



Manual of European Environmental Policy

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Birds and their habitats

Formal references	
2009/147/EC (OJ L20 26.1.2010)	Directive on the conservation of wild birds
Proposed 20.3.2009 – COM(2009)129	
Legal base	Article 192 TFEU (originally Article 175 TEC)
Repealed Directives	
79/409/EEC (OJ L103 25.4.1979)	
Proposed 20.12.1976 – COM(76)676	
Amended by	
1979 Act of Accession (OJ L291 19.11.1979)	
81/854/EEC (OJ L319 07.11.1981)	
85/411/EEC (OJ L233 30.8.1985)	
1985 Act of Accession (OJ L302 15.11.1985)	
86/122/EEC (OJ L100 16.04.1986)	
91/244/EEC (OJ L115 08.05.1991)	
94/24/EC (OJ L164 30.06.1994)	
1994 Act of Accession (OJ C241 29.8.1994)	
97/49/EC (OJ L223 13.08.1997)	
Regulation (EC) No 807/2003 (OJ L122 16.05.2003)	
2003 Act of Accession (OJ L236 23.9.2003)	
2006/105/EC (OJ L363 20.12.2006)	
2008/102/EC (OJ L323 3.12.2008)	
Legal base (original Directive)	
Directive 79/409/EEC	Article 352 and 353 TFEU (originally Article 235 EEC Treaty)
Directive 94/24/EC	Article 192 TFEU (originally Article 130s EEC Treaty)
Binding dates	

79/409/EEC	
Notification date and entry into force	6 April 1979
Formal compliance	7 April 1981
First three-yearly report by Member States to the Commission	7 April 1981
End of validity	14 February 2010
85/411/EEC	
Formal compliance	31 July 1986
91/244/EEC	
Entry into force	27 March 1991
Formal compliance	31 July 1992
94/24/EC	
Entry into force	20 July 1994
Formal compliance	29 September 1995
97/49/EC	
Entry into force	2 September 1997
Formal compliance	30 September 1998
2006/105/EC	
Formal compliance	1 January 2007
2009/147/EC	
Entry into force	15 February 2010 Note: Directive 2009/147/EC is a codified version of Directive 79/409/EEC as amended by the Standardized Reporting Directive 91/692/EEC . The provisions in the original Directives are unaffected by the codification.

Purpose of the Directive

This Directive, widely known as the Birds Directive, arose out of public disquiet at the annual killing of migratory birds in southern Europe, but goes further in providing a general framework for the conservation of all species of wild birds found in EU Member States. It seeks to control the hunting and killing of wild birds and protects their eggs and nests. It also requires the protection and management of a sufficient diversity and area of habitats to maintain the population of all species. The Habitats Directive [92/43/EEC](#) replaces certain habitat protection obligations arising from the Birds Directive.

Summary of the Directive

General obligations

The Directive relates to the conservation of all species of naturally occurring birds in the wild in the European territory of Member States (except Greenland) etc. It applies to birds, their eggs, nests and habitats Article 1).

Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 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' (Article 2).

Member States are to preserve, maintain or re-establish a sufficient diversity and area of habitats for birds. This is to be done primarily by creating protected areas, managing habitats both inside and outside protected areas, re-establishing destroyed biotopes and creating new ones (Article 3).

Member States are to lay down a general system of protection for all species of wild birds, although exceptions are made for hunting and for certain other reasons (Article 5). In particular the following are prohibited:

- Deliberate killing or capture by any method.
- Deliberate destruction of, or damage to, their nests and eggs or removal of nests.
- Taking eggs in the wild and keeping them, even if empty.
- Deliberate disturbance, particularly during breeding and rearing.
- Keeping birds whose hunting and capture is prohibited.

Special measures concerning habitats

Annex I lists species that require special conservation measures concerning their habitat (because they are in danger of extinction, vulnerable to habitat change, rare, localized or otherwise affected by habitat-related threats) (Article 4.1). The aim of such measures should be to ensure their survival and reproduction in the area of their distribution. Member States have to classify the most suitable territories (both land and sea) as Special Protection Areas (SPAs) for the conservation of these species.

Similar measures are to be taken for regularly occurring migratory species not listed in Annex I. Particular attention is to be paid to the protection of wetlands particularly wetlands of international importance (Article 4.2).

Member States are to send the Commission information about the measures they have taken, so that the Commission can ensure that these form a coherent whole. Member States are to strive generally to avoid pollution or deterioration of habitats and are to undertake more specific measures to conserve SPAs (Article 4.3).

