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## **Implementation of Natura 2000 Protection – Problems Faced by National Courts**

The role of national courts in respect to the implementation of Natura 2000 is, in general, twofold: Firstly, there are the applications which refer to the stage of establishing the network. These are roughly the same as the application of Article 4 of the Habitats Directive. Secondly, there are the cases that refer to the legal effects of the Natura sites. These cases are roughly the same as the application of Article 6 of the same Directive. These two regimes are different in several judicial and practical respects. E.g., due to the time factor, the national application of Article 6 is so far only in fragmentary parts covered by court practice. On the other hand, one may be of the opinion that the application of Article 4 is, already, mostly a matter of history. Perhaps so, but as a part of the system as a whole, also the legal problems of that stage, if not as such actual any more, may preserve some of their relevance further on.

To be exact, paragraphs 4 and 5 of Article 4, i.e. the transforming of SCI areas into SAC areas, makes a different context, which is closely connected to Article 6, also in terms of time.

As a basis to my presentation, I have beforehand had the opportunity to study the valuable national responses to the questionnaire “Impact of Natura 2000 sites on Environmental licensing”, all of which have today been delivered here and are now also to be found on the website of this forum. As you have noticed, those reports have come from Belgium, Cyprus, the Czech Republic, Finland, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Slovakia, Sweden and the United Kingdom. The Estonian response arrived today and consequently has not been able to be included. Hence, some member countries are missing here, a fact that makes an exhaustive union-wide summary unfeasible.

To achieve a general overview on the situation in the various countries covered by the responses is not an easy task, either. This is by no means any fault of the distinguished reporters, but a direct outcome of the very different national legal systems and the different structures of judiciaries – and even the different ways to arrange the division of powers between administrative bodies and courts of justice. In federal states, the diversity multiplies further. – Don’t blame me too much, if I have misunderstood something in your reports. The examples I point out here in various contexts are not intended to be exhaustive.

### *Decisions on national proposals*

I shall begin with the authority that drafts (or has drafted) the Natura 2000 site list and/or makes the national proposal to the European Commission. The position and status of this competent body often more or less directly defines the forthcoming court procedures. On the one hand, there are countries where the lists are, or have been, drafted in a much decentralized way, by several and different actors – like in Italy, where the Regions draft the lists on the basis of applications made by various public bodies, and also in the UK. On the other hand, there are also many countries in which the list is, or has been, drafted or at least finally decided upon at central governmental level by the competent Ministry or by the Cabinet. In several countries the competence is vested in the Environmental Ministry (France, Netherlands) or the Cabinet (Finland, Sweden, Slovakia), but also

in these cases the regional and local administration levels have been participated in the preparation. In general, interested parties and largely also NGOs have been consulted before the decision-making.

In federal countries, the proposals of the different regional governments, and the respective procedures, may be separate, as in Belgium, although the procedures show many similarities. In Germany, the lists are prepared by the Environmental Ministries of the Lands and decided upon by the Governments of the Lands, whereas the role of the Federal Government between the Lands and the Commission is practically formal. The situation in this respect is rather similar in Italy, where the Ministry transmits the regional proposals to the Commission. The list-drafting procedure may also in other countries take place in several stages.

I would like to add here that also Finland is kind of a federal state, due to the autonomous status of the Åland Islands. The proposal regarding Åland is (has been) independently drafted and decided upon by the Åland Government.

#### *Access to court regarding the national proposals*

Access to court in respect to the list decisions, if there is any, seems to have been provided in manifold ways. This holds true also in respect to the standing rules, e.g. in respect to NGOs. If the procedure consists of various administrative stages, there may be even more than one possibility to access to court.

Where administrative judicial appeal before administrative courts is not provided (e.g. the UK), there may be a possibility to court review on administrative law grounds. That was also the national procedural background of the well-known Bristol harbour (First Corporate Shipping) preliminary ruling of the ECJ (7 November 2000, Case C-371/98).

In the countries with administrative courts, the decision of the Cabinet or the Ministry is subject to administrative judicial appeal to administrative court or tribunal (e.g. Finland, France, Netherlands and Sweden). In France, the final proposal is made by the Ministry of the Environment, but access to administrative tribunals applies to the preceding decisions of the prefects.

In Finland the national proposal, and also that of the Åland government, may be appealed against by landowners and other interested parties before the Supreme Administrative Court. Also NGOs and municipalities have standing. It seems that the amount of court procedures clearly exceeds the respective amount in any other country (regarding the basic proposal of 1998, 850 appeal documents, 750 sites, 5000 appellants, about 700 decisions in 40 000 pages in June 2000). About 7 % of those appeals were at least partly successful.

In Sweden, the general Act on administrative judicial appeal does not cover Cabinet decisions, but there is a specific, human rights based Act creating a right of appeal to the Supreme Administrative Court against such Cabinet decisions that include exercise of public power. In practice, there have been no appeals against the Natura decisions. From last July on, that possibility to access to court has been available also to environmental NGOs.

In Luxembourg, the proposal is made in the form of a governmental regulation, but it may be appealed against before an administrative tribunal and further on before the Administrative Court. In Italy, the national proposal may be appealed against before an administrative court by private parties, NGOs and public bodies.

In Slovakia, the governmental-level procedure regarding SPAs is partly different from that regarding SCIs. The decisions are issued in the form of Ministerial decree, and there is no ordinary access to court. The constitutionality of the decree can be challenged before the Constitutional Court, but only by certain state organs. The forthcoming expropriation stage is another matter.

