment is reflected in the Natura 2000 guidance documents produced by the European Commission that refer in many places to the Court's findings.¹⁰⁴ The EU Court of Justice has in more recent judgments confirmed and elaborated its findings on the strict interpretation of article 6(3) of the Habitats Directive, including the application of the precautionary principle. All Member States have to apply these findings to activities that fall within the scope of article 6(3) of the Habitats Directive.

¹⁰⁴ European Commission, Managing Natura 2000 sites – The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, 2019 <https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/EN_art_6_guide_jun_2019.pdf> .

Poland: C-441/17, Commission v Poland, 17 April 2018 (Białowieża)

Background

The Puszcza Białowieska Natura 2000 site¹⁰⁵ holds one of the best preserved natural forests in Europe, characterised by large quantities of dead wood and old trees with trees a century old or more. It includes extremely well-preserved natural habits that are defined as priority habitats under Annex I of the Habitats Directive. The site is home to some of Europe's most fragile species and habitats, like the three-toed woodpecker, wolf, lynx, European bison and many species of saproxylic beetles included in Annex II to the Habitats Directive. It is also a UNESCO World Heritage site.¹⁰⁶

The case centres around the decision to significantly increase logging in the Białowieża Forest District made by the Minister of Environment in March 2016. This Forest District is one of three forest districts in this forest and covers 123 km² which is almost a fifth of the Natura 2000 site.

Each Forest District in Białowieża Forest had a 10 year Forest Management Plan (FMP) in place since 2012. For the Białowieża Forest District the limit was established at 63,471m³ of timber harvest over 10 years. However, due to the large-scale extraction of timber between 2012 to 2015, this maximum volume for a ten-year period was almost reached in the first four years already, paralleled by an increased spread of the spruce bark beetle. In March 2016, through an appendix to the 2012 FMP, the Minister for Environment amended the maximum volume to 188 000 m³. The justification provided was that the spruce bark beetle spread led to a need to increase logging to maintain forests in an appropriate state of health, despite warnings from scientists across Europe that it would be very harmful. Numerous scientists pointed out that logging of the infested spruces would not stop the bark beetle infestation at all, just leaving huge parts of the forest damaged.

It was further claimed that accumulation of dying trees in the forest constituted a public danger and safety risk for persons in the forest. Several other decisions and programmes to implement this followed. In February 2017, Decision 51 provided an obligation to carry out immediate felling of trees threatening public safety even in the oldest parts of the forest, establishing further derogations from previous restrictions on logging. This decision extended logging operations to the Browsk and Hajnówka Forest District, and, therefore to the entire Białowieża Forest Natura 2000 site with the exception of the national park. Boths, the appendix and Decision 51 permit felling of trees on grounds of 'public safety' without defining at all the specific conditions that justify felling on such grounds.

It was not possible to challenge the Minister's decision under Polish law, so in April 2016, ClientEarth along with several other Polish and international NGOs, lodged a complaint to the European Commission. They pointed out that before taking the decision the Minister failed to carry out an assessment to determine whether the increased logging would have an adverse effect on the integrity of the Natura 2000 site and that the logging endangers the protected species, in particular through deterioration or destruction of their breeding sites or disturbance of their rearing periods.

In June 2016, the Commission began formal infringement proceedings, which were fast-tracked at every stage, against the Polish government by sending a letter of formal notice. It was followed by a

¹⁰⁵ Natura 2000 Standard Data Form, 'Puszcza Białowieska'

<<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=PLC200004>>.

¹⁰⁶ World Heritage Convention, 'Białowieża Forest' <<https://whc.unesco.org/en/list/33/>>.

reasoned opinion in April 2017 claiming that Poland failed to fulfil its obligations arising from Art. 6(1) and (3) and Art. 12(1)(a) and (d) of the Habitats Directive and Art. 4(1) and (2) and Art. 5(b) and (d) of the Birds Directive.

In July 2017, the European Commission referred the complaint about ongoing illegal logging, together with the request to apply the interim measures under Art. 279 TFEU, to the Court of Justice of the EU. The Court responded swiftly, issuing a ban on logging, saying all chainsaws and harvesters must be stopped immediately, except where there is a threat to public safety. In the history of the EU, emergency nature conservation measures like this have been used just three times before. But the Polish Environment Minister became the first in the history of the European Union not only to ignore the interim measures, but to declare his intention to do so publicly.

In September 2017, the Commission added a request for a penalty payment order should Poland fail to comply with the orders made in the proceedings. In November 2017, the Court of Justice announced it would impose fines of at least €100,000 a day if Poland's Environment Minister kept ignoring the Court's decisions. This formal warning set a new precedent – financial consequences had never before been applied at this stage of the procedure.