Following the development of the Habitats Directive [92/43/EC](#), all SPAs are to be part of the coherent European network of protected areas under the title Natura 2000. Furthermore, the protection measures to be specifically taken by Member States with respect to SPAs, and originally contained in the first sentence of Article 4(4) of the Directive, have been replaced by the obligations provided under Articles 6(2), (3) and (4) of the Habitats Directive.

Protection from hunting, killing and sale

Member States shall take the requisite measures to establish a general system of protection of all species of birds covered by the Directive (Article 5, without prejudice to Articles 7 and 9).

Member States shall prohibit the sale of wild birds (including the transport, keeping or offering, for sale) (Article 6). This prohibition extends to live or dead birds and to any recognizable parts or derivatives of such birds. Sale of species listed in Annex III/1 is allowed provided the birds have been legally killed or captured or otherwise legally acquired. Further species listed in Annex III/2 may also be exempted from this prohibition by Member States, after consultation with the Commission. If the Commission believes that the sale of any of these species will result in it being endangered the Commission is to forward a reasoned recommendation to the Member State. If the Commission believes there is no such risk it must say so. The Commission's recommendation is to be published in the *Official Journal*.

Species listed in Annex II of the Directive may be hunted under national legislation, but Member States are to ensure that hunting does not jeopardize conservation efforts (Article 7). Annex II is in two parts. Species listed in Annex II/1 (Part A in codified version) may be hunted anywhere, but the species in Annex II/2 (Part B in codified version) may be hunted only in certain Member States indicated in the Annex.

Member States are to ensure that hunting complies with the principles of wise use and ecologically balanced control of the species concerned. In particular, Member States are to ensure that birds are not hunted during their breeding season and that migratory birds are not to be hunted during their return to their breeding sites (in order to reduce the risk of significant population-level impacts). Member States are to send the Commission all relevant information on the practical application of their hunting regulations.

Member States must prohibit the use of all means of large-scale or non-selective killing of birds, or methods capable of causing the local disappearance of species, especially those listed in Annex IV(a) (such as explosives, nets, poisoned baits and semiautomatic or automatic weapons with a magazine capable of using more than two rounds of ammunition) (Article 8.1). Prohibits hunting from modes of transport listed in Annex IV(b) including aircraft, motor vehicles and boats driven at more than five kilometres per hour (an exception to the speed limit can apply in the open sea for safety reasons) (Article 8.2).

In accordance with Article 9, Member States may derogate from the prohibitions on killing or capture (under Articles 5–8), for the following reasons:

- In the interest of public health and safety.
- In the interests of air safety.
- To prevent serious damage to crops, livestock, forests, fisheries and water.
- For the protection of flora and fauna.
- For the purposes of research and teaching.
- For repopulation or reintroduction.
- To permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

However, such derogations should only be made where there are no other satisfactory solutions.

Member States do not need to consult the Commission before applying derogations but are obliged to report annually to the European Commission on all derogations (Article

9.2). The Commission is then expected to produce an annual composite report on derogations.

Other provisions

Article 11 Member States shall see that any introduction of species of bird which do not occur naturally in the wild state in the European territory of the Member States does not prejudice the local flora and fauna.

Every three years Member States are to forward a report on the implementation of national provisions taken to comply with the Directive. In its turn, the Commission is to prepare a composite report and the part of the draft report covering information supplied by a Member State is to be verified by the authorities in that Member State. The final version of the report is to be sent to the Member States, but it does not have to be sent to the Parliament and thus made public (Article 12). The Commission has produced six such reports, the most recent covering 2005–2007¹. It has been agreed with Member States that reporting under the Birds and Habitats Directives will be synchronised. This means the next reporting period will cover 2008-2012 (five years instead of three), and subsequent reporting cycles will cover six years, corresponding with the cycles under Article 17 of the Habitats Directive.

Member States are to encourage research and any work required as a basis for protection and management of birds (Article 10). Particular attention is to be paid to research on the subjects listed in Annex V. The Commission is to coordinate research. Member States are to ensure that the introduction of bird species which do not occur naturally does not prejudice the local flora and fauna and must consult the Commission on such introductions. Member States may introduce stricter protective measures than those provided for under the Directive.

A Committee for the Adaptation to Technical and Scientific Progress (now commonly known as the ORNIS Committee) is established to assist the Commission with the implementation of the Directive, including the updating of Annexes, etc. (Article 17).

The Resolution

On the same day that the Directive was adopted (2 April 1979), the Council also passed a Resolution (OJ C103 25.4.79) requiring Member States to notify the Commission within two years of:

- The SPAs that had been classified under the Directive.
- The wetlands that had been, or were intended to be, designated as wetlands of international importance (under the [Ramsar Convention](#)).
- Any other areas classified according to national legislation for bird protection.

