

The impact of species protection on  
land use planning:  
towards a more proactive approach?

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# On the Advocate General

- Member of the Court
- Advises the Court by preparing Opinions
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background

# Outline

- Species Protection – strong substantive obligations without process
- EIA & SEA – strong process without substantial obligations
- Combine the two?

# Species Protection – wide scope

- The obligations apply *everywhere* within the EU, including the maritime exclusive economic zones
- Covers all species in Annex IV of the Habitats Directive, among others all bat species, many amphibian species as well as certain lizards, beetles and butterflies
- **German courts apply the protection of birds in parallel with the rules of the Habitats Directive**

# Strict System of Species Protection Prohibitions

Art. 5 of the Birds Directive & Art. 12 of the Habitats Directive

- *deliberate* capture or killing
- *deliberate* disturbance
- *deliberate* destruction or taking of eggs from the wild (birds: + destruction of nests)
- >> **Otter snares case (C-221/04): deliberate means that the author of the action must accept the possibility of harm**
- *Habitats*: deterioration or destruction of breeding sites or resting places (irrespective of deliberation) – can include feeding habitats if required for continued ecological functionality (Opinion C-383/09)

# Strict System of Species Protection Prohibitions - Examples

Art. 5 of the Birds Directive & Art. 12 of the Habitats Directive

- Caretta case (C-103/00): use of Mopeds or Pedallos in the site
- Cypriot Grass Snake case (C-340/10):
  - Tolerance of Moto-cross racing in the site (point 63)
  - Excessive extraction of water from the site (point 64)
  - Property development in or near the site (point 65)

# Strict System of Species Protection

## Prohibitions - Problems

Art. 5 of the Birds Directive & Art. 12 of the Habitats Directive

- Ignorance is bliss
  - If the presence of the species is not known deliberate action is unlikely.
  - If the presence of breeding and resting places is unknown the enforcement of protection is unlikely.
  - Consequently there is an incentive to abstain from investigation into risks to protected species.

# Systemic Obligations of Species Protection

- Summed up in C-340/10, points 59 ff:
  - comprehensive legislative framework + concrete and specific protection measures
  - coherent and coordinated measures of a preventive nature
  - system of strict protection must enable the effective avoidance of all prohibited actions
- But systemic action requires the initiative of (typically weak) agencies charged with the protection of species + knowledge required.

# Species Protection - *Obligation de resultat?*

- C-383/09 (Hamster in Alsace):
  - Population of the European Hamster in Alsace declined continuously
  - French active protection measures were implemented incompletely
  - Insufficiency of active protection measures was recognised by French authorities
- >> Court finds infringement of Article 12 (1) (d), i.e. the protection of breeding sites and resting places

# EIA & SEA

- Obligation to conduct environmental assessments of significant impacts
- At present, EIAs tend to cover impacts on Natura 2000 sites while the species protection provisions tend to be neglected (Impact Assessment for the EIA revision, p. 140).
- BUT: Effects on protected species are significant and therefore must be assessed
- In the absence an environmental assessment projects, programmes and plans may not be implemented (C-41/11) [What about gaps?]

# Substantial Obligations and the Environmental Assessment

- EIA & SEA do not prescribe any substantial obligations
- However, projects, plans & programmes must respect the rules on species protection
- Information gathered in the assessment will make the prohibitions effective
- This information can also help to comply with the systemic obligations and to achieve the result

# EIA

- Environmental assessment of certain projects, which are likely to have significant effects on the environment
- Scope is wide and its purpose very broad
- NGOs can challenge the substantive and procedural legality of decisions under 9 (2) of Aarhus (C-115/09):
  - Incomplete assessment
  - Respect of species protection by the project
- Individuals can at least claim an infringement of the EIA Directive in court

# SEA

- Environmental assessment of certain plans and programmes, which are likely to have significant effects on the environment
- Provides for a high level of protection of the environment (C-295/10 & C-567/10)
- **Applies to plans and programmes foreseen by national law, which determines the competent authorities for adopting them and the procedure for preparing them (C-567/10)**

# SEA – going beyond assessments of the EIA and Habitats

## Directives?

- A SEA is necessary for P & P that
  - set the framework for EIA projects [Art. 3 (2)(a)]
  - come under Art. 6 (3) of the Habitats Directive [Art. 3 (2)(b)]
- But also: P & P that MS determine are likely to have significant environmental effects [Art. 3 (4)]
  - under the EIA Directive, MS discretion must not result in the exclusion of projects likely to have significant effects (eg. Kraaijeveld, point 50).
  - impacts on protected species would be significant

