

The implementation of area protection provisions from European environmental directives in the Member States

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1. Introduction

In this article, I will focus on the obligation to designate areas in European environmental directives. The main question of this article is as follows: what differences are there between the interpretation of the Member States, the European Commission and the European Court of Justice (ECJ) concerning the obligation to designate protected areas in the Member States? There seem to be differences about the margin of appreciation for the Member States in selecting areas and discussions about the exact meaning of provisions. In order to answer this question, the Wild Birds Directive, the Habitats Directive, the Nitrates Directive and the Bathing Water Directive will be used as examples. In the first two directives, the designation of areas plays a major role. In the Nitrates Directive, the designation of areas is important, but the Directive also contains an alternative: Member States can choose to apply the Directive to their complete territory. Then it is no longer necessary to designate specific areas. The Bathing Water Directive contains a different system. The definition of bathing water in the Directive is used to determine to which waters the Directive must be applied. Designation is not necessary, since the Directive must be applied by law. In Section 2 I will give a brief description of these directives and the role of the designation of areas therein, their implementation in the Member States and some examples from the case law on the designation of areas. Section 3 will subsequently focus on the interpretation by the European Commission, the Member States and the European Court of Justice of the obligation to designate areas. In Section 4 I will come to a conclusion about the different interpretations of the obligation to designate areas.

European environmental law is an area in which there are many infringement procedures.¹ The implementation (transposition as well as application) contains many flaws, of which the infringement procedures cover only a part. The Commission has a limited capacity to check the compliance of the Member States, so many problems will remain unnoticed.² Apparently, environmental directives and regulations give rise to many questions as to their interpretation.

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1 Art. 226 EC Treaty, a procedure before the European Court of Justice, commenced by the Commission if it is of the opinion that a Member State fails to fulfil its obligations under Community law. For a more extensive explanation of this procedure, see for example J. Jans *et al.*, *European Environmental Law*, 2008, pp. 157-164.

2 Art. 234 EC Treaty, a procedure in which national judges can refer questions about the interpretation or validity of the EC Treaty and acts of the European Community to the ECJ. For a more extensive explanation of this procedure, see for example J. Jans *et al.*, *Europeanisation of Public Law*, 2007, pp. 263-271.

European environmental law covers different subjects, such as air, water, waste, nature, chemicals. These subjects are governed by sectoral legislation. Examples are the Ambient Air Quality Directive,³ the Water Framework Directive,⁴ the Waste Directive,⁵ the Habitats Directive,⁶ and the REACH Regulation.⁷ In addition to this sectoral legislation, there are also some general rules governing procedure, such as the Environmental Impact Assessment Directive (EIA Directive),⁸ the Integrated Pollution Prevention and Control Directive (IPPC Directive)⁹ and the Access to Environmental Information Directive.¹⁰

The most common form of decision in European environmental law is the directive,¹¹ but regulations¹² are used as well, mainly when the harmonization of the internal market is concerned (for example, the trade in chemicals or in waste).

In these directives and regulations different regulatory instruments are used, depending on the goal that must be achieved. Examples are emission standards, environmental quality standards, procedural requirements like public participation, product standards, the obligation to set up plans and programmes, permit regimes and requirements regarding the designation and use of areas. All of these instruments can give rise to their own problems in their implementation. Given the theme of this issue of the Utrecht Law Review, I will focus on the designation of certain areas.

2. Designation of areas in European environmental directives

Different directives contain an obligation to protect certain areas. In this article the Wild Birds Directive, the Habitats Directive, the Nitrates Directive and the Bathing Water Directive will be used as examples. These directives each contain their own procedures for the identification and designation of areas. The designation of areas has led to infringement procedures before the European Court of Justice for all of these directives. Most often these cases concerned areas which in the opinion of the European Commission should have been designated by the Member States, but where the Member States were of the opinion that they had a certain margin of appreciation in not designating the areas. This does not necessarily imply that Member States never designate the right amount of areas or more areas than necessary, but at least there are enough examples of cases in which they designated too few or too small areas for which the Member States offered several reasons.

3 Directive 2008/50/EC, *OJ L* 152, 11.6.2008, p. 1.

4 Directive 2000/60/EC, *OJ L* 327, 22.12.2000, p. 1.

5 Directive 2006/12/EC, *OJ L* 114, 27.4.2006, p. 9.

6 Directive 1992/43/EEC, *OJ L* 206, 22.7.1992, p. 7.

7 Regulation (EC) 1907/2006, *OJ L* 30.12.2006, p. 1.

8 Directive 85/337/EEC, *OJ L* 175, 5.7.1985, p. 40, as amended by Directive 97/11/EC, *OJ L* 73, 14.3.1997, p. 5.

9 Directive 2008/1/EC, *OJ L* 24, 29.1.2008, p. 8.

10 Directive 90/313/EEC, *OJ L* 158, 23.6.1990, p. 56.

11 Art. 249 EC Treaty: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' A directive has to be implemented in the national law of the Member States within the time-limit prescribed in that directive. See for further information for example P. Craig *et al.*, *EU Law*, 2007, p. 85.

12 Art. 249 EC Treaty: 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.' A regulation may not be transposed into national law, but must be applied directly in the Member States. See for further information for example P. Craig *et al.*, *EU Law*, 2007, pp. 83-84.

2.1. Wild Birds Directive (79/409/EC)¹³

2.1.1. Contents of the Directive

The Wild Birds Directive was adopted in 1979, as the first European directive in nature protection.¹⁴ Its purpose is to protect all birds which naturally occur in the Member States; its scope is not limited to threatened species. Article 2 contains a general obligation for the Member States to take measures to maintain the populations of all bird species at an adequate level, while taking into account economic and recreational requirements. Article 3 contains a list of measures which should be taken in relation to bird habitats. For threatened species, additional conservation measures must be taken. Article 4 obliges the Member States to designate the most suitable areas in number and size as special protection areas (SPA), in order to protect the habitats of the threatened species listed in annex I. Article 4(4) contained the protection regime, which was very strict. Member States were ‘to avoid pollution or deterioration of habitats of or any disturbances affecting the birds, in so far as these would be significant (...)’. This provision blocked most environmentally unfriendly projects. With the adoption of the Habitats Directive, this article was replaced by the more flexible regime of Article 6(2-4) Habitats Directive, which allowed for exceptions under certain conditions.