Judgment

The Court (Grand Chamber):

Declares that the Republic of Poland has failed to fulfil its obligations under:

– Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2013/17/EU of 13 May 2013, by adopting an appendix to the forest management plan for the Białowieża Forest District without ascertaining that that appendix would not adversely affect the integrity of the site of Community importance and special protection area PLC200004 Puszcza Białowieska;

– Article 6(1) of Directive 92/43, as amended by Directive 2013/17, and Article 4(1) and (2) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, as amended by Directive 2013/17, by failing to establish the necessary conservation measures corresponding to the ecological requirements of (i) the natural habitat types listed in Annex I to Directive 92/43, as amended by Directive 2013/17, and the species listed in Annex II to that directive, and (ii) the species of birds listed in Annex I to Directive 2009/147, as amended by Directive 2013/17, and the regularly occurring migratory species not listed in that annex, for which the site of Community importance and special protection area PLC200004 Puszcza Białowieska were designated;

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

On 27 July 2017, the Vice-President of the CJEU imposed an interim injunction on logging in Białowieża,¹⁰⁷ but Poland ignored the ruling and continued logging. In fact, it was the very first time in the EU's history that a member state ignored an interim injunction by the Court of Justice, which made this case a first.

On 11 September 2017, the Commission filed a motion to impose a financial penalty on Poland for ignoring the interim injunction. On 20 November 2017, the Court of Justice ruled that the Polish government should stop the logging immediately (with only one strict exception of guaranteeing the public safety, for instance if the infected trees close to transport routes would endanger human life) and imposed financial penalty of 100,000 Euro for each day that Poland was to ignore the ruling.¹⁰⁸

After the order on 20 November, the Polish Ministry of the Environment said that the logging has stopped and that all heavy machinery was withdrawn from the Białowieża Forest in line with the interim injunction so there is no reason to impose any financial penalties. The ruling came very quickly when the Court of Justice of the EU decided on 17 April 2018 that the logging is indeed illegal.

After the judgment, ClientEarth organised a press conference, highlighting the lack of implementation at the one-month mark of the Court's decision.¹⁰⁹ A semi-victory was then achieved when Environment Minister Henryk Kowalczyk repealed one of the two illegal logging permits (Decision 51) in May 2018.

There was no retroactive appropriate assessment. In fact, the controversial logging permit for the Białowieża Forest District (an appendix to the 2012 FMP) is still valid as it has not been withdrawn, although it is currently not being executed.

However, the logging continues to be harmful in other ways, because the Polish position interprets the notion of public safety very extensively, as public safety is the only exception to continue logging. The Court of Justice has not stipulated what exactly it means by 'public safety' and European and Polish law is very vague in this regard. Against this backdrop, the Polish government argues that public safety does not only encompass falling timber in the vicinity of roads that could become a threat to tourists and conservation workers, but also trees inside the woodland, as they could fall accidentally on mushroom pickers. In this vein, failing to remove dead trees from the natural forests increases the chances of wildfires and is thus also a danger to public safety. And now, the public safety reason is used as an argument for new logging permits in Białowieża Forest.

¹⁰⁷ Case C-441/17 R, *European Commission v Republic of Poland*, Order of the Court (Grand Chamber) (20 November 2017).

¹⁰⁸ Case C-441/17 R, *European Commission v Republic of Poland*, Order of the Court (Grand Chamber) (20 November 2017).

¹⁰⁹ ClientEarth, 'Polish government confirms it will half-comply with EU Court order on illegal logging – minutes after press conference highlights failure to act' (15 May 2018) <<https://www.clientearth.org/polish-government-half-complies-with-eu-court-order-on-illegal-logging-20-minutes-after-press-conference-highlights-failure-to-act/>>.

In early 2019, Poland's state-run forestry company, the State Forests, tried to restart logging in the Białowieża Forest by creating new logging permits that would allow hundreds of thousands of trees to be cut down in the next three years.¹¹⁰ ClientEarth has submitted a number of access to information requests to review the content of those new logging permits for the Białowieża, Browsk and Hajnowka forest inspectorates, and is monitoring the process of the adoption of these documents.

When the public consultation for those new logging permits was announced in May 2019, ClientEarth, together with a group of Polish NGOs, developed an internet application that allowed people to send comments to the State Forests. Over 12,000 people took part in these consultations, creating substantial pressure on the State Forests. The NGO coalition also took part in the public consultations and provided comprehensive legal and technical comments calling for these permits to be rejected. The coalition explained that the new logging permits were contrary to the recommendations of UNESCO and the Plan of Protective Tasks for the Natura 2000 area and the CJEU judgment. In addition, based on scientific analysis the coalition showed that they introduced new threats to the last natural forest of Europe and the protected species inhabiting it. So far, the Minister of Environment has not signed it, which means that attempts to resume logging in Białowieża have been successfully stopped so far.

