THE CONSERVATION OF HABITATS FOR BIRDS OUTSIDE PROTECTED AREAS

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OVERVIEW

1.Introduction
2.Conservation obligations <- Art. 3 & 4 (4) 2nd sentence Birds Directive (+ case-law) + Art. 3 (3) & 10 Habitats Directive
3.Conservation obligations <- Art. 6 (4) Habitats Directive (compensatory measures) + Environmental Liability Directive

INTRODUCTION

- Conservation of habitats (other speeches)
  - Inside protected areas (SPA and SAC = Natura 2000, art. 4 Birds Directive, art. 4 & 6 Habitats Directive)
  - As part of the species protection regime (art. 5 Birds Directive, art. 12 & 13 Habitats Directive)
- Conservation of habitats (my speech)
  - Art. 3 + 4 (4) 2nd sentence Birds Directive
  - Art. 3 (3) & 10 Habitats Directive
  - Conservation obligations <- Art. 6 (4) Habitats Directive (compensatory measures) + Environmental Liability Directive

Art. 3 Birds Directive

? Art. 3 (1): "*In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.*"
? Art. 3 (2): "*The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:*
(a) creation of protected areas;
(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;
(c) re-establishment of destroyed biotopes;
(d) creation of biotopes."

Art. 3 Birds Directive

? Habitat conservation includes
  ? creation and restoration
  ? and management
? Habitat conservation for all wild bird species
  ? not only for Annex I – species
? Habitat conservation in the light of the requirements of Article 2
  ? → "*maintain the population of the species (…) at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level*"

Art. 3 Birds Directive

? Clear legal obligation: "*shall*" … "*sufficient*" …
  – → certain population level corresponding primarily with ecological, scientific and cultural requirements (= +/- favourable conservation status cf. Habitats Directive ?)
? ECJ 11 July 1996, C-44/95 Lappel Bank:
  – for the SPA art. 2 is superseded by lex specialis art. 4 Birds Directive or art. 6 Habitats Directive
  – → a contrario not for habitat conservation under art. 3, so habitat conservation outside the SPA and SAC takes into account economic and recreational requirements

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Art. 3 Birds Directive

- Result obligation: ECJ 13 June 2002, C-117/00, Commission v Ireland, Red Grouse
  - Facts: Red Grouse is not in Annex I, is dependent on common heather; reduction of population by more than 50 % over the last 20 years, due to overgrazing of their habitats by sheep
  - ECJ:
    - obligations under art. 3 exist before reduction of population;
    - art. 3 is a kind of result obligation: pasturelands must be properly managed halting the decline of the Red Grouse (so heavily reducing the sheep); former distribution areas must be repopulated; Ireland has not taken all the necessary measures to safeguard a sufficient diversity and area of habitats for the Red Grouse

Art. 4 (4) 2nd sentence Birds Directive

Art. 4 (4) 2nd sentence: "*Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats*."

- At first sight: seems not to add something to the obligation under art. 3 Birds Directive
- ECJ 13 December 2007, C-418/04, Commission v Ireland
  - Facts: certain bird species suffer from degradation of their habitats due to changes in agricultural practices, e.g. cuckoo, skylark, swallow, sand martin
  - Art. 4 (4) 2nd sentence is not a result obligation
  - Requires that town and country planning legislation, environmental permit legislation, manure legislation, etc. does take the requirements of conservation of the birds habitats into account
  - References must be made in these legislations

Art. 3 (3) & 10 Habitats Directive

- Art. 3 (3): "*Where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10.*"
- Art. 10: "*Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora.*

  Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or the traditional systems for marking field boundaries) or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species."
- Seems to leave large discretion to the Member States

Art. 6 (4) Habitats Directive and Environmental Liability Directive

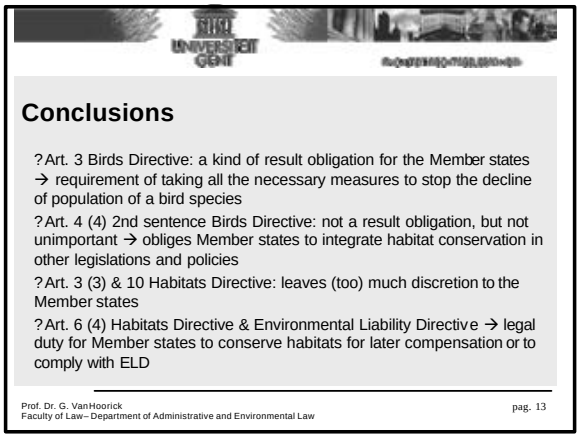
- Art. 6 (4) Habitats Directive: *"(…) the Member States shall take all compensatory measures to ensure that the overall coherence of Natura 2000 is protected*."
- Some habitat types can't be compensated
- Coherence of Natura 2000 can only be protected if compensation is at least on same time as the project or plan is carried out
- → Legal duty to conserve habitats of Annex I- species also outside Natura 2000 → degraded habitats can be upgraded and be designated as SPA as compensation for a destroyed SPA (better than to start from zero)

Art. 6 (4) Habitats Directive and Environmental Liability Directive

- Environmental Liability Directive:
  - Applicable to habitats of Annex I- species of the Birds Directive (and habitats of Annex I, or habitats of Annex II- or IV- species of the Habitats Directive (not only in SPA or SAC)
  - Operator must take remedial actions in case of environmental damage or damage to habitats; national competent authority can order the operator to do so
- → Legal duty to conserve habitats of Annex I species also outside Natura 2000

Art. 6 (4) Habitats Directive and Environmental Liability Directive

- How to implement the legal duty in domestic law ?
- Direct habitat/biotope protection:
  - lists of protected biotopes
  - registers or maps of protected biotopes
  - permit system for damaging the protected biotopes
  - in case of allowed action that damages a biotope, compensatory measures
  - in case of illegal action that damages a biotope, restoration measures
  - e.g. "*Biotopschutz*" in combination with "*Eingriffsregelung*" in Germany
- Innovative proactive instruments towards compensation: e.g. habitat banking



Conclusions

- ? Art. 3 Birds Directive: a kind of result obligation for the Member states → requirement of taking all the necessary measures to stop the decline of population of a bird species
- ? Art. 4 (4) 2nd sentence Birds Directive: not a result obligation, but not unimportant → obliges Member states to integrate habitat conservation in other legislations and policies
- ? Art. 3 (3) & 10 Habitats Directive: leaves (too) much discretion to the Member states
- ? Art. 6 (4) Habitats Directive & Environmental Liability Directive → legal duty for Member states to conserve habitats for later compensation or to comply with ELD