2.1.2. Implementation problems

The freedom of the Member States in designating SPAs under the Wild Birds Directive is very limited. Only ornithological criteria may be decisive for the designation of special protection areas.¹⁵ Many Member States designated too few or too small areas.¹⁶

In the *Leybucht* case, Germany wanted to displace a dyke for safety reasons.¹⁷ The new location of the dyke would however reduce the SPA, since the dyke is one of the borders of the SPA. The ECJ recognized that the Member States have a certain discretion with regard to the choice of territories, but they do not have the same freedom to reduce an SPA. That would be a way to escape the obligations of Article 4(4). Although the Directive does not contain an exception, the Court found that a reduction can be justified on exceptional grounds. The danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures, but only if the measures are confined to a strict minimum. This judgment is a reaction to the very strict obligations of the Wild Birds Directive, which in some cases seemed impossible to follow. This is a reason why Article 4(4) Wild Birds Directive has been replaced by a less strict regime.

The designation of areas under the Wild Birds Directive led to numerous problems. Designation was a task of the Member States, but the Commission could check whether the right areas were being designated. The most suitable territories in number and size had to be selected as special protection areas. The ECJ subjected this to a strict test. Only ornithological arguments were accepted.

The International Council for Bird Preservation made up a list of Important Bird Areas in Europe (the so-called IBA list) that was very authoritative. Areas mentioned on this list were

¹³ Directive 79/409/EEC, OJ L 103, 25.4.1979, p. 1.

¹⁴ See for more information about this directive for example J. Jans *et al.*, *European Environmental Law*, 2008, pp. 452-458.

¹⁵ See for example Case C-3/96, *Commission v Netherlands*, [1998] ECR I-03031.

¹⁶ See for example Case C-3/96, *Commission v Netherlands*, [1998] ECR I-03031; Case C-166/97, *Commission v France*, [1999] ECR I-017-19; Case C-96/98, *Commission v France*, [1999] ECR I-08531; Case C-374/98, *Commission v France*, [2000] ECR I-10799; Case C-117/00, *Commission v Ireland*, [2002] ECR I-05335; Case C-240/00, *Commission v Finland*, [2003] ECR I-02187; Case C-202/01, *Commission v France*, [2002] ECR I-11019; Case C-378/01, *Commission v Italy*, [2003] ECR I-02857.

¹⁷ Case C-57/89, *Commission v Germany (Leybucht)*, [1991] ECR I-00883.

supposed to be important, unless the Member State proved otherwise. This list also enabled the Directive to have direct effect: in areas from the list that were not designated, the Directive had to be applied directly.

Other interests, such as economic or recreational interests, cannot be taken into account when selecting areas. These interests can only play a role when deciding whether a project can take place in the protected area. In the *Leybucht* case, the ECJ accepted the reduction of an SPA in order to allow a dyke and to limit the risk of flooding.¹⁸ The Directive itself did not contain this possibility, but more exceptions were introduced when Article 4(4) Wild Birds Directive was replaced by Article 6(2-4) Habitats Directive.

The problems that occurred with designation can largely be attributed to two causes. In the first place it was not clear at first sight that the criteria for designation were so objective and strict. The Directive left room for different interpretations. The IBA list was first drawn up in 1989, so this was of no assistance to the Member States when they first had to designate areas. In the second place, the Member States were very reluctant to designate large areas, because of the severe limitations on use. They tried to select small areas and to find arguments to avoid designation for economic reasons, job losses etc. The ECJ rejected all non-ornithological arguments (see the case law below), however. This reluctance by the Member States does however make sense, because the original Directive (before it was adapted by the Habitats Directive) contained hardly any exceptions. This made the Directive very difficult to execute. The replacement of Article 4 Wild Birds Directive by Article 6 Habitats Directive was a major improvement in this respect. Since then, it is somewhat easier to carry out projects in special protection areas, which slightly lowers the threshold for actually designating such areas.

2.1.3. Examples from case law

Concerning the Wild Birds Directive, I will use two judgments by the ECJ which illustrate the different interpretations of the European Commission, the Member States and the ECJ as to the obligation to designate special protection areas.

The first case is a preliminary ruling concerning the designation of the Lappel Bank area in the United Kingdom.¹⁹

The United Kingdom had designated the Medway Estuary and Marshes as an SPA. An area known as Lappel Bank was excluded from this designation, although it had the same ornithological values as the rest of the area, because it was the only area into which the Port of Sheerness could expand. This was the fifth largest port in the United Kingdom and a major employer in the area. This was a sufficient reason for the Secretary of State to exclude Lappel Bank from the designation.²⁰ The Royal Society for the Protection of Birds was of the opinion that this economic argument could not be taken into account for the designation and started a procedure against the decision. The House of Lords asked the ECJ in a preliminary procedure whether a Member State is entitled to take into account the economic and recreational requirements of Article 2 Wild Birds Directive when designating areas, or any other interests, superior to the ecological objective of the Directive. The United Kingdom and France were of the opinion that economic objectives could be taken into account.²¹ However, the ECJ's answer is clear. Article 4 makes no reference to the economic and recreational requirements in Article 2, so they cannot be applied to the

18 Case C-57/89, *Commission v Germany (Leybucht)*, [1991] ECR I-00883, Paras. 20-23.

19 Case C-44/95, *Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds (Lappel Bank)*, [1996] ECR I-03805.

20 *Ibid.*, Para. 14.