Under this Resolution the Commission must also keep an up-to-date list of these areas and was to submit proposals regarding the criteria for determining SPAs.

Development of the Directive

The Directive stemmed from the public disquiet at the annual hunting of migratory birds that has been customary in southern Europe and northern Africa. As early as 1971, questions were being asked in the European Parliament (OJ C119 26.11.71) with suggestions for Community legislation and this disquiet was reflected in the first action programme on the environment in 1973. The action programme proposed a study with a view to possible harmonization of national regulations on the protection of animal species and migratory birds in particular. The programme promised action by the end of 1974.

In the autumn of 1974, the European Parliament received a petition (No 8/74) from national and international animal protection organizations under the title 'Save the Migratory Birds'. This called for an international conference to investigate the problem at a bicontinental (European-African) level and recommended a halt to the hunting of birds until the results of the conference were known. This petition resulted in the adoption of a Resolution by the Parliament on 21 February 1975 calling in particular for a general prohibition on the trapping of wild birds with nets, but also recommending the preservation of certain species and the creation of suitable breeding grounds.

Meanwhile the Commission had conducted studies and consulted experts. These first resulted in a Recommendation ([75/66/EEC](#)) that Member States should, if they had not already done so, accede to the 1950 Paris Convention on Birds and the Ramsar Convention on Wetlands. The proposed Directive, eventually published in December 1976, turned out to be much more comprehensive than the Parliament had suggested. The Parliament debated it on 14 June, one day before the Council was due to discuss the proposal, but it took a further 18 months for important points of detail and a major point of conflict to be resolved. This conflict was the desire of Italy and France to allow hunting of the Skylark (*Alauda arvensis*) and the Ortolan Bunting (*Emberiza hortulana*). Before agreement could be secured the Council had to agree to allow hunting of the Skylark in these countries, but not the Ortolan Bunting.

The annexes to the Directive have been amended a number of times, to reflect new scientific information and as a result of successive EU enlargements. Originally 74 species (or in some cases subspecies) requiring special conservation measures were listed on Annex I but new lists were substituted by Directives 85/411/EEC, 91/244/EEC and 97/49/EC. Directive 97/49/EC removed the continental subspecies of the Cormorant (*Phalacrocorax carbo sinensis*) from Annex I on the basis that scientific information indicted a favourable conservation status at a European level of the species. However, SPAs can still be designated for Cormorants as they are a migratory bird. Pressure to declassify the species was originally initiated by France and Germany in response to complaints from fishermen that Cormorants were decimating their catches; thousands of Cormorants have since been culled to protect fish stocks under national derogations allowed by Article 9 of the Directive (see below). The codified version of the Birds Directive (2009/147/EC) now lists 193 species/subspecies.

Annex II/2 originally included 48 species, but a new list was substituted by Directive 94/24/EC, so that 58 species are now included. The original proposal for this Directive was put forward by the Commission in March 1991 in response to representations made by several Member States which wanted to extend hunting rights for game species and to a number of species causing significant damage to agriculture. It was argued that the

species could not be dealt with satisfactorily through the derogation procedure provided for in Article 9 of the Birds Directive. Directive 94/24/EC added six new bird species, five crow species (Corvidae) and the Starling (*Sturnus vulgaris*) to the list in Annex II/2 of those species which may be hunted, outside the breeding period, in certain Member States. During negotiations on the amending Directive, Denmark failed to agree with the proposal to add the starling to the list of huntable species, arguing that Community policy should be moving towards the strengthening and not weakening of protection for song birds and small birds.

Nevertheless, the proposal was adopted by a qualified majority. The amending Directive also removed three species from the list of birds which may be hunted in Italy because of their similarity to the Slender-billed Curlew (*Numenius tenuirostris*), which is a globally endangered species and therefore particularly vulnerable to accidental killing.

The Birds Directive has been the subject of many rulings by the ECJ, as discussed further below. One of these, Case [C-57/89](#) led to a significant change in the application of Article 4(4), achieved not by an amendment to the original text, but by an Article included in the Habitats Directive. It arose because the ECJ ruling suggested that Member States were obliged to protect SPAs more stringently than most were accustomed to doing under national implementing legislation. Consequently, new clauses were introduced into the text of the Habitats Directive in order to limit the level of protection afforded to sites designated under the Birds Directive, thereby blunting the impact of the Court's judgement (see discussion of Articles 6(2), (3) and (4) in the section on [Habitats and species conservation](#)).

Directive 2008/102/EC was introduced to enable the Commission to amend certain annexes in the light of scientific and technical progress in accordance with the regulatory procedure with scrutiny.

