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SUMMARY

The aim of this paper is to describe and analyse the EC-Environmental Law and the Danish legislation to protect the Natura 2000 areas. The Natura 2000 network is a coherent European ecological network of special areas of conservation.

In some cases nature conservation must give way to the expansion of society. This is true, for instance, in connection with the continued expansion of infrastructure systems of importance to society. In other cases preference must be given to the preservation of threatened biotopes and animal species.

This balancing act between society's needs for efficient infrastructure on the one hand and the protection of biotopes and natural areas worthy of conservation on the other has been a part of Danish natural resource management for many years. Nature conservation is, however, no longer just a national concern in that the EU has, by adopting the Directive on the Conservation of Wild Birds and the Habitat Directive, and by creating Natura 2000, established that the protection of wild animals and plants is a collective responsibility.

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1. INTRODUCTION

In some cases nature conservation must give way to the expansion of society. This is true, for instance, in connection with the continued expansion of infrastructure systems of importance to society. In other cases preference must be given to the preservation of threatened biotopes and animal species.

This balancing act between society's needs for efficient infrastructure on the one hand and the protection of biotopes and natural areas worthy of conservation on the other has been a part of Danish natural resource management for many years. Nature conservation is, however, no longer just a national concern in that the EU has, by adopting the Directive on the Conservation of Wild Birds and the Habitat Directive, and by creating Natura 2000, established that the protection of wild animals and plants is a collective responsibility.

Natura 2000 is a European network of protected nature areas and encompasses those areas in the EU where nature must be given special protection. This protection applies not only to the designated Natura 2000 areas, but also to other areas which are habitats for species requiring protection. Provisions concerning the measures to be implemented to protect Natura 2000 and governing the circumstances under which exemptions from such protection may be granted are set out in the EU directives, in combination with the practice of the European Court of Justice.

In Denmark, Natura 2000 areas are protected under the provisions of the Danish Nature Protection Act, the Danish Forest Act, and numerous other laws.

2. THE EUROPEAN LEGISLATION

2.1 The Natura 2000 Network

The purpose of Natura 2000 is to establish a coherent European network of special nature preserves. This network, which consists of localities that contain selected biotopes (which are listed in Appendix I) and habitats for threatened species (listed in Appendix II), must safeguard the maintenance or, in some cases, re-establishment of favourable conservation status for the biotopes and habitats for the species in question in their natural geographic regions. The Natura 2000 network also includes the special protection areas (SPAs) established pursuant to the EU Directive on the Conservation of Wild Birds.

The establishment of Natura 2000 is stated to be predicated on the fact that biotopes are being steadily degraded, and that rising numbers of wild species are seriously threatened. Because the threatened habitats and species are part of the Community's nature inheritance, and

because the threats facing them are, in many cases, trans-national in nature, it is necessary to implement measures at the Community level in order to conserve them.

The purpose of Natura 2000 is to safeguard the re-establishment or maintenance of favourable conservation status for biotopes and species of Community importance by designating special preserves to create a coherent European ecological network.

The physical coherence between the areas which together comprise the Natura 2000 network is considered to be of substantial importance. The internal coherence within the Natura 2000 network is of importance with respect to exemptions from such protection in individual areas. The member states are required, in connection with the physical planning process, seek to strengthen the ecological coherence in the Natura 2000 network. This pertains to elements which, by virtue of their linear and continuous structures (such as watercourses, with their widths, or traditional systems of delimiting territories), or their roles as stepping stones (such as small lakes and groves), are essential to the migration and spread of wild species, and to ensuring genetic exchange within those species.

2.2 Council Directive on the Conservation of Wild Birds

The purpose of the 1979 Directive on the Conservation of Wild Birds was to protect all wild birds found in the member states. The preamble to the directive sets out as the basis for the directive the fact that conditions for wild birds have deteriorated. There was need to take action because this degradation is proceeding rapidly, thereby threatening the biological balance.