21 *Ibid.*, Paras. 20-21.

designation of SPAs. Nor does the Directive leave the possibility to resort to other superior interests to limit the designation of areas. Such interests can only play a role in the decision on an actual plan in the area after designation. For the designation itself, only ornithological criteria are relevant.²²

The second case is an infringement procedure against the Netherlands. The Commission was of the opinion that not enough sites had been designated as special protection areas.²³ In the view of the Commission, Member States had to designate at least half of the sites on the IBA 89 list in their country.²⁴ In the Netherlands, only 23 sites with a surface of 327,602 hectares were designated, whereas the IBA 89 list contained 70 territories with a surface of 797,920 hectares. Among the designated areas was the Wadden Sea, with a surface of approximately 250,000 hectares, which meant that the other designated areas were fairly small. The Netherlands contended that the designation of SPAs was only one of the means to fulfil the obligations of Article 4(1) of the Wild Birds Directive, but that other special conservation measures were allowed as well. In addition, the Netherlands stated that the Member States had a margin of discretion when designating areas and that economic and recreational requirements (contained in Article 2) could be taken into account.²⁵ The German Government supported the Netherlands on the point of the margin of discretion.

Given the character of a directive, which leaves the choice of form and methods to the Member States and is only binding as to the result to be achieved, the view of the Netherlands that other conservation measures could be taken to fulfil the obligation is not so strange. However, one of the objectives of the Directive is to create a coherent network of SPAs, and this objective cannot be achieved if a Member State chooses not to designate any areas, but only to use other conservation measures. This is why the ECJ stated that the obligation to designate SPAs cannot be replaced by other conservation measures.²⁶ The ECJ recognized a certain margin of appreciation for the Member States in designating areas, but this freedom is limited by ornithological criteria. Economic and recreational requirements cannot be taken into account when selecting an SPA and defining its boundaries. This margin of discretion does not concern the appropriateness of classifying a territory as an SPA, but only the application of the ornithological criteria.²⁷

These two cases show that the Commission and the ECJ had a limited interpretation of the freedom of the Member States, whereas the Member States²⁸ were of the opinion that a balance between ornithological and economic requirements was possible. Article 4 of the Wild Birds Directive does not open up this possibility and there is no convincing reason as to why the economic and recreational requirements from Article 2 could be applied for the designation of SPAs. This is even more so since Article 2 concerns the protection of all birds and Article 4 is limited to endangered species, and it makes sense that the requirements for the protection of endangered species are stricter.

22 *Ibid.*, Paras. 24, 30 and 41.

23 Case C-3/96, *Commission v Netherlands*, [1998] ECR I-03031.

24 *Ibid.*, Para. 44.

25 *Ibid.*, Paras. 46-49.

26 *Ibid.*, Paras. 55-58.

27 *Ibid.*, Paras. 59-62.

28 The view of the United Kingdom was supported by France and the opinion of the Netherlands was supported by Germany, as stated above.

2.2. *Habitats Directive (92/43/EEC)*²⁹

2.2.1. *Contents of the Directive*

The Habitats Directive was adopted in 1992 as a complement to the Wild Birds Directive. Its purpose is to protect animals (other than birds) and plants.³⁰ Under the Habitats Directive, habitats are not only protected to benefit the wildlife living there, but also for their own merits.

The Habitats Directive dates from 1992. By that time, there had been some experience with the Wild Birds Directive and it was clear that the system of area protection could be improved on certain points. The Habitats Directive thus contains a different procedure for designating special areas of conservation. Under this Directive, the Commission has been assigned a role in the designation procedure. This was probably introduced in order to have more control over the designation, so as to limit the problems that occurred under the Wild Birds Directive. However, the result was just as disappointing as under the Wild Birds Directive: it took far too long to identify all relevant areas.

Under the Wild Birds Directive, the designation was the task of the Member States, with no role for the Commission except in checking *ex post* and the possibility to start an infringement procedure. This caused many problems, which probably played a role in the choice of adapting the procedure in the Habitats Directive.

The procedure for the designation of areas is described in Article 4 of the Directive. First, the Member States have to propose a list of sites that host protected habitats and/or species. They submit this list to the Commission. Then the Commission must establish a draft list of sites of Community importance. The Member States are obliged to designate the sites on this Community list as special areas of conservation (SAC). The regime of Article 6, Paragraphs 2-4 must, however, already be applied from the moment the areas are placed on the list of sites of Community interest. Designation by the Member States is therefore not required for the applicability of the protection regime. National designation is merely necessary to lay down the special status in national law.

In practice, this designation procedure did not work much better than the procedure under the Wild Birds Directive. The Member States were late in drafting the first list of areas. The Commission was late in making the list of sites of Community importance. And then the Member States were again late in officially designating the areas.³¹

The protective regime of the Habitats Directive is laid down in Article 6 and must also be applied to designated special protection areas under the Wild Birds Directive. The core obligation is to avoid any deterioration of protected areas. This can take two forms. Paragraph 2 applies to existing use and Paragraph 3 to new plans or projects. In the case of new plans or projects, an appropriate assessment of their consequences must be made if the plans or projects are likely to have a significant effect on the site. In the absence of negative consequences, permission can be granted. If, however, there will be negative consequences or there is no certainty about the absence of such consequences, permission is only possible under certain conditions. It must be proved that the project is necessary and no alternative solutions can be found. Furthermore, the negative consequences must be compensated.

²⁹ Directive 1992/43/EEC, OJ L 206, 22.7.1992, p. 7.

³⁰ See for more information on this directive for example J. Jans *et al.*, *European Environmental Law*, 2008, pp. 459-463.

³¹ See for example Case C-67/99, *Commission v Ireland*, [2001] ECR I-05757; Case C-71/99, *Commission v Germany*, [2001] ECR I-05811; Case C-220/99, *Commission v France*, [2001] ECR I-05831.