Ordinary administrative appeal against the designation decisions may be excluded due to the principal fact that governmental decisions in general cannot be appealed against (e.g. the Flemish and Walloon Governments), but an action for annulment before the Council of State is available here, based on infringement of procedural or substantive law. In the Czech Republic, the final proposal has been issued in the form of Government decree. Hence there has been no right to appeal. However, the Government decree can be challenged before the Constitutional Court, but only by certain privileged applicants.

As to one country, it has been otherwise stated that there was no judicial review at courts (Hungary). This might indicate that there has been no such possibility. For another country, it seems that the appeals have not been dealt with by a court of justice, but by the Scientific Committee connected to the Ministry of the Environment (Cyprus).

The involvement of interested parties, interest groups and the public in the screening procedure has also varied considerably. This is reflected in the nature of the possibly forthcoming court procedures. For the Flemish Region it was accentuated that the hearing and participation of interested parties has there been of minor importance, also pursuant to the practice of the Constitutional Court, due to the fact that the screening has to be based merely on scientific grounds.

Also access to biological data showed a remarkable variation. E.g. in the UK, the relevant register was made public. In Hungary, there was no public access to the data. In Italy, the public has not been involved, but there has been access to the environmental data. In Cyprus, large publicity has resulted in differing opinions. Minor restrictions to access have been set forth at least in the Czech Republic, in Finland and Sweden, the two-last-mentioned concerning geographical data on certain endangered species.

In many countries, the existing preserves and other protected areas based on national law have in practice more or less been included in the network. The share of such already protected areas seems also to be one of the factors explaining the amount of complaints or appeals by landowners, developers, operators etc.

### *Legal effects of the network*

As regards Article 6, paragraphs 1, 2 and 3, there are quite different legislative solutions. In some countries, the legislative emphasis seems to have been in the preservation and management of the site, in some others in the impacting projects and their qualifications.

It seems to be rather common that the existing national nature preserving mechanisms are used to implement Article 6, at least in part. In Cyprus, France and the UK, such arrangements are intended to cover the all the sites. But the situation may also be quite opposite: In the Netherlands, Natura sites are *ex lege* excluded from the status of protected nature areas, in order to prevent cumulating obligations.

As to the impacts regime, there are various solutions e.g. in regard to whether a specific Natura-focused licensing procedure is provided or whether the specific qualifications are decided upon by in ordinary permit or plan procedures. The huge variety of solutions cannot be envisaged here in detail.

There are some evident implementation problems. E.g. existing activities are not necessarily covered, and the thresholds to apply for a permit defined in sectoral legislation may leave gaps. Emphasis on preserve-type implementation again may leave gaps in impact-type implementation.

It appears anyway to be quite common that the ordinary environmental permit and plan authorities within the ordinary procedure also apply the national provisions based on Article 6, paragraph 3 (Finland, Germany, Netherlands, Sweden). In the Czech Republic, the decisions based on assessments by authorized experts are in the first place made by the Ministry of the Environment, but the final licensing is vested in regional authorities.

The manifold legislative solutions also make that the respective court procedures are manifold. Insofar the existing permit or project plan procedures are used for the Natura purpose, also the access to court and the applicable appellate mechanisms as a rule depend on sectoral legislation. The coverage of administrative judicial procedure, where provided by the legal system, seems nevertheless be high.

There are also other problems related to Article 6. Paragraph 4 provides that once a SCI has been adopted, the Member State concerned shall designate that site as a special area of conservation, i.e. a SAC area, as soon as possible and within six years at most. This seems to have been omitted at least formally by e.g. the Finnish law regarding those sites that are not going to be transformed to preserves etc. (or are not already such), but the protection of which is intended to be based solely on the plan and permit laws.

### *Exemptions*

As to paragraph 4 of Article 6, i.e. the exceptions based on imperative reasons of overriding public interest, it is quite often that the competence is separated from the application of the more everyday paragraph 3 and vested upon the Cabinet (e.g. Finland, Luxembourg, Sweden) or other government-level body, such as the Ministry of Environment (the Czech Republic, Slovakia). But also such cases there are differences: if the derogation is made or ratified in the form of an act of the legislature, the only applicable court procedure may be an action for annulment or suspension before the Constitutional Court (e.g. in the Flemish and Walloon Regions).

It is also possible that also the exemptions are decided upon by the same authorities that are responsible for the approval of the plan or project, but that power may also be restricted by a ministerial direction to refrain from approving the plan or project (Germany, UK).

Administrative judicial appeal is available e.g. in Finland, Germany and Sweden. However, it has not always been made clear in the reports whether there is a possibility to challenge the exemption decision before a court of justice. This might imply future problems regarding the implementation of EU law. There have also some well-known cases where the relationship between a Cabinet exemption and the coverage of judicial control by courts may appear problematic (the Botnia Railway Case in Sweden).

In several reports it is openly stated that there are still many problems in the practical implementation of the network (e.g. Italy). The environmental administration and decision-making may also be at a transition stage, which makes a more detailed analysis right now difficult (Hungary).

A particularly Finnish problem has already been presented by President Hallberg. Here I try to go somewhat to the details. Article 4, paragraph 1 of the Habitats Directive provides the following:

*On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host.*

The Finnish language version of the provision, translated into English, is something different. It requires a quite different and in practice impossible list:

*On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which native species in Annex II its territory hosts.*

The two contents are of course completely different. The Finnish Supreme Administrative Court made an analysis on different language versions in its year 2000 network decisions and explained its outcome that was based on the English, French, German, Swedish, Danish etc. versions. As you know the recent discussion in the member countries and before the European Court of Justice on an exhaustive national list provided by the Article 4 and Annex III of the Directive was rather complicated as such. But in Finland, all that was extra difficult due to the misleading Directive text. Many people were, and some perhaps still are, badly misled.