Derogations

The Member States and the Commission's composite derogation reports indicate that there are substantial numbers of derogations each year, though there is considerable variation amongst the Member States in the numbers of requests and their reasons for such requests. The most recent composite report was produced by the Commission in 2011², and covered derogations up to 2008. This indicated that in total 4,415 derogations were issued in 2008 in the EU-25, with the numbers varying from country to country, with less than ten derogations in Cyprus, Estonia, , Latvia, Luxemburg Malta and Slovenia, to several hundred in others, such as Germany, Hungary, Italy and Spain. The largest number of derogations (1,747) were in the United Kingdom, as was the case in 2005, 2006 and 2007.

However, it is important to note that there is a considerable difference between the number of derogations and the number of licenses issued per derogation and sometimes a single derogation covered many licenses. The main difference between the two indicators is evident in Cyprus, Italy, Malta and Spain. Moreover, some Member States did not indicate the number of licenses issued per derogation in their reports.

Most of the derogations issued by Member States in 2008 (according to standard reporting codes) were ‘in the interest of protecting wild fauna and flora’. Derogations for the purposes of research and teaching mostly concerned studies of the population dynamics of listed Birds Directive species. Other common reasons for derogations were ‘the interest of public health and public safety’ and to prevent serious damage, in particular to crops, livestock, forests, fisheries and water.

The number of birds killed under the derogations is uncertain and reported numbers are clearly underestimates because some national reports do not include such information. Of the birds killed under derogations, a large proportion are probably the so-called pest species and, in particular, crow species such as Carrion Crow (*Corvus corone*), Rook (*Corvus frugilegus*), Jackdaw (*Corvus monedula*), Magpie (*Pica pica*) and Jay (*Garrulus glandarius*), as well as various thrush species (*Turdus* ssp), Starling, Cormorant, Black-headed Gull (*Larus ridibundus*) and Herring Gull (*Larus argentatus*).

Implementation of the Directive

National transposition measures taken for Directive 79/409/EEC can be found in the Member States’ national [execution measures](#).

As regards the legal transposition of the Directives and the implementation of Natura 2000 network, no transition periods were agreed with Member States joining the EU. Only one strictly limited transition period (until 2008) for one provision of the Birds Directive (trapping of birds) was agreed with Malta. Acceding Countries were obliged to implement the Birds Directive (and Habitats Directive) from the date of accession.

Implementation of the Directive has been controversial and problematical in several Member States, resulting in numerous rulings and referrals to the ECJ (see below). A particular problem has been the slow or inadequate designation of SPAs. However, progress with SPA designation improved significantly after a number of important ECJ rulings relating to the adequacy of SPA networks. A key problem had been that the Directive does not provide criteria for the identification of SPAs and no formal criteria have been subsequently produced by the Commission. It has therefore been difficult to judge the adequacy of the SPA networks that have been proposed by Member States. However, a ECJ ruling (see Case C-3/96 below) confirmed that the list of Important Birds Areas (IBAs) in Europe³ produced by BirdLife International to aid SPA designation should be used as a source against which to assess adequacy.

However, progress was still inadequate in many Member States, leading to many infringement cases (see below). In addition, the Commission warned Member States that failure to meet their commitments under the Birds and Habitats Directives may jeopardize receipt of regional development funding under the [Structural Funds](#). It has also warned governments that access to funding under the [LIFE programme](#) ‘may be more difficult’ in the future for Member States that have not yet proposed a comprehensive list of SPAs. In 2004 a Dutch Council Presidency conference, held at Bergen op Zoom to celebrate 25 years of the Directive, urged the EU to complete the terrestrial network of SPAs by 2005. It also recommended its full extension to the marine environment by 2008 and the establishment of an effective protection regime for all SPAs, with management objectives in place and initiated for all sites by 2010.

A summary of SPA designations provided in the Natura Barometer on DG Environment's website indicated that, as of May 2010, no Member States had a noticeably insufficient SPA network. But only thirteen were listed as having largely complete networks (i.e. Belgium, Czech Republic, Denmark, Germany, Estonia, France, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal and Finland). Other Member State networks were listed as incomplete. More up to date data on the number and extent of Natura sites, as of January 2011, are provided in the current [Natura Barometer](#) and January 2012 Natura Newsletters⁴. These indicate that as of January 2011 there were some 5,347 terrestrial SPAs covering 517,340 km², and 566 marine SPAs covering 110,220 km². However, the barometer no longer provides an assessment of the adequacy of SPA designations by each Member State.