That this was a Community problem was based on the fact that wild bird species are largely migratory, and must be viewed as a common heritage, and that the member states shared a collective responsibility for finding an effective solution to this trans-national challenge.

Article 3 of the directive requires, in general, that the member states must maintain and, if necessary, create sufficiently diverse habitats for wild birds.

Pursuant to Article 4 of the Directive on the Conservation of Wild Birds, special protection areas (SPAs) must be designated for migratory birds and threatened species. Special preservation measures are to be implemented in these designated areas to ensure that the birds can survive and reproduce. The directive enjoins the member states to identify those areas which, in terms of number and size, are best suited for protecting the species enumerated in Appendix 1.

2.3 The Council Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora

The purpose of the Habitat Directive is, according to Article 2, to contribute to ensuring biological diversity by preserving various biotopes and wild flora and fauna within the areas of the member states. The Habitat Directive provides for the protection of both individual

species and habitats. Measures are to be implemented with a view to maintaining or re-establishing favourable conservation status for biotopes and wild animal and plant species of Community importance.

As the basis for the directive, its preamble cites the need to respond to the steadily increasing degradation of biotopes and the threatened status of many species.

The special regulations regarding the designation and protection of biotopes and habitats in the Habitat Directive are supplemented with provisions in articles concerning the protection of specific species. The directive's protection of wild animals and biotopes is thus two-pronged. One prong consists in conserving biotopes and habitats for species by establishing a coherent European ecological network of special protection areas, the Natura 2000 network. The other prong consists in the member states' protection of plant and animal species regardless of where they are found, i.e. even outside of the special protection areas. The Habitat Directive thus covers both biotopes of Community importance (Appendix 1) and the habitats of selected species of Community importance (Appendix 2). Both categories contain specially prioritised species and biotopes with special conservation needs. There is less leeway for obtaining exemptions from the provisions of the directive that concern prioritised species and biotopes.

The fundamental idea underlying the Habitat Directive is, as in the Directive on the Conservation of Wild Birds, to provide indirect species and habitat protection by designating area-based habitat regions with associated protective measures, plus direct species protection. The Habitat Directive is an EU legislative instrument in the area of nature, which establishes a common framework for the conservation of 1) wild animal and plant species and 2) biotopes of Community importance.

Article 6 of the Habitat Directive states as a principle rule that permits will be denied for any project which could damage a designated protected area. This provision establishes that approval can be granted for a project only after the authorities after ascertained that it will not entail damage to such an area. Exceptions to this rule are possible under Article 6, Section 4 of the Habitat Directive, pursuant to which a project which, despite having a negative impact on the area, must be carried out in deference to significant social interests in cases where there are no alternative solutions, can be carried out in return for compensatory measures. Pursuant to this regulation, the member states must undertake all required compensatory measures to ensure that the global integrity of Natura 2000 is protected. The member states must notify the Commission as to which compensatory measures have been taken, and an opinion must be obtained from the Commission in cases involving an area containing prioritised biotopes and species.

3. THE DANISH LEGISLATION

In Denmark, 8.3% of the land area and 12.4% of the sea area have been designated as Natura 2000 areas. Natura 2000 comprises 113 bird sanctuaries and 254 habitat areas, although 23 of these areas have been designated as both habitat areas and bird sanctuaries with identical

demarcations, while 79 of the bird sanctuaries share some area in common with 99 of the habitat areas. Substantial areas of Denmark are thus protected.

3.1 Protecting Nature and Deviations from such Protection

The most important provisions for protecting nature and landscape interests are those set out in the Danish Nature Protection Act, the Danish Forest Act and the Danish Planning Act.

Chapter 2 of the Danish Nature Protection Act contains numerous general protective provisions. The protection pursuant to § 3 covers many biotopes, such as lakes, watercourses, moors, bogs and meadows, and provides that it is forbidden to change the conditions there. This provision strengthens the protection of the underlying nature and contributes to achieving the objectives set out in the Habitat Directive, etc.