Conservation objectives must be determined as part of the protective regime. The Member States were very late in doing so.

Article 4 Paragraph 4 of the Wild Birds Directive hardly contained a possibility to continue with a project if there were negative consequences for the protected area. Article 6 Paragraph 4 is somewhat less stringent in this regard. There must be an imperative reason of overriding public interest to grant permission for a project with (possible) negative effects, but economic and social interests can form such a reason. This possibility has been introduced in the Habitats Directive as a reaction to the judgment by the ECJ in the *Leybucht* case.³² The Wild Birds Directive contained very limited possibilities to carry out harmful projects in special protection areas. This resulted in the desire to modify or reduce the extent of such areas, because if a site is no longer an SPA, the project would be allowed. However, the Court decided that the Member States can only reduce the extent of an SPA on exceptional grounds, not including economic and recreational requirements. With Article 6 Habitats Directive containing more possibilities in protected areas and also applicable to protected areas under the Wild Birds Directive, there is less need to reduce protected areas. This could lead to a better designation of areas, as the use of designated areas is not completely precluded.

2.2.2. Implementation problems

The designation procedure in the Habitats Directive left hardly any discretionary powers to the Member States. They have to propose a complete list of all sites that are, based on nothing but their ecological characteristics, eligible for designation.³³ A full list of all relevant sites must be presented to the Commission so that it can select the most relevant sites and set up a coherent ecological network between the Member States. The Commission selects a list of sites of Community interest based on ecological characteristics and coherence with other areas.³⁴ Member States are obliged to designate those sites. In practice this procedure took far too long.³⁵ But procedures concerning the Wild Birds Directive had made it clear to the Member States that a designation could only be based on ecological arguments. Member States no longer used that argument, although individuals continued to do so.³⁶ A major difference with the Wild Birds Directive is however the procedure under Article 6 (2-4) of the Habitats Directive. Under the Wild Birds Directive, the possibilities to carry out damaging projects in SPAs were very limited. The protection regime of the Habitats Directive contains restrictions, but does not completely preclude the use of designated areas.

As opposed to the Wild Birds Directive, there is no authoritative list like the IBA list, which clarifies which areas should be designated. This has two consequences. In the first place, it is more difficult for the Commission to prove in an infringement procedure that an area should have been designated. Secondly, no direct effect can be attributed to Article 6 in areas that have

³² Case C-57/89, *Commission v Germany (Leybucht)*, [1991] ECR I-00883, Paras. 20-23.

³³ Case C-371/98, *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust (Severn Estuary)*, [2000] ECR I-09235, Paras. 22-25. See also J. Verschuuren, 'Effectiveness of nature protection legislation in the European Union and the United States: The Habitats Directive and the Endangered Species Act', in: M. Dieterich *et al.* (eds.), *Cultural Landscapes and Land Use: The Nature Conservation-Society Interface*, 2004, p. 47.

³⁴ Ch. Backes, 'Veel habitat, weinig richtlijnen? Enkele opmerkingen over interpretatie en rechtsgevolgen van de Habitatrictlijn', in: Ch. Backes *et al.*, *Gemeenten en de Vogel- en Habitatrictlijn*, 2000, pp. 14-15.

³⁵ See for example Case C-67/99, *Commission v Ireland*, [2001] ECR I-05757; Case C-71/99, *Commission v Germany*, [2001] ECR I-05811; Case C-220/99, *Commission v France*, [2001] ECR I-05831.

³⁶ Case C-371/98, *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust (Severn Estuary)*, [2000] ECR I-09235.

not been officially designated, or at least been placed on the list of sites of Community interest. There is not enough certainty as to whether or not a site should have been designated.

2.2.3. Examples from case law

A preliminary ruling of the ECJ in a British case concerns the freedom of Member States in designating areas under the Habitats Directive.³⁷ The British Secretary of State wished to propose the Severn Estuary to the Commission as a site eligible for designation as a SAC. First Corporate Shipping was the port authority of the port of Bristol, on the Severn Estuary, and it wanted economic requirements to be taken into account in the decision to propose the site to the Commission.³⁸ The case law on the Wild Birds Directive had made it clear that economic requirements could not be taken into account.³⁹ There was no reason to believe that this would be any different under the Habitats Directive. The British Secretary of State therefore included the Severn Estuary in the proposal to the Commission, notwithstanding the economic consequences for the port of Bristol. The High Court of Justice submitted questions to the ECJ about the interpretation of the Habitats Directive. The Finnish Government contended that a Member State could exclude some sites from its proposal to the European Commission for economic reasons, but only if this does not jeopardize the goal of the Directive. This could be the case if a very large number of sites qualify for designation. Then, according to Finland, the Member State could make a selection.⁴⁰ The ECJ considered that a coherent ecological network can only be created if all the sites with an ecological interest are proposed to the Commission. The Directive does not contain a possibility to take economic considerations into account. This means that the Member States cannot exclude sites from their proposal because of economic or other non-ecological reasons.⁴¹

There were also a number of infringement procedures concerning the late and insufficient designation of areas.⁴² The Member States had to propose a list of sites eligible for designation to the Commission. The European Commission was supposed to send a format to the Member States, in which they could lay down the relevant information about selected areas. The Commission was late in sending this format, which was used as an excuse by the Member States for their late proposal. The ECJ stated, however, that it is clear from the Directive itself which information must be sent to the Commission. It was thus not necessary to wait for the format before starting to collect those data. Then they could have returned the format shortly after receiving it, instead of waiting for another year.

Other procedures on the Habitats Directive mainly concerned the application of the protection regime in the designated SACs. I will not discuss these cases in this article, as the application of the protective regime falls outside the scope of this article. However, the shift in the case law from conflicts concerning designation towards the application of the protective regime seems to be a way for Member States to limit the consequences of the Directive.