The assessment of recent progress on other aspects of the implementation of the Directive is difficult because reports on the application of the Directive by the Commission have been late, and the most recent report only covers the period from 2005–2007. Furthermore, the reporting format only requires Member states to provide a general description of the measures taken. However, this is to change with the streamlining of the reporting with the Habitats Directive, as data on individual birds species populations and trends will be included in future reports. Nevertheless, it is evident that Member States are undertaking some actions to manage and restore habitats within SPAs, and to a certain extent in the wider environment, through various measures, including [agri-environment schemes](#), [LIFE Nature projects](#) and numerous pollution control policy instruments. Issues concerning the management of SPAs and actions to conserve and restore habitats in the wider environment are further discussed in the section on the [Habitats Directive](#).

Despite the slow progress and other problems with implementation there is evidence from the monitoring of European population trends that the Birds Directive is having important beneficial impacts, especially for birds on Annex I⁵. The rate of recovery of Annex I species has been significantly greater inside the EU than outside, and within the EU has been greater for species listed on Annex I compared to others. Furthermore, the role of protected areas appears to be important, as the greater the area of SPAs the more positive populations trends appear to be, especially for the rarest and most vulnerable species listed on Annex I.

However, there is little evidence that the Birds Directive is having such significant beneficial impacts on huntable species (that is those listed in Annex II), despite its intention to maintain populations by following the principles of wise use. There have been problems concerning the setting of hunting seasons and restrictions on quarry species, resulting in numerous ECJ cases (see below). Consequently, the Commission and other stakeholders have taken a number of actions to address the key issues. These included the preparation of management plans⁶ for Annex II species that are considered to have an unfavourable conservation status and the launch of a Sustainable Hunting Initiative⁷ by the Commission in 2001. But despite these measures, a study of the status of birds in the EU in 2004 by BirdLife International⁸ concluded that the status of Annex II species had worsened with 46 per cent having an unfavourable conservation status. As a further response to such problems, the two main organizations representing hunters and bird conservationists in Europe, the Federation of Associations for Hunting and Conservation of the EU (FACE) and BirdLife International, signed an agreement in October 2004, on sustainable hunting, in which they affirmed their commitment to the objectives of the Birds Directive. This was witnessed by Environment Commissioner

Margot Wallström and followed years of meetings facilitated by the Commission. The Commission also produced guidance in 2004 on hunting under the Birds Directive, which was updated in 2008⁹ in response to important ECJ judgements (in particular Cases [C-79/03](#), [C-344/03](#), [C-235/04](#), [C-60/05](#) – see below).

Enforcement and court cases

As discussed above, there have been widespread problems with the implementation of the Directive, with numerous cases being referred to the European Court of Justice (ECJ). To date this has resulted in over 70 ECJ rulings, many of which have had important impacts on the implementation of the Birds Directive (and in some cases the development of the Habitats Directive). These and their implications are described in a 2006 Commission report on ECJ rulings¹⁰ and the Commission's 2008 guidance on hunting under the Directive, and the most important are outlined below with respect to the key issues **addressed**.

Designation and protection of SPAs

Case [C-57/89](#) referred to the obligations on Member States under Article 4(4). The case concerned dyke building operations in Leybucht in northwest Germany, approved by the local authority as part of a coastal defence project. The Commission brought infringement proceedings against Germany on the grounds that the works would significantly affect birds within a designated SPA by reducing the size of the protected area. The German government, supported by the United Kingdom as an intervener, argued that the works were carried out principally for safety purposes. It was proposed that an associated aspect of the works, the improvement of harbour access for fishing vessels, would eventually improve the protection of birds by closing other access routes. The Court ruling was given on 28 February 1991, and suggested that Member States were obliged to protect such sites more stringently than most were accustomed to doing under national implementing legislation. As described above, this led to new clauses in the text of the Habitats Directive, which reduced the impact of the Court's judgement.

Importantly, although the Court rejected the Commission's case, it nevertheless ruled that the duty of Member States in relation to SPAs was not qualified by the general economic and recreational interests referred to in Article 2. The ruling noted that Member States had no general power to modify or reduce SPAs once declared. Only in exceptional circumstances could this be justified, and these grounds had to 'correspond to a general interest superior to the ecological objective envisaged by the Directive'. In this case, protection from flooding was such a justification, but improved fishing access was not. Moreover, in line with the principle of proportionality, any disturbance to birds had to be the minimum necessary to secure the overriding interests. The Court's ruling was seen as an important precedent which could influence national legislation or practice in several Member States.