# SEA – Threshold for an Assessment

- Art. 3 (1) of the SEA Directive: likely to have significant environmental effects
  - Art. 2 (1) of the EIA Directive: likely to have significant effects on the environment
  - Art. 6 (3) of the Habitats Directive: likely to have a significant effect on the site
- >> On the basis of objective information significant effects cannot be excluded (C-127/02, point 45)

# SEA – Quality of the Assessment

- An SEA *cannot* cover all specific impacts on protected species because it only sets up a framework
- An SEA *can* identify areas included in the plan or programme where protected species are present – either potentially or effectively
- An SEA *can* identify implementation measures that could come into conflict with the prohibitions
- An SEA *should* identify cumulative effects – either potentially or effectively [Art. 5 (1) + Annex I (f)]
- Standard: Best available science + Principle of proportionality

# Authorisation of Projects, Plans & Programmes

- Article 6 (3): no reasonable scientific doubt remains as to the absence of adverse effects to the integrity of the site
- Prohibitions:
  - Articles 12 a – c, 13, birds: author of the act accepts the possibility of prohibited action
  - Article 12 d: no harm deterioration or destruction of breeding sites or resting places
  - >> assessment must demonstrate that harm is unlikely = no reasonable scientific doubt?
- The burden of proof shifts >> incomplete assessments are insufficient for authorisation, complete assessments must exclude realistic risks to justify authorisation

# Authorisation of Plans & Programmes >> Delegation

- However, it may not be reasonable or even possible to completely assess the effects of Plans & Programmes on protected species
- Therefore, in principle, plans & programmes can delegate assessments to a later state
- But an effective assessment must be guaranteed (eg. additional permit procedures, reliable species actions plans, other forms of supervision)

# Authorisation of Projects, Plans & Programmes >> Derogations

- If harm cannot be excluded, an authorisation requires a derogation (Art. 16 of the Habitats Directive or Art. 9 of the Birds Directive)
  - no satisfactory alternative
  - favourable conservation status (only under the Habitats Dir.)
  - specific grounds
- The SEA must cover reasonable alternatives [Art. 5 (1) of the SEA Directive], in particular in the following cases:
  - definitive impacts
  - Species protection assessments could not exclude impacts
  - Species protection assessments have been delegated to later stages [the delegation should not create the risk that identified reasonable alternatives disappear by the time of the assessment]

# Species Action Plans in the Assessment

- Mutual benefits with regard to scientific information
  - Information acquired in relation to an action plan can inform the assessment
  - Information generated for the assessment can help with the action plan
- The objectives of Species Actions Plans must be taken into account in the assessment and in decisions based on the assessment

# Enforcement – practical considerations

- Burden of proof shifts -
- Checklist approach with regard to p, p & p:
  - Procedurally: Are all species covered (easy) + is coverage correct ? (potentially difficult, focus on gaps should be easier)
  - Substantive: Are the results of a sufficient assessment correctly implemented, in particular with regard to the prohibitions ? (potentially difficult, but ignorance no longer is possible, focus on gaps)
  - Failure at any stage should be sufficient to stop p, p & p.

# Access to Court

- COM – Infringement procedure
- EIA: Art. 9 (2) of Aarhus + EU transposition
- SEA: C-237/07 - persons (directly) concerned must be in a position to rely on mandatory rules included in directives + Effective legal protection (Art. 47 of the Charter)
  - Recognised Environmental NGOs could be considered as being directly concerned, in particular in the light of Art. 9 (3) of Aarhus
  - Individuals could be excluded from invoking species protection rules, but not from procedural obligations under EIA and SEA

# Systemic obligations with regard to species protection

- Informational Basis for Systemic Measures
  - In particular strategic assessments should cover the conservation status of all species concerned and at least any risks or problems related to the plan or project in question.
  - Awareness of systemic problems triggers the obligation to adopt comprehensive preventive measures, including active management measures aimed a satisfactory conservation status.

# Outlook

- The SEA and EIA Directives provide valuable support for the effective application of the rules on species protection under the Habitats and Birds Directive
- This legal potential must be implemented in practice

# Thank you for your attention!



*Lacerta bilineata* (or *viridis*) – Western Green Lizard (westliche Smaragdeidechse), Annex IV (?), near Koblenz