The prohibition pursuant to § 3 of the Danish Nature Protection Act affects all types of activities or interventions which could alter the condition of a biotope.

Dispensations from the nature protection pursuant to § 3 of the Danish Nature Protection Act are possible. Such dispensations are limited to the discretionary powers of the county council to grant exemptions from the provision in special cases; cf. § 65, Section 3 of the Danish Nature Protection Act.

The possibilities for obtaining dispensations from § 3 of the Danish Nature Protection Act are limited in that the authorities can grant exemptions from the provision only in special cases. The Natura 2000 areas are subject to particularly restrictive rules with regard to the granting of such dispensations. As a result, no dispensation from the Nature Protection Act can be granted if it could entail a degradation of the area's biotopes and habitats for species, or if it could entail disturbances that would have significant consequences for the species for which the area has been designated. This thus limits the freedom of the authorities to grant dispensations from the provisions of the Danish Nature Protection Act in Natura 2000 areas.

Dispensations from the § 3 of the Danish Nature Protection Act can and often are granted subject to conditions. The Act places no restrictions on the conditions which can be set in connection with a dispensation, and also requires that such conditions fall within the framework of the provisions of the Act which set out its purpose. Dispensations can thus be granted subject to conditions requiring preventive measures in the form of the establishment of replacement biotopes.

4. ENVIRONMENTAL COMPENSATION

In Danish law, the requirement concerning the establishment of replacement biotopes is usually applied in connection with the legalisation of unlawfully altered conditions. Such legalisation is effected in such cases via a subsequent dispensation.

There may be a need to set conditions concerning the establishment of replacement biotopes or the re-establishment of existing biotopes in cases where a violation of law has occurred, and where the authorities have declined to impose requirements with regard to an actual re-establishment of the biotope in question. This can be especially relevant in situations where requiring the re-establishment of the original biotope would entail disproportionately heavy expense, or where such re-establishment would be impossible or, in any event, unfeasible in the foreseeable future.

The authorities have been reluctant to grant dispensations conditioned on the establishment of replacement biotopes insofar as, from a nature conservation perspective, it is usually preferable to maintain the original nature areas and their unique characteristics to the greatest possible extent.

4.1 Replacing Nature

Replacement forests pursuant to the Danish Forest Act may be cited as an example of replacement areas established under Danish law.

The Danish Forest Act provides the authority to require replacement areas in the event of deviations from the Danish forest preserve obligation. Under the Danish Forest Act, the forest preserve obligation can, if special grounds to do so exist, be lifted for an area which is desired for use for other purposes. In connection with such a dispensation, conditions can be set to the effect that some other area will fall under the forest preserve obligation in the form of a replacement forest.

This legislation includes provisions governing the size, location and establishment of replacement forests. Pursuant to § 2 of the government order, the area of the replacement forest must, as a starting point, be at least 10% greater than the area of the forest to be replaced. The authority is also granted to set conditions for a replacement forest such that it must be up to twice as large in area as the forest it is to replace.

The more detailed conditions which can be set with regard to a replacement forest pertain to whether it must be located in proximity to the area it is to replace, and whether the replacement forest must contain any particular tree species in cases where it is intended to replace an area containing such species. Emphasis is thus placed on ensuring the proximity and character of the replacement forest.

5. EXPROPRIATION

In cases where it is not possible to enter into an agreement, one option can be to expropriate and thereby acquire the areas at issue.

Fulfilment of a condition regarding replacement biotopes can, if necessary, be enforced by expropriation. The expropriation authority granted under the Danish Road Act has thus been expanded to include areas for establishing animal crossings and replacement biotopes to

compensate for the encroachments of road construction on natural conditions. The provision is based on the fact that, in some cases, it is more appropriate to relocate a biotope (e.g. a watering hole of importance to animal life) to an area adjacent to the road, and to thereby avoid having to change the route taken by the road.

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