The *First Corporate Shipping* case shows that the Member States were more aware of the extent of their obligation to designate than under the Wild Birds Directive. Where under the Wild

³⁷ *Ibid.*

³⁸ *Ibid.*, Paras. 7-10.

³⁹ Case C-44/95, *Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds (Lappel Bank)*, [1996] ECR I-03805, see *supra*.

⁴⁰ Case C-371/98, *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust (Severn Estuary)*, [2000] ECR I-09235, Para. 18.

⁴¹ *Ibid.*, Paras. 22-24.

⁴² Case C-67/99, *Commission v Ireland*, [2001] ECR I-05757; Case C-71/99, *Commission v Germany*, [2001] ECR I-05811; Case C-220/99, *Commission v France*, [2001] ECR I-05831.

Birds Directive the discussion about the margin of appreciation for the Member States in the designation of areas was possible, by the time the Habitats Directive was adopted, the Member States were quite aware of the lack of discretionary powers in proposing and designating sites. Instead, however, questions about the application of the protective regime were raised. Economic reasons were no longer put forward as a reason not to designate an area, but in the procedure of Article 6(3-4) of the Directive about giving permission for a plan of project in a SAC.

2.3. Nitrates Directive (91/676/EEC)⁴³

2.3.1. Contents of the Directive

The goal of the Nitrates Directive is to reduce and prevent water pollution caused by nitrates from agricultural sources.⁴⁴ The Directive contains an obligation to identify waters which are or could be affected by nitrate pollution. Land areas which drain into those waters must be designated as vulnerable zones. For these zones, action programmes must be set up (Article 5). As an alternative for the designation of vulnerable zones, Member States can also decide to apply these action programmes throughout their national territory, thus extending the scope of application of the Directive. Many Member States chose this option. In addition to the action programmes for vulnerable zones, Member States have to draw up a code of good agricultural practice. This code contains advice for farmers about the use of fertilizers, but is in principle non-binding. In vulnerable zones, however, this is different. The code forms a mandatory part of the action programme in vulnerable zones.

The remainder of the Directive contains rules on monitoring, a procedure for adaptations to the annexes, an obligation for the Member States to submit a report to the Commission every four years, etcetera.

The Annexes to the Directive provide criteria for the identification of waters threatened by nitrate pollution, contain elements which have to be included in the codes of good agricultural practice and the action programmes, specifications for measuring nitrate pollution and the required information for or reports to the Commission.

2.3.2. Implementation problems

In the Member States that did not choose to apply the Directive to their whole territory, several problems occurred with the designation.⁴⁵ The Member States preferred to keep the designation limited, but the Commission and the ECJ require a broader approach. Member States tried to limit their designation for different reasons. Spain claimed, for example, that a site did not have to be designated because the nitrate pollution was not caused by agriculture alone, but by other sources as well.⁴⁶ The United Kingdom wanted to limit designation to those sites that influenced waters used for the production of drinking water.⁴⁷ Both arguments were dismissed by the ECJ, as these limitations did not follow from the Directive. For the application of the Directive, it is not necessary that the pollution is only caused by agriculture. It suffices if the agricultural sector

⁴³ Directive 91/676/EEC, OJL 375, 31.12.1991, p. 1.

⁴⁴ See for more information about this Directive for example J. Jans *et al.*, *European Environmental Law*, 2008, pp. 368-370.

⁴⁵ Case C-71/97, *Commission v Spain*, [1998] ECR I-05991; Case C-195/97, *Commission v Italy*, [1999] ECR I-01169; Case C-293/97, *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others*, [1999] ECR I-02603; Case C-69/99, *Commission v United Kingdom*, [2000] ECR I-10979; Case C-258/00, *Commission v France*, [2002] ECR I-05959; Case C-396/01, *Commission v Ireland*, [2004] ECR I-02315; Case C-416/02, *Commission v Spain*, [2005] ECR I-07487; Case C-221/03, *Commission v Belgium*, [2005] ECR I-08307.

⁴⁶ Case C-416/02, *Commission v Spain*, [2005] ECR I-07487.

⁴⁷ Case C-69/99, *Commission v United Kingdom*, [2000] ECR I-10979.

makes a ‘significant contribution’ to the overall concentration of nitrates.⁴⁸ The Member States do have discretionary powers in deciding when there is such a significant contribution.

2.3.3. Examples from case law

The judgments of the ECJ show that the designation of vulnerable zones was problematic.⁴⁹ But there are judgments on the contents of the code of good agricultural practices and of the action programmes as well.⁵⁰ Problems arise both in relation to the designation of protected areas and to the regime which is applicable in those areas.

Concerning the Nitrates Directive, I will discuss three judgments of the ECJ.

The first is an infringement procedure against the United Kingdom.⁵¹ The Commission stated that the UK had not fulfilled its obligation to identify all waters which were or could be affected by nitrate pollution. The UK only identified surface waters intended for the abstraction of drinking water and groundwater intended for human consumption. However, the Directive is applicable to all surface waters and groundwater which are vulnerable to nitrate pollution. The United Kingdom accepted the submissions of the Commission, but stated that it had initially misinterpreted the scope of the Directive as regards the identification of ‘waters affected by pollution’.

The second case is a preliminary procedure from the United Kingdom.⁵² The case concerned the designation by a ministerial decision of the area of the River Waveney and the area of the Rivers Blackwater and Chelmer as nitrate vulnerable zones. The applicants wanted to have these decisions annulled, because they feared that there would be economic harm to their farming businesses.⁵³ They claimed that the Directive should only be applied to waters in which the threshold for nitrates of 50 mg/l is or can be exceeded by discharges from agricultural sources alone. Other sources of nitrate pollution should not be taken into account, since the title of the Directive refers to pollution caused by nitrates from agricultural sources. However, Article 3 on the identification of vulnerable zones does not contain a restriction based on the source of the pollution. The ECJ thus does not exclude waters where other sources contribute to nitrate pollution,⁵⁴ but it does limit the scope of the Directive to cases where the discharge of nitrogen from agricultural sources makes a significant contribution to the total nitrate pollution.⁵⁵ It is up to the Member States to decide when there is such a ‘significant contribution’.