What has happened to the Natura 2000 site(s) involved?

Huge chunks of the forest are gone forever so that the site is fragmented and significantly deteriorated due to the extensive logging activities.¹¹¹ No mitigation or restoration measures have been taken. The damage has not been remediated and no active management and conservation measures are being taken.

In addition to the logging, the State Forests has built an asphalt road, the so-called Narewowska Road, which cuts through environmentally valuable sections of the forest.¹¹²

What has been the impact of the judgement in law and practice within the Member State beyond the site/project?

Unfortunately, Poland failed to enact legislation providing a mechanism for civil society to access courts in relation to Forest Management Plans (which prevented NGOs from appealing in a Polish court), but the European Commission reacted to this lack of access to justice. In July 2019, the Commission issued a reasoned opinion urging the Polish government to ensure the public has access to justice over forest management plans, which regulate activities such as logging.¹¹³ In the Białowieża case, ClientEarth was not able to challenge the plans to cut down the forest in the national courts because of these limitations. ClientEarth raised this issue several times in their communication with

¹¹⁰ ClientEarth, Lawyers sound alarm over new Polish plans to log Białowieża Forest' <<https://www.clientearth.org/lawyers-sound-alarm-over-new-polish-plans-to-log-bialowieza-forest/>>.

¹¹¹ European Wilderness Society, 'Illegal Logging Bialowieza Forest Affects 4000+ Hectares Of Natura 2000' (23 October 2018) <<https://wilderness-society.org/illegal-logging-bialowieza-forest-affects-4000-hectares-of-natura2000/>>.

¹¹² European Parliament, Question for written answer P-003650-18 to the Commission (30 June 2018) <http://www.europarl.europa.eu/doceo/document/P-8-2018-003650_EN.html>.

¹¹³ European Commission, 'July infringements package: key decisions' (25 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/INF_19_4251>.

the Commission and highlighted it in the Polish and international media. A complaint was also made to the Aarhus Convention Compliance Committee.¹¹⁴

The judgment does not seem to have been followed in national courts in related cases. However, the case has been treated as a reference point in Central and Eastern Europe and also stimulated other local NGOs to take similar action.¹¹⁵

Overall, the impact of the case has been enormous. First, the public perception of the case was immense and certainly made many decision makers aware of the importance of EU environmental law and its real power. Further, the case allowed the Commission and the environmental NGOs to prove that the Nature Directives were effective. Finally, the European institutions demonstrated not only their importance in terms of environmental protection, but also regarding the respect of the rule of law in the EU member states. Indeed, the Polish citizens had no means at the national level to defend the forest and the European Union established itself as the only solution. Last but not least, the ruling has an impact beyond Białowieża Forest by setting a higher standard for forestry assessments across Europe.

¹¹⁴ Aarhus Convention Compliance Committee, 'ACCC/C/2017/154 Poland' <<https://www.unece.org/env/pp/cc/accc/c/2017/154.html>>.

¹¹⁵ ClientEarth, 'Commission urged to protect Europe's last natural forests from illegal logging' (10 September 2019) <<https://www.clientearth.org/press/commission-urged-to-protect-europes-last-natural-forests-from-illegal-logging/>>.

Portugal: C-239/04, Commission v Portugal, 26 October 2006 (Castro Verde)

Background

In 1997, the construction project for a motorway between Lisbon and the Algarve region (A2) was awarded to a construction company. The planned route would cross the western side of the Castro Verde which was classified as an SPA in September 1999. An EIA was carried out, giving three alternatives but not the option of not building the road at all or doing it outside the SPA. In January 2000, the project was authorised and in July 2001, the 10km section between Aljustrel and Castro Verde opened to traffic. In October 2000, based on a complaint, the Commission sent Portugal a letter of formal notice, followed by a reasoned opinion in April 2001. The Commission asserted that the EIA clearly shows that the A2 route has a very significant negative impact on 17 species of wild birds listed in Annex I BD and asked the Court to declare that due to the negative EIA and the existence of alternative solutions for the route, Portugal failed to fulfil its Art. 6(4) HD obligations.

Castro Verde is home to several species of birds such as the Great Bustard (*Otis tarda*) and the Lesser Kestrel (*Falco naumanni*)¹¹⁶ which are considered as globally threatened species and listed in Annex I BD.

Judgment

Given the EIA's conclusion that the project has a "significantly high" overall impact and "high negative impact" on the birds present in the SPA, the inevitable conclusion is that the Portuguese authorities were not entitled to take the view that the route would not have adverse effects upon the SPA.¹¹⁷ "The fact that, after its completion, the project may not have produced such effects is immaterial to that assessment. It is at the time of the adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question."¹¹⁸

The Court (Second Chamber) declared that:

by implementing a project for a motorway whose route crosses the Castro Verde special protection area, notwithstanding the negative environmental impact assessment and without having demonstrated the absence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 97/62/EC of 27 October 1997;

¹¹⁶ Natura 2000 Standard Data Form, 'Castro Verde' <<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=PTZPE0046>>.