The EJC ruling of 2 August 1993 against Spain, with respect to its lack of SPA designation and protection of the Santona Marshes ([C-355/90](#)), was also of significance as it reiterated that Member States are not authorized to invoke, at their option, grounds of derogation based on taking other interests into account. In particular economic and recreational requirements (as referred to in Article 2 of the Directive) do not constitute an

autonomous derogation from the general system of protection established by the Directive, and are not therefore allowable considerations in the designation of SPAs.

A similar important dispute over the interpretation of the Directive arose from the UK government's proposed exclusion of part of Lappel Bank from the Medway Estuary SPA. The portion of Lappel Bank was excluded on the grounds that the area was needed for future port expansion. However, the Royal Society for the Protection of Birds (RSPB) argued that taking into account economic and social factors (Article 2 of the Directive) at the stage of classifying SPAs under Article 4 was an incorrect interpretation of the Directive and ECJ case law. The case was referred to the ECJ by the United Kingdom House of Lords in February 1995. On 11 July 1996, the ECJ ruled in favour of the RSPB that the United Kingdom Government acted illegally when it left Lappel Bank out of the Medway Estuary SPA for economic reasons (Case [C-44/95](#)). The ruling had implications for other important bird areas under threat of development and the interpretation of the Habitats Directive, which came into force whilst the case was proceeding.

In a later judgement against Portugal concerning the Moura, Mourão, Barrancos' SPA (Case [C-191/05](#), on 13 July 2006), it was reaffirmed that a Member State may not reduce the surface area of an SPA or alter its boundaries unless the areas excluded from the SPA are no longer the most suitable territories for the conservation of species of wild birds.

A landmark judgement clarifying Member States' duties to designate SPAs was delivered by the ECJ on 19 May 1998 (Case [C-3/96](#)). The case focused on the requirement under Article 4(1) of the Directive to 'classify in particular the most suitable territories in number and size' as SPAs. The Commission argued that the Netherlands had failed to do this, whilst the Netherlands Government claimed that Member States had a margin of discretion in implementing Article 4(1). Whereas previous judgements had confirmed the importance of ornithological criteria in site selection, this case related to the overall nature of the duty to classify SPAs. The ECJ judgement confirmed that Member States are obliged to classify as SPAs all the sites which, applying ornithological criteria, appear to be the most suitable for conservation of the species in question. Furthermore, it is not possible to avoid the designation of SPAs through the implementation of other conservation measures.

The case also confirmed that BirdLife International's 1989 inventory of Important Bird Areas (IBAs), though not legally binding on Member States, represented a list of sites of great importance for the conservation of wild birds in the EU and, in this case, was used to assess whether the Netherlands had fulfilled its obligation to classify SPAs. BirdLife updated its list of IBAs in 2006¹¹ and this was backed by MEPs and Environment Commissioner Margot Wallström. As a result of better information, particularly regarding Eastern Europe, the list includes numerous new sites, and totals 3,600 IBAs covering 7 per cent of Europe's land area.

The Commission has continued to use the IBAs as a scientific reference list and has sent many written warnings to Member States concerning insufficient SPA designations. This has led to several ECJ rulings on the sufficiency of SPA designations, including against Austria ([C-209/04](#)), Belgium (Case [C-415/01](#)), Finland ([C-240/00](#)), France ([C-202/01](#)), Greece ([C-334/04](#)), Ireland ([C-418/04](#)), Italy (Case [C-378/01](#) and [C-388/05](#)), Spain ([C-235/04](#)), and the Italian region of Sardinia (Case [C-508/09](#)). The case against Romania ([C-522/09](#)) has now been dismissed because of procedural irregularities.

The ECJ gave a highly significant judgement (Case [C-374/98](#)) on 7 December 2000 regarding the level of protection to be afforded to sites that should, but have not been, designated as SPAs. In this case, the ECJ found that France had failed to fulfil its obligations under Articles 4(1) and (2) of the Directive by not classifying any part of the Basses Corbieres site as a SPA (as it is listed as an IBA) and by not adopting geographically sufficient conservation measures for the site. Importantly, the ruling confirms that areas which have not yet been classified as SPAs, but should have been so classified, still fall under the regime governed by the first sentence of Article 4(4) of the Directive. Such areas are made subject to a regime that is stricter than that laid down by Article 6(2) to (4) of the Habitats Directive. This effectively acts as an incentive for Member States to classify SPAs as the standard of protection is higher for sites not declared as SPAs. Once so classified, Member States can adopt a plan or project adversely affecting an SPA, but only for imperative reasons of overriding public interest and subject to certain conditions.