The third case concerns an infringement procedure against Spain.⁵⁶ This case concerned a specific pig farm, concerning which questions were raised about the application of different environmental directives.⁵⁷ For the Nitrates Directive, the case concerned the non-designation

48 Case C-293/97, *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others*, [1999] ECR I-02603.

49 Case C-71/97, *Commission v Spain*, [1998] ECR I-05991; Case C-195/97, *Commission v Italy*, [1999] ECR I-01169; Case C-293/97, *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others*, [1999] ECR I-02603; Case C-69/99, *Commission v United Kingdom*, [2000] ECR I-10979; Case C-258/00, *Commission v France*, [2002] ECR I-05959; Case C-396/01, *Commission v Ireland*, [2004] ECR I-02315; Case C-416/02, *Commission v Spain*, [2005] ECR I-07487; Case C-221/03, *Commission v Belgium*, [2005] ECR I-08307.

50 Case C-71/97, *Commission v Spain*, [1998] ECR I-05991 and Case C-221/03, *Commission v Belgium*, [2005] ECR I-08307 about the code, and for example Case C-274/98, *Commission v Spain*, [2000] ECR I-02823; Case C-69/99, *Commission v United Kingdom*, [2000] ECR I-10979; Case C-127/99, *Commission v Italy*, [2001] ECR I-08305 on the action programme.

51 Case C-69/99, *Commission v United Kingdom*, [2000] ECR I-10979.

52 Case C-293/97, *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others*, [1999] ECR I-02603.

53 *Ibid.*, Paras. 14-15.

54 *Ibid.*, Paras. 31-34.

55 *Ibid.*, Paras. 35 en 38.

56 Case C-416/02, *Commission v Spain*, [2005] ECR I-07487.

57 *Ibid.*, Para. 41.

of the area as a nitrate vulnerable zone. Spain recognized the eutrophic state of the waters in the region, but failed to designate the ground as a vulnerable zone.⁵⁸ Spain justified this by stating that the pollution was not due to agricultural sources alone. The ECJ dismissed this argument because, as it had already stated in the *Standley* case, it is sufficient if agricultural sources make a ‘significant contribution’ to the nitrate pollution, but it does not have to be the sole source.⁵⁹

In the *Standley* case, farmers requested a limited interpretation of the Nitrates Directive so as to prevent economic harm to their businesses. In the procedure against Spain, it was the Member State itself that invoked this argument. Although the title of the Directive is a little misleading, it does not leave room for a limited interpretation based on the source of the nitrate pollution. The ECJ was already quite accommodating by allowing an exception if agriculture did not make a ‘significant contribution’ to the level of nitrate pollution.

2.4. Bathing Water Directive (76/160/EEC and 2006/7/EC)⁶⁰

2.4.1. Contents of the Directive

The first rules on the quality of bathing water were determined in 1976 in Directive 76/160. In 2006 a new Bathing Water Directive was adopted (2006/7).⁶¹ The old Directive is repealed with effect from 31 December 2014. The purpose of both directives is the protection of public health and the environment. The Directive contains limit values for the quality of bathing water, an obligation to take samples and an obligation to inform the Commission of the quality of bathing waters. The new Directive contains similar rules. The most important new element is the new obligation to inform the public about water quality.

An exception when it comes to area protection in European law is the Bathing Water Directive 2006/7. This Directive does not contain an obligation to designate certain areas. The definition of bathing water is ‘any element of surface water where the competent authority expects a large number of people to bathe and has not imposed a permanent bathing prohibition, or issued permanent advice against bathing’. The Directive is applicable to all areas which fulfil this definition. This prevents problems concerning the designation of areas, but still does not guarantee that the Directive is applied in all relevant areas. Article 3 concerning monitoring does contain an obligation to ‘identify’ all bathing waters. The difference with an obligation to officially designate areas is thus quite formal. A discussion as to which waters should be seen as bathing water can still exist. The problem under this Directive is thus not the formal designation of areas, but rather the question to which waters the rules of the Directive should be applied. This is independent from the question whether the waters have to be designated or only identified.

Identified bathing waters have to be monitored (Article 3). Their quality must be assessed (Article 4). The waters must be classified as poor, sufficient, good or excellent (Article 5). For waters qualified as poor, certain measures have to be taken (Article 5 Paragraph 4). The last Articles of the Directive contain obligations concerning transboundary cooperation, public participation, information to the public, and an obligation to send annual reports about the quality of bathing water to the Commission. Furthermore, the Directive contains provisions on a review of the Directive, technical adaptations, implementation etcetera. The Annexes contain the quality standards and technical specifications for monitoring.

⁵⁸ *Ibid.*, Para. 67.

⁵⁹ *Ibid.*, Paras. 68-69.

⁶⁰ Directive 76/160/EEC, *OJL* 31, 5.2.1976, p. 1 and Directive 2006/7/EC, *OJL* 64, 4.3.2006, p. 37.

⁶¹ See for more information about this directive for example J. Jans *et al.*, *European Environmental Law*, 2008, pp. 362-365.

The goal of the Directive is not the identification of bathing waters, but attaining a certain quality of bathing waters to protect public health. For this goal, it is necessary to identify all bathing waters. This does not leave any freedom for the Member States, because that would endanger human health. That is exactly why the solution in this Directive (no designation, the Directive itself decides which waters fall under its scope) cannot be applied in many cases. It would not work in the field of nature protection, because a selection of the sites which must be protected has to be made. If not, the obligation would be too far-reaching.