¹¹⁷ Case C-239/04, [21]-[23].

¹¹⁸ Case C-239/04, [24].

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

Because the road had already been opened in 2001, the 2006 decision did not change anything about the existence or course of the road. In March 2007, the Commission issued an Art. 260 TFEU formal notice to Portugal regarding its implementation of the CJEU decision and a reasoned opinion in January 2008.¹¹⁹ In October 2009, the case was closed.¹²⁰

What has happened to the Natura 2000 site(s) involved?

After the CJEU decision, in 2008, the SPA of Castro Verde was enlarged by adding around 5,000 hectares to the SPA, increasing the area of the SPA to almost 86,000 hectares. The idea was for the expansion to compensate for the lost space of the road and the deterioration and fragmentation caused by it. However, this expansion did not include the most important areas for steppe birds surrounding the road or around the Castro Verde SPA. While some of the new SPA areas were indeed important for the affected steppe birds, overall, for some of the new areas, others would have been more appropriate. It appears that practical and bureaucratic reasons to avoid further delays and complications played a role in the designation rather than purely ornithological criteria.

Because the expansion of the SPA areas did not include the most important areas, the expansion was likely not enough to compensate for the value of the areas lost to the road. The areas that were not included in 2008 are now being proposed for projects of irrigation facilities where steppe habitats will be converted into intensive almond and olive groves. The SPA expansion could have had a better result if it had been broader and prioritised other areas.

The construction of the road took away a key display area of the Great Bustard which is likely to affect the reproduction rate of the species. The road has also had an impact on the Lesser Kestrel. When the location of several colonies was made public during the construction time, several incidents of egg robbery, destruction and killing of chicks occurred. After surveillance increased, these incidents have stopped and the colonies besides the road are still there, although their numbers appear to have decreased. Measures taken to support a Lesser Kestrel colony included constructions to support nests and work in old ruins to support breeding. At the beginning, these measures appeared effective. Lately, however, the colony seems to be decreasing for unknown reasons.

Other compensation measures included payments to farmers for maintaining farming practices that were beneficial for steppe birds in the vicinity of the highway. These measures meant that over five years, the highway company paid farmers additional compensation for what they were already doing, such as having a balance between some fields with dry cereal and others with grasslands for grazing. Because most of the farmers receiving the payments were already using farming techniques that

¹¹⁹ European Commission, , Nature protection: Commission takes legal action against Portugal over protected bird areas' (31 January 2008) <https://ec.europa.eu/commission/presscorner/detail/en/IP_08_154>.

¹²⁰ European Commission, Infringements Database < https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm>.

supported steppe birds and participated in agro-ecological measures, there was no or little additional benefit. Thus, other more effective measures could have been taken instead.

Active management varies. LPN participates in some of the monitoring of the site and implemented a LIFE project in the area.¹²¹ Agri-environmental measures are ongoing since 1995. The area is not part of the national park network but only a Natura 2000 site. There is no management plan for this area and management relies upon the decision of private owners. Some restrictions do apply due to the Natura 2000 status and some management is taking place although in a more reactive rather than proactive manner.

What has been the impact of the judgement in law and practice within the Member State beyond the site/project?

Overall, the EIA procedure in Portugal is still very weak as for instance the project to expand the Lisbon airport, encroaching upon a protected wetland, demonstrates. Before the completion of the EIA, agreements have already been signed with a company to manage the airport.¹²² Several NGOs are considering a complaint to the Commission as well as national court proceedings. Similarly, in an estuary with a wild population of dolphins, the port authority decided to deepen the river to enable bigger ships to pass through. An EIA was carried out and the project is continuing despite a decision of the Portuguese courts advising to stop it.¹²³

These cases cast doubts upon whether the lessons of the Castro Verde case have been learnt. There has been no change in legislation as a result of the case. Unfortunately, it therefore seems that project developers have learnt that they can move forward with a project despite environmental issues and then simply see if they have to pay or compensate the harm in some way in case it becomes clear that there was a violation of the law.

It is very difficult to build a case in the Portuguese courts as the burden of proof is very high. It is often difficult to demonstrate that something is clearly in breach of the law, courts are not very sensitive to environmental issues and the legal costs are very high. Hence, NGOs have to be very selective and certain when bringing a case. The Court system is also very slow meaning that sometimes by the time there is a decision, the project will have been carried out, making it too late to prevent the harm. This was also the issue in the Castro Verde case as the highway had already been built.