Overall, the court cases make clear that SPA selection and demarcation must be done on pure ornithological grounds ([C-255/90](#), [C-44/95](#)), and the provisions must be implemented with unquestionable binding force, and the specificity, precision and clarity needed for legal certainty ([C-415/01](#)). This means economic or recreational considerations cannot be taken into account in the designation process, even though the Habitats Directive refers to imperative reasons of overriding public interest. Furthermore the boundaries of SPAs should be clearly defined. The protection regime also applies to sites that qualify as SPA but are unjustifiably not designated ([C-375/98](#)). Member States have the obligation to take measures against deterioration of these sites, regardless whether they are caused by human impacts or by (semi-) natural developments ([C-418/04](#), [C-177/00](#), [C-6/04](#)).

The Regulation of hunting

Problems have arisen as a result of the discretionary authority of Member States to specify the hunting season for migratory birds under Article 7(4). Differences in interpretation between Member States have had to be resolved by the ECJ. One such case in particular (Association pour la Protection des Animaux Sauvages and Others v Préfet de Maine-et-Loire and Others, Case [C-435/92](#)) concerning the setting of different closing dates for hunting between departments in France, highlights the ambiguity. The ruling confirmed that closing dates for hunting seasons may vary between regions to reflect differences in the timing of migration and breeding. However, the closing date for the hunting of migratory birds must be fixed in accordance with a method that guarantees complete protection of each species during the period of spring (pre-mating) migration. Therefore, regulations whose object or effect is the absence of protection from hunting of a certain percentage of a species' population are not compliant with Article 7(4) the Directive.

This case prompted the ORNIS Committee to produce a report that summarizes information on the period of pre-mating migration and reproduction of each Annex II species for each Member State where that species occurs¹². In addition the Commission sought to clarify the margins of discretion available to Member States by proposing an amendment ([COM\(94\)39](#)) to the Directive, which included a new Annex VI containing criteria for determining the duration of the hunting season. The European Parliament approved the proposal subject to amendments, the most important being the replacement

of the proposed criteria by a single definitive date of 31 January for the close of the hunting season in all Member States (OJ L65 4.3.96). However, the amendment was not taken forward and was formally withdrawn in 2004 ([OJ C5 9.1.2004](#)).

France has met with particular controversy over hunting season dates. In 1998 the French Parliament passed a law that lengthened the bird hunting season beyond the limits permitted under the Birds Directive under pressure from hunters. In December 1998 the Commission announced legal action against France in the ECJ for breaching of the Birds Directive (Case [C-38/99](#)). In July 2000 the French government introduced legislation which aimed to meet requirements of the Directive by shortening the shooting season in most French Departments from the traditional seven and a half months to about five months. However, the ECJ ruled on 7 December 2000 that France had not correctly transposed Article 7(4) on the hunting of migratory species. It reiterated the need for complete protection of all individuals and not a percentage of a population, and ruled that national authorities are not empowered by the Directive to fix closing dates for the hunting season which vary according to the species of bird, unless the Member State concerned can provide evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering. The French constitutional court also ruled in January 2002 that the law was in breach of the Birds Directive, due to a series of derogations that were subsequently added.

In cases [C-435/92](#) and [C-38/99](#), the Court recognized two additional difficulties with the staggering of closing dates of the hunting season (that is different closing dates for different species): the risk of confusion between different species (which may lead to the shooting of species for which the hunting season is already closed); and potential for disturbance of a species by the hunting of other bird species.

In October 2003, the ECJ responded to a referral from the French *Conseil d'État* (Case [C-182/02](#)), concerning the issue of 'no other satisfactory solution' (with respect to derogations under Article 9) and whether this condition could ever be satisfied in relation to hunting, especially proposed extensions of hunting seasons. Having confirmed that recreational hunting may constitute a 'judicious use', the Court declared that a derogation under Article 9(1)(c) could only be given where there is no other satisfactory solution. The Court did not describe at length under what circumstances recreational hunting would meet the condition as to 'no other satisfactory solution'. However, in paragraph 16 of the judgement, the Court provides important clarification, noting that this condition 'cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection (see, to that effect, *Commission v Italy* (C-262/85) paragraph 39). There would be no such need if the sole purpose of the derogation authorizing hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive.'