2.4.2. *Implementation problems*

In relation to the Bathing Water Directive, problems concerned the identification of bathing waters, but the most serious problem was the failure by Member States to comply with the environmental quality standards laid down in the Directive. Furthermore, Member States did not always comply with their duty to report to the Commission.

2.4.3. *Examples from case law*

Some cases before the ECJ concerned discussions about the identification of bathing waters,⁶² poor water quality and an insufficient monitoring of water quality.⁶³ Spain was even ordered to pay a penalty payment because it did not comply with the earlier judgment of the ECJ.⁶⁴

In an infringement procedure against the United Kingdom, the UK accepted that the bathing water quality at Blackpool and Southport did not fulfil the criteria of the Bathing Water Directive.⁶⁵ However, it was of the opinion that the quality standards were not yet applicable, because the Directive contained a 10-year time-limit and this period only started to run after the designation of Blackpool and Southport as bathing zones.⁶⁶ According to the ECJ, the sites at Blackpool and Southport are equipped with facilities such as changing huts, toilets, markers indicating bathing areas, and supervised by lifeguards. They are visited by a large number of bathers. Thus, these areas should have been considered as bathing zones within the meaning of the Directive.⁶⁷ The time-limit is not dependent of the actual designation, since the Directive is applicable to all waters that fulfil the definition of bathing water in the Directive.

In another infringement procedure, the Commission submitted that Belgium had limited the scope of the Bathing Water Directive by excluding from its reports on bathing water quality numerous bathing zones previously included in those reports.⁶⁸ Belgium contended that it only had ten inland bathing zones in which bathing was expressly authorised.⁶⁹ It excluded shallow waters, because the Directive requires that bathing water must be clear to a depth of at least one metre. It also used the absence of facilities and unfavourable climatic conditions as arguments why certain sites should not be regarded as bathing water. The Commission pointed out that a leaflet published by the Walloon Region about campsites contained references to at least 16 bathing waters which had been excluded from the annual report. According to Belgium, the campsite owners were responsible for this information and it was not clear that bathing took place there by a large number of bathers. According to the ECJ, Belgium did not prove that bathing was

62 Case C-56/90, *Commission v United Kingdom*, [1993] ECR I-04109 and Case C-307/98, *Commission v Belgium*, [2000] ECR I-03933.

63 For example Case C-92/96, *Commission v Spain* and Case C-147/00, *Commission v France*.

64 Case C-278/01, *Commission v Spain*.

65 Case C-56/90, *Commission v United Kingdom*, [1993] ECR I-04109, Para. 28.

66 *Ibid.*, Paras. 28 and 32.

67 *Ibid.*, Paras. 34-35.

68 Case C-307/98, *Commission v Belgium*, [2000] ECR I-03933, Para. 21.

69 *Ibid.*, Para. 22.

no longer practised in the excluded areas.⁷⁰ The reference to bathing sites in the camping leaflet indicated that these waters were used by large numbers of bathers. Shallow water cannot be excluded because of the requirement that water must be transparent for at least one metre. This merely means that shallower water should be totally transparent.

These cases demonstrate two examples in which Member States tried to limit the scope of the Directive. The UK wanted to postpone the date by which it had to comply with the environmental quality standards and Belgium excluded zones which it had previously regarded as bathing water from its annual report, without proving that these really could no longer be regarded as bathing zones as meant in the Directive.

3. Interpretation of the obligation to designate areas

The cases mentioned in the previous sections are an illustration of the different views of the Commission, the Member States and the ECJ about the scope of the obligation to designate areas.

3.1. Interpretation by the European Commission

The Commission usually adheres to a quite strict interpretation of the obligation to designate areas. Under the Wild Birds Directive and the Habitats Directive, only ornithological or ecological requirements can be decisive for the designation.⁷¹ Other elements, such as recreational or economic requirements cannot be taken into account. For the Nitrates Directive, the criterion of 50 mg/l nitrate should be regarded as decisive for the identification of nitrate vulnerable zones.⁷² It is not necessary that the pollution is caused by agriculture alone. Possible economic damage to farms cannot be a reason not to designate areas. The Bathing Water Directive contains a clear definition of what is to be regarded as bathing water, namely all waters in which bathing is not prohibited and in which a large number of people actually bathe. Member States are not allowed to exclude water from this.⁷³

For all of these directives, the Commission started infringement procedures because it was of the opinion that the Member States did not designate enough areas.⁷⁴

3.2. Interpretation by the Member States

Many of the procedures discussed in this article show a restrictive interpretation by the Member States of their obligation to designate and protect areas. This restrictive interpretation is based on different arguments. In the first place, Member States rely on the margin of discretion that the directive grants them. This happened mostly under the Wild Birds Directive, where the Member States tried to invoke other than ecological interests for the selection of areas, even though the Directive did not contain that possibility. In the second place Member States tried to limit the scope of the directive. In the Belgian bathing water case, the Belgian authorities excluded bathing

⁷⁰ *Ibid.*, Paras. 30-36.

⁷¹ Case C-44/95, *Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds (Lappel Bank)*, [1996] ECR I-03805, and Case C-371/98, *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust (Severn Estuary)*, [2000] ECR I-09235.

⁷² Case C-293/97, *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others*, [1999] ECR I-02603 and Case C-416/02, *Commission v Spain*, [2005] ECR I-07487.

⁷³ Case C-307/98, *Commission v Belgium*, [2000] ECR I-03933.