It also seems that the threat of making a complaint to the Commission is no longer perceived as much of a threat and that the Commission has lost (some of) its power to make Portugal/Member States comply with EU law. Instead, non-compliance with EU law and a failure to implement CJEU decisions appears somewhat accepted and tolerated rather than taken seriously and to be avoided at all cost.

¹²¹ <<https://lifeimperial.lpn.pt/en>>

¹²² Environmental Justice Atlas, 'Vinci's plan for a new airport mid-Nature Reserve, Portugal' <<https://ejat-las.org/conflict/vincis-plan-for-a-new-airport-mid-nature-reserve>>.

¹²³ <https://parlamento.sossado.pt/?fbclid=IwAR0W3dF9y_p62ynIBnkt4JojYhuCnfYSpO7SVI5VoCpZkKthI-uQQeH24r0w#know>

Overall, the case has been useful as the expansion and other compensation measures were only taken because the CJEU decision gave the matter more weight and has been influential and important for the conservation of the site. Due to the shortcomings and difficulties associated with obtaining a national court decision, the CJEU is particularly important in making up for that deficit. Despite the issues that remain, a complaint to the Commission and resulting infringement procedures are still a useful tool. This can also be seen with a decision by the CJEU on the classification of areas as SPAs.¹²⁴ Only now, due to the decision, areas are classified slowly even though this upgrade and the creation of management plans had long been due. However, the Commission also needs to be active enough in following up and enforcing the decisions.

¹²⁴ Case C-290/18, *Commission v Portugal* (5 September 2019).

Spain: C-355/90, Commission v Spain, 2 August 1993 (Santoña)

Background

The Santoña marshes are one of the most important ecosystems in the Iberian peninsula for many aquatic birds, serving as a wintering area or staging post for many migratory birds. The area is regularly visited by 19 Annex I BD species and at least 14 species of migratory birds.

Several projects threatened or caused the deterioration of the site. The construction of a road and buildings between Argoños and Santoña reduced the surface area of the Santoña marshes and caused the disturbance of the wild birds and the peaceful nature of the area. Further, the case addressed the establishment of an industrial estate at Laredo and Colindres that would lead to the disappearance of the Asón or Treto estuary, a substantial part of the marsh. This project was eventually abandoned, yet dykes had already been built and re-sealed. Spain had also authorised clam farming and aquaculture facilities in the marshes and estuary, reducing the surface area, impacting the sediment processes, modifying the structure of the marsh bed and destroying vegetation. Lastly, untreated waste water containing toxic substances was being discharged, with significant effects upon the ecological conditions and the water quality.

The Commission therefore sought a declaration that by failing to take upkeep and management measures or measures to re-establish destroyed biotopes in the Santoña marshes, by not classifying those marshes as SPA and by not taking the appropriate steps to avoid the pollution or deterioration of habitats, Spain has failed to fulfil its obligations under Art. 3 and 4 of the Birds Directive.

Judgment

The Court :

Declares that, by not classifying the Santoña marshes as a special protection area and by not taking appropriate steps to avoid pollution or deterioration of habitats in that area, contrary to the provisions of Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Kingdom of Spain has failed to fulfil its obligations under the EEC Treaty;

The Court clarified that the Art. 3 and 4 BD obligations to maintain and re-establish habitats exist before any reduction in the number of birds or any risk of a protected species becoming extinct has materialised.¹²⁵

While Member states do have a margin of discretion in choosing SPAs, the classification is subject to certain ornithological criteria determined by the Directive. As the marsh is one of the most important ecosystems in the Iberian peninsula for many aquatic birds, Spain has failed to meet its Art. 4(1) ad (2) BD obligations by not classifying the Santoña marshes as SPA.

¹²⁵ Case C-355/90, [15].

Follow-up

What happened with the (planned) project or activity as a consequence of the CJEU judgment?

With some of the projects, such as the road, modifications were made to reduce the impact, by e.g. opening more bridges to allow the tidal flow. The aquaculture infrastructure was removed completely and the remnant dikes were adapted as islands for roosting sites for waders during high tide. In addition, after the judgment, the Spanish government started to build a complete water treatment infrastructure to reduce the pollution inside the Santoña marshes. In the Joyel marshes, the old dump was removed and this part is now an ecotourism centre.

SEO/BirdLife carry out a continuous monitoring scheme that includes 20 years of monthly census that shows that the habitat and bird population in this wetland are doing well. Conservation problems come from invasive species, climate change or inappropriate management of some wetland habitats like coastal lagoons.

What has happened to the Natura 2000 site(s) involved?

The judgment included a series of conclusions that should prevent the deterioration of the site. In 1994, Santoña was classified as an SPA¹²⁶ and also as a site protected under the Ramsar Convention.¹²⁷

Active management and conservation measures are being taken on the site. Since Santoña is included as a protected Natura 2000 site, several conservation and restoration projects run by municipalities, regional or national governments and NGOs have been improving the conservation status of intertidal habitats, sand dunes, coastal lagoons and reducing the presence of alien species.¹²⁸

The site has not been significantly harmed by other similar activities since the judgment.