Other ECJ rulings have clarified a number of issues concerning derogations. Case C-262/85 (*Commission v Italy*) reaffirmed the need for national legislation to include criteria and conditions that ensure derogations are in accordance with the aims of the Directive. Case C-247/85 (*Commission v Belgium*) reiterated that derogations must cover specific situations. The criterion limiting derogations to small numbers of birds has also led to a number of cases and guidance from the Commission. Case C-252/85

(Commission v France) noted that small numbers is not an absolute criterion but rather refers to the maintenance of the level of total population and to the reproductive situation of the species concerned. However, in its second report on the application of Birds Directive ([COM\(93\)572](#)) the Commission indicated that, according to the work of the ORNIS committee, 'small numbers' should be understood to mean any sample of less than 1 per cent of the total annual mortality rate of the population in question (average value) for those species which are not to be hunted and a sample in the order of 1 per cent for those species which may be hunted, with 'population in question' being understood, with regard to migratory species, to mean the population of those regions from which come the main contingents passing through the region to which the derogation applies during its period of application. Although not legally binding, the ORNIS Committee views have been used as a reference by the ECJ, for example with respect to the rulings on Case C-79/03 (Commission v Spain) and [C-344/03](#) (Commission v Finland) that their derogations were not limited to small numbers of birds.

Case [C-60/05](#) (WWF Italia and others v Regione Lombardia) concerned the administrative and legal measures that must be put in place to implement derogations. The ruling noted that in all cases of application of a derogation authorized hunting must not exceed a ceiling consistent with the restriction on hunting to small numbers, and that ceiling must be determined on the basis of strict scientific data. Furthermore, the obligation on the Member States to ensure that hunting of birds is carried out only in 'small numbers', requires that 'the administrative procedures provided for are organized in such a way that both the decisions of the competent authorities authorizing hunting derogations and the manner in which those decisions are applied are subject to effective control exercised in a timely manner'. Similarly in Case [C-164/09](#) the ECJ's judgment of 11 November 2010 upheld the Commission's view that derogations by the Vento region of Italy were too general as they did not define their temporal limits, or the species and the numbers covered, nor did they demonstrate that the derogation was required because there was no other satisfactory solution, and the definition of small numbers was not on a scientific basis.

One of the most significant contraventions of the Birds Directive's hunting provisions in recent years has concerned the hunting of Turtle Doves (*Streptopelia turtur*) and Common Quails (*Coturnix coturnix*) in Malta during spring, a key period of vulnerability as they return from Africa to their breeding grounds in Europe. Legislation allowing this practice remained unchanged in Malta despite it becoming a member of the EU. The Commission therefore brought an infringement action in February 2008 against Malta for violations of the provisions of the Directive ([C-76/08](#)). The Commission considered that derogation conditions were not being met in the Maltese case because alternative solutions to spring hunting existed. In April 2008, the ECJ issued interim measures regarding the 2008 spring hunting season in Malta. An Order of the President of the Court prohibited the hunting of relevant birds species covered by the Directive. Subsequently, the ECJ ruled on 10 September 2009, in [C-267/16](#) that Malta had indeed failed to meet its obligations under the Directive by authorizing spring hunting of these species.

According to spring 2011 press reports in Malta¹¹, the Government has agreed with the Commission a hunting regulation framework that allows limited spring hunting of Turtle Doves and Quails provided that autumn quotas are not exceeded. However, such a derogation would seem to contradict previous positions by the Commission and ECJ on spring hunting and no official statement appears to have been made by the Commission

on the claimed arrangement. BirdLife International has also claimed that the proposed derogation has not been discussed by the Ornithological Committee, which should be consulted by the Commission on such an issue.

Other infringements

Other significant infringements leading to ECJ cases have related to:

- Transposition of the Directive (e.g. Commission v Greece, [C-259/08](#)).
- Legal protection of migratory birds as well as Annex I listed birds (Commission v France, concerning the Seine Estuary, [C-166/97](#); Commission v France, concerning Poitevin Marsh, [C-96/98](#); Commission v Belgium [C-415/01](#)).
- Failure to protect sites from threats such as wetland loss ([C-96/98](#)), irrigation (Commission v Spain, concerning Segarra-Garrigues Canal, [C-186/06](#)), pollution (Commission v Spain, concerning Santona Marsh, Case [C-355/90](#)) and habitat loss through a golf course development (Commission v Austria, concerning Wörschacher Moos SPA, C-209/02).

Related legislation

There are a number of other EU Directives that have a strong interaction with the Birds Directive, in particular the:

- Habitats Directive ([92/43/EEC](#)).
- Water Framework Directive ([2000/60/EC](#)).
- Urban Waste Water Treatment Directive ([91/271/EEC](#)).
- Marine Strategy Framework Directive ([2008/56/EC](#)).
- Environmental Liability Directive ([2004/35/EC](#))
- [Common Fisheries Policy](#).
- [Rural Development policies](#).
- [Forestry policies](#).

Of these the Habitats Directive is of special importance as some of its provisions apply to SPAs (including their incorporation into the Natura 2000 network and related protection). Habitat management and restoration measures within SPAs are also often delivered through agri-environment schemes or Natura-specific measures through Rural Development Programmes.

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