⁷⁴ Case C-3/96, *Commission v Netherlands*, [1998] ECR I-03031, Case C-67/99, *Commission v Ireland*, [2001] ECR I-05757; Case C-71/99, *Commission v Germany*, [2001] ECR I-05811; Case C-220/99, *Commission v France*, [2001] ECR I-05831, Case C-69/99, *Commission v United Kingdom*, [2000] ECR I-10979, Case C-56/90, *Commission v United Kingdom*, [1993] ECR I-04109 and Case C-307/98, *Commission v Belgium*, [2000] ECR I-03933.

zones from their annual report which clearly matched the definition in the Directive. In the Spanish case on the Nitrates Directive, Spain wanted to limit the applicability of the Directive to zones where the nitrate pollution caused by agriculture alone was above 50 mg/l and to exclude zones where this standard was exceeded, but part of it could be contributed to other sources. Even though the title of the Directive refers to pollution from agricultural sources, the text of the Directive does not limit its applicability in such a way. A third way to limit the effects of a directive is to accept the designation itself, but to limit the protective regime. The Habitats Directive clearly did not leave a large margin of discretion to the Member States, but they were late in proposing sites to the Commission and they tried to allow ecologically harmful projects by broadly interpreting the exceptions contained in Article 6. A similar thing happened in the *Blackpool* case concerning the Bathing Water Directive. It was clear that two areas had to be regarded as bathing water, but the UK wanted a transition period of ten years from the moment of designation before the quality standards would have to be achieved. However, this period started before the identification by the UK, because under the Bathing Water Directive a designation was not necessary and the Directive had to be applied to all waters that fulfilled the requirements of the Directive.

The Wild Birds Directive is one of the first directives in the field of environmental protection. In those early years, the Commission did not start many infringement procedures. Member States may thus not have been fully aware of the extent of the obligation it had imposed on them. Directives were seen more as containing an intention than as a binding legal obligation. It was only in the second half of the 1980s that the Commission actually started to enforce directives, probably to the surprise of the Member States.

The Member States do not always use a limited interpretation of their obligations. Two of the preliminary rulings were given in cases where the Member State's interpretation was correct, but where individuals wished to limit the scope of the directive, because they were fearful of economic damage as a result of the designation. This occurred in the *First Corporate Shipping* case and in the *Standley* case. Furthermore, 7 of the 15 'old' Member States decided to apply the Nitrates Directive to their complete territory instead of only to selected nitrate vulnerable zones.⁷⁵ In addition, Member States may have designated areas under these directives which, strictly speaking, did not have to be designated. But in such cases the Commission does not start an infringement procedure, so they will remain hidden unless a preliminary question will be raised in a case started by an individual who considers that his rights have been limited.

3.3. Interpretation by the European Court of Justice

The ECJ has adopted a strict interpretation of the directives and dismisses arguments from the Member States if they rely on exceptions for economic reasons that are not based on the directive. This has led to many decisions where Member States have been condemned for a failure to designate all relevant areas. The preliminary rulings discussed in this article also show a broad interpretation of the obligation to designate and protect areas.

According to the ECJ, the Member States do have a certain margin of appreciation when it comes to the selection of sites eligible for designation under the Wild Birds Directive and the Habitats Directive. However, this freedom is limited to the application of the ecological criteria to decide which sites to designate. It does not include a freedom not to designate because that would limit the economic potential of an area.

75 COM(2007) 120 final, p. 8.

3.4. Differences between the interpretations of the Commission, the Member States and the ECJ

The cases mentioned in this article most often show a difference in interpretation between the Member States on the one hand, and the Commission and the ECJ on the other. The Commission and the ECJ usually interpret environmental directives in light of their goal, which is the protection of the environment. The Member States, on the other hand, often try to find a balance between the environment and economic interests. Preliminary cases such as *First Corporate Shipping* and *Standley* show that if the Member States confine themselves to a strict interpretation, individuals have objections against their decision.

Directives often leave some room for interpretation. This is inherent in any kind of legislation, and even more so in European legislation because of the difficult procedures for reaching an agreement. Texts are always compromises and everybody (the Commission, Member States, but also individuals influenced by a directive) prefers interpretations which are most favourable to one's own interests. Member States are likely to use open areas in the directive to allow for the expansion of ports etc. On the other hand, the Commission wishes to protect the environment and chooses to adopt a stricter interpretation.

4. Conclusion

The directives studied in this article each contain their own procedures for the designation of areas. Under the Wild Birds Directive, it is up to the Member States to designate areas. In the Habitats Directive, a role for the Commission in the designation procedure was added. The Nitrates Directive leaves Member States the choice to identify vulnerable zones or to apply the Directive to the whole territory. The Bathing Water Directive has a different system: the Directive must be applied to all areas which fit within the definition of bathing water given in the Directive. The actual designation of bathing zones is not necessary.

As the case law discussed in this article shows, Member States often prefer an interpretation which leaves them with a margin of discretion in their decision on the designation of areas. A second element of their interpretation is a tendency to limit the scope of the directive by excluding certain bathing zones or sources of nitrate pollution. In the third place, if the directive clearly does not leave much freedom in deciding on the designation, problems seem to shift towards the application of the protective regime, as is clear in the case of the Habitats Directive. The Commission and the ECJ usually support a broad interpretation in the light of the goal of the directive, which is environmental protection. This limits the margin of discretion for the Member States. The different interests of the Commission and the Member States lead to differences in interpretation.

Directives are never entirely clear, as they are the result of negotiations. It is however important that the margin of discretion and the scope of the directive are clear.

To avoid or limit problems concerning the designation of areas, the directives should be as clear as possible as to the criteria for designation and the margin of appreciation for the Member States. The Bathing Water Directive contains a definition of bathing water. The Directive is applicable by law to all areas which fulfill that definition. There can still be discussions about the application of the definition, but at least the criteria are clear. But this solution cannot be applied in all directives. In nature protection, a selection of the sites which are the most important to protect has to be made. Such a selection cannot be made by a directive, but only by the Member States or the Commission in individual cases.

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In general, the instrument for the designation of areas is quite complicated. Directives are not always clear about the scope of the obligations for the Member States. Judgments from the ECJ show that this scope must be interpreted quite broadly so as to protect the environment.