What has been the impact of the judgement in law and practice within the Member State beyond the site/project?

The judgment has been followed in national courts in related cases. It was the first case in which a Member State was held to be in breach of its obligation to avoid the deterioration of a natural area of international importance for birds, setting a very important precedent.

¹²⁶ Natura 2000 Standard Data Form, 'Marismas de Santoña, Victoria y Joyel y Ría de Ajo' < <http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=ES0000143>>.

¹²⁷ Ramsar Sites Information Service, 'Marismas de Santoña' < <https://rsis.ramsar.org/ris/707>>.

¹²⁸ SEO/BirdLife, 'SEO/BirdLife celebra el 20º aniversario de la declaración de la Reserva Natural de las marismas de Santoña, Noja y Joyel' < <https://www.seo.org/2012/09/28/seobirdlife-celebra-el-20o-aniversario-de-la-declaracion-de-la-reserva-natural-de-las-marismas-de-santona-noja-y-joyel/>>.

Conclusions

The results of the 11 case studies on the implementation of the CJEU decisions are mixed. The cases can be divided into three categories: positive cases where the judgment was implemented satisfactorily, negative cases where the follow-up has been insufficient or very unsatisfactory, and an intermediate category where some follow-up and implementation action has been taken but that was nonetheless unsatisfactory.

The cases from Austria (*Wörschacher Moos*), the Netherlands (*Cockle Fisheries*) and Spain (*Santoña*) fall in the category of positive cases where the respective activity or development negatively impacting upon the Natura 2000 site has been stopped or removed. These cases show that where implemented, CJEU judgments can bring fundamental improvements for the protected site.

The category of negative cases includes the cases from Bulgaria (*Kaliakra*), France (*Marais Poitevin*), Greece (*Acheloos River*), Italy (*Santa Caterina Valfurva skiing area*) and Portugal (*Castro Verde*). In these cases, it seems that the judgment has not brought an end to the harmful activity or development and thus led to little or no improvement of the situation on the ground. Implementation action has either been lacking (so far), the judgment, as well as national decisions, have been disregarded (in Greece) or the development was already completed at the time of the judgment and similar activities or developments continue, suggesting that the judgment has not led to a change in practice (in Italy and Portugal).

The remainder of the cases would seem to fall in an intermediate category. This then includes the cases from Germany (*Stadt Papenburg*), Ireland (*Red Grouse*) and Poland (*Białowieża*). Here, the situation on the ground and the impact of the judgment is less clear and some positive steps have been taken, such as a reduction of grazing in Ireland, an overarching plan to address the degradation of the river Ems and an end to the logging in Białowieża. However, these cases nonetheless have in common that the risks of deterioration that were the subject matter of the respective CJEU rulings still continue to exist, despite in some cases to a more limited extent. This may be because the deterioration has not been remediated and restored fully, or negative impacts from the same or very similar activity continue to be a risk or are likely to occur in the future.

The *Castro Verde* case could also have been added to this intermediate group of cases as some measures to improve the site were adopted on the ground, yet similar deficits regarding environmental impact assessment that were at the centre of the dispute still continue to be repeated in other projects. However, given that the CJEU's judgment only came after the construction and opening of the harmful development (the road) which continues to exist and the impacts of which do not appear fully remediated, it has been included in the negative category.

A distinction must also be made between infringement proceedings and preliminary references. In the latter type of case, it remains for the national courts to decide the case in question on the basis of the CJEU's clarification of the relevant EU law provisions. Therefore, the necessary implementation activities may not always be as clear-cut, as could be said to be the case for the German *Stadt Papenburg* case. However, particularly in the Greek *Acheloos River* it has become clear that the activities on the ground are not in line with the judgment and that serious conservation and management issues remain.

Labelling the follow-up of the cases as negative or intermediate is not to disregard the important role these cases have nonetheless played in shaping the correct interpretation and application of the Nature Directives and in creating precedents that have influenced the outcomes of further cases and significantly benefited other Natura 2000 sites. However, the analysis of the follow-up indicates that further steps are often necessary to ensure adequate protection of the site on the ground.

Further formal enforcement steps by the Commission appear beneficiary for the implementation and overall improvement of the situation of the protected site. In most cases, enforcement measures and infringement proceedings send strong political signals and create pressure that leads to an improved follow-up of the judgment. On the contrary, insufficient implementation of judgments by Member States undermines the perception of EU (environmental) law and also threatens the rule of law as such.

Therefore, to improve the implementation of CJEU nature protection rulings, the following recommendations can be made.

As the guardian of the treaties and to fully ensure the proper implementation of the EU environmental *acquis* the European Commission should:

- Demonstrate clear political will to fully protect the EU environmental law *acquis* and the rule of law by ensuring the proper implementation of CJEU judgments.
- Systematically follow-up on infringement proceedings to ensure that the harmful activity is fully stopped, the affected habitats restored and the long-term management secured.
- Put in place and manage a public database monitoring the steps taken by Member States to implement environmental infringement and preliminary reference judgments. This database should include all follow-up inquiries by the Commission and resulting activities. Such a database not only increases transparency on the compliance with EU law but can also help the Commission in obtaining and making visible relevant information on the local situation from e.g. civil society.
- Monitor the follow-up of preliminary references and engage in dialogues with Member States to ensure that the application and implementation is in line with the CJEU's interpretation. Start infringement proceedings where the monitoring indicates a complete disregard for the CJEU's preliminary reference ruling.
- Allocate additional resources to implement these steps and to translate the commitment to prioritise implementation and enforcement made in the 2030 Biodiversity Strategy into practice.
- Initiate timely Art. 260 TFEU proceedings with adequate penalty payments where Member States fail to comply with the judgment to enforce the ruling and ensure its full implementation.
- Where possible, the Commission should directly ask for remedial action to be explicitly included in the judgment as part of infringement proceedings.

Annex I

Research project: CJEU rulings regarding nature conservation: follow up and lessons learned

A successful Court of Justice of the European Union (CJEU) case for nature conservation is a great win – but what actually happens on the ground afterwards? BirdLife and the EEB are conducting a research project to establish what the impact of key rulings of the CJEU on the Birds and Habitats Directives has been for nature conservation in Europe. The research is carried out by Laura Hildt (EEB, laura.hildt@eeb.org) and supervised by Harm Dotinga (BirdLife Netherlands).

The aim of the research project is to assess what actions have been taken by the Member States to comply with the judgment and what the impact of the cases has been on the ground. We would like to know whether the cases enhanced the protection of the Natura 2000 site concerned, triggered a wider change in practice, or were simply superseded by a different destructive development.

For this research, we need your knowledge of the situation on the ground! To guide the research and to obtain comparable results, we have set up a short questionnaire and would very much appreciate your input, ideally by setting up a phone call.

The research focuses on rulings dealing with the protection and management of Natura 2000 sites (Art. 6 Habitats Directive, Art. 4 Birds Directive). Transposition, designation, hunting and species protection cases are not included unless they also have a direct bearing on the protection and management of the sites. Based on these criteria we selected the following cases for **MS**:

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Part A – Case-specific

*These questions relate to the **XXX case**.*

1. What happened with the (planned) project or activity as a consequence of the CJEU judgment?
 - Has the harmful project stopped?
 - Has the project simply been executed in an adapted way (after a retroactive appropriate assessment)?
 - Does the project continue to be harmful in similar or different ways?
 - Has the project simply been moved to an alternative site? If yes is it harmful there?
2. What has happened to the Natura 2000 site(s) involved?
 - Have compensation/mitigation/restoration measures been taken? If yes, how effective they are?
 - Has damage done been restored/remediated?
 - Are active management and conservation measures being taken?
 - Has the site been significantly harmed by other (similar) activities/projects since the judgement?
3. What has been the impact of the judgement in law and practice within the Member State beyond the site/project?
 - Has there been a change in legislation as a result of the case?
 - Has the judgment been followed in national courts in related cases?
 - Has there been a change in practice relating to the activity/type of project?
 - Has this change in law or practice been successful in preventing harm/damage?

4. Has the case had impacts in law and practice in other Member States or at EU level?

Part B – General

These questions relate to the general follow-up of the specified CJEU cases in (MS).

- What has been the follow-up/implementation of these cases?
- Infringement rulings: has the Member State taken effective action to end the infringement?
- Preliminary rulings: what has been the effect of the findings of the Court?
- Have these cases changed the way the country protects Natura 2000 overall (changes in national legislation and/or practice)?

Annex II

List of BHD cases – Screening result¹²⁹

C-10/96 - Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques AVES v Région wallonne
C-103/00 - Commission v Greece
C-115/09 - Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen
C-117/00 - Commission v Ireland
C-117/03 - Dragaggi and Others
C-118/94 - Associazione Italiana per il WWF and Others
C-127/02 - Waddenvereniging and Vogelsbeschermingvereniging
C-131/05 - Commission v United Kingdom
C-135/04 - Commission v Spain
C-141/14 - Commission v Bulgaria
C-142/16 - Commission v Germany
C-143/02 - Commission v Italy
C-149/94 - Vergy
C-157/89 - Commission v Italy
C-159/99 - Commission v Italy
C-164/09 - Commission v Italy
C-164/17 - Grace and Sweetman
C-166/04 - Commission v Greece
C-166/97 - Commission v France
C-169/89 - Van den Burg
C-177/11 - Syllogos Ellinon Poleodomon kai chorotakton
C-179/06 - Commission v Italy
C-182/02 - Ligue pour la protection des oiseaux sauvages and Others
C-182/10 - Solvay and Others
C-183/05 - Commission v Ireland
C-186/06 - Commission v Spain
C-191/05 - Commission v Portugal
C-192/11 - Commission v Poland
C-2/10 - Azienda Agro-Zootecnica Franchini and Eolica di Altamura
C-202/01 - Commission v France
C-202/94 - van der Feesten
C-209/02 - Commission v Austria
C-209/04 - Commission v Austria
C-220/99 - Commission v France
C-221/04 - Commission v Spain

¹²⁹ As of September 2019.

C-226/08 - Stadt Papenburg
C-235/04 - Commission v Spain
C-236/85 - Commission v Netherlands
C-239/04 - Commission v Portugal
C-240/00 - Commission v Finland
C-241/08 - Commission v France
C-243/15 - Lesoochránárske zoskupenie VLK
C-244/05 - Bund Naturschutz in Bayern and Others
C-247/85 - Commission v Belgium
C-252/85 - Commission v France
C-256/98 - Commission v France
C-258/11 - Sweetman and Others
C-259/08 - Commission v Greece
C-262/85 - Commission v Italy
C-288/88 - Commission v Germany
C-290/18 - Commission v Portugal
C-293/07 - Commission v Greece
C-293/17 - Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu
C-3/96 - Commission v Netherlands
C-301/12 - Cascina Tre Pini
C-304/05 - Commission v Italy
C-308/08 - Commission v Spain
C-323/17 - People Over Wind and Sweetman
C-324/01 - Commission v Belgium
C-329/96 - Commission v Greece
C-33/03 - Commission v United Kingdom
C-334/89 - Commission v Italy
C-339/87 - Commission v Netherlands
C-340/10 - Commission v Cyprus
C-342/05 - Commission v Finland
C-344/03 - Commission v Finland
C-345/92 - Commission v Germany
C-355/90 - Commission v Spain
C-371/98 - First Corporate Shipping
C-374/98 - Commission v France
C-378/01 - Commission v Italy
C-38/99 - Commission v France
C-383/09 - Commission v France
C-387/15 - Orleans and Others
C-388/05 - Commission v Italy
C-399/14 - Grüne Liga Sachsen and Others

C-404/09 - Commission v Spain
C-407/03 - Commission v Finland
C-411/17 - Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen
C-412/85 - Commission v Germany
C-415/01 - Commission v Belgium
C-418/04 - Commission v Ireland
C-43/10 - Nomarchiaki Aftodioikisi Aitolokarnanias and Others
C-435/92 - Association pour la protection des animaux sauvages and Others v Préfet de Maine-et-Loire and Préfet de la Loire-Atlantique
C-44/95 - Regina v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds
C-441/03 - Commission v Netherlands
C-441/17 - Commission v Poland (Białowieża)
C-46/11 - Commission v Poland
C-461/14 - Commission v Spain
C-461/17 - Holohan and Others
C-480/03 - Clerens
C-491/08 - Commission v Italy
C-502/15 - Commission v United Kingdom
C-503/06 - Commission v Italy
C-504/14 - Commission v Greece
C-507/04 - Commission v Austria
C-508/04 - Commission v Austria
C-508/09 - Commission v Italy
C-517/11 - Commission v Greece
C-518/04 - Commission v Greece
C-521/12 - Briels and Others
C-522/09 - Commission v Romania
C-535/07 - Commission v Austria
C-538/09 - Commission v Belgium
C-557/15 - Commission v Malta
C-560/08 - Commission v Spain
C-57/89 - Commission v Germany
C-573/08 - Commission v Italy
C-6/04 - Commission v United Kingdom
C-60/05 - WWF Italia and Others
C-600/12 - Commission v Greece
C-67/99 - Commission v Ireland
C-683/16 - Deutscher Naturschutzring
C-71/99 - Commission v Germany
C-72/02 - Commission v Portugal

C-75/01 - Commission v Luxembourg
C-75/91 - Commission v Netherlands
C-76/08 - Commission v Malta
C-79/03 - Commission v Spain
C-83/97 - Commission v Germany
C-90/10 - Commission v Spain
C-96/98 - Commission v France
C-97/17 - Commission v Bulgaria
C-98/03 - Commission v Germany
T-157/15 - Estonia v Commission
T-480/17 - Greece v Commission
T-562/15 - Federcaccia Toscana and Others v Commission
T-570/15 - Federcaccia della Regione Liguria and Others v Commission
C-10/96 - Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques AVES
v